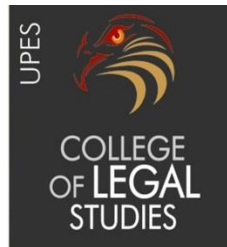
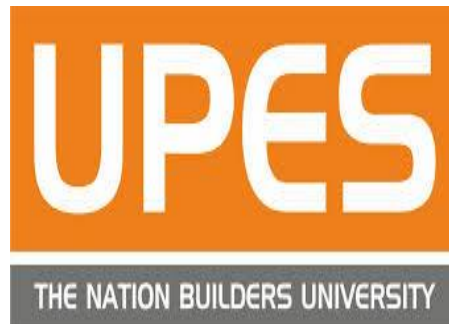


ROLE OF JUDICIARY IN PROTECTING PRISONERS' RIGHT (A COMPARATIVE STUDY)

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This dissertation is submitted in partial fulfillment of the degree of B.A., LL.B. (Hons.)



College of Legal Studies

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**CERTIFICATE:**

This is to certify that the research work entitled “Role of judiciary in protecting prisoners’ right :A Comparative Study” is the work done by Ashna Verma under my guidance and supervision for the partial fulfillment of the requirement of B.A., LL.B. (Hons.) degree at College of Legal Studies, University of Petroleum and Energy Studies, Dehradun.

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22/03/2017

**DECLARATION:**

I declare that the dissertation entitled “Role of Judiciary in Protecting Prisoners’ Right (A Comparative study)” is the outcome of my own work conducted under the supervision of Dr. /Prof. Shubham Srivastava, at College of Legal Studies, University of Petroleum and Energy Studies, Dehradun.

I declare that the dissertation comprises only of my original work and due acknowledgement has been made in the text to all other material used.

ASHNA VERMA

22/03/2017

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ABBREVIATIONS

- a. UDHR:UNIVERSAL DECLARATION OF HUMAN RIGHTS
- b. ICESR: INTERNATIONAL COVENANT ON ECONOMICAL,SOCIAL AND CULTURAL RIGHTS.
- c. HIV:HUMAN IMMUNO DEFICIENCY VIRUS
- d. MTP :MEDICAL TERMINATION OF PREGNANCY ACT
- e. ELFI:ENHANCING LIVES OF FEMALE INMATES
- f. UNODC:UNITED NATIONS OFFICE ON DRUGS AND CRIME
- g. AIDS:IMMUNO DEFICIENCY SYNDROME
- h. ECHR :EUROPEAN CONVENTION ON HUMAN RIGHTS
- i. IPS:ISRAEL PRISON SERVICE
- j. WHO:WORLD HEALTH ORGANIZATION
- k. ICPD: THE INTERNATIONAL CONFERENCE ON POPULATION AND DEVELOPMENT PROGRAMME
- l. CEDAW: CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN
- m. CRPD:PROMOTION OF THE RIGHTS AND DIGNITY OF PERSONS WITH DISABILITIES
- n. CRC:CONVENTION ON THE RIGHTS OF THE CHILD
- o. AID: ARTIFICIAL INSEMINATION BY DONOR

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18. THE ANDHRA PRADESH HIGH COURT,MS. BHARGAVI PRESIDENT M/S. GAREEB GUIDE

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**CHAPTER1**

**PREFACE/INTRODUCTION:**

- In my first chapter I will mentioned about the conventions and declaration. These declarations somehow talks about the reproductive rights or health of women .By convention it will come to our knowledge that why every person has a right to parenthood and good helath.Conventions ensures that everyone's right should be fulfilled. Then I will deal with cases which talks about reproductive rights and conjugal visits for prisoners. I will also talk that how men and reproductive rights have been co-related.
- In second chapter I will cover some other rights covered under reproductive right. Special rights given to women prisoners' .The chapter will focus on sanitation and hygienic facilities to women prisoners. Then I will be throwing some light on abortion facilities and right to women prisoner. The chapter also focuses and explains why these rights are necessary and how to execute these rights without violating any other person's right. The chapter also mentions the states which recognize these rights and what efforts have been done for that.
- Chapter 3 will throw light on reproductive rights and conjugal visits and its effect .It further mentions the effect and its consequences .The chapter determines whether conjugal visits in guise of reproductive rights are beneficial for state or not. It will discuss the pros and cons of granting reproductive rights.
- Chapter four will focus the condition of reproductive rights in India .It will throw light on how judiciary is putting effort in protecting reproductive rights .Further I will deal how judiciary has protected the right of its prisoners till now. The chapter will also focus on the reasons for delay in framing legislation on reproductive rights and conjugal visits.
- Chapter 5 will deal purely with conjugal visits and its availability to men and women.
- Chapter6 deals with the opinion of common people and the author on conjugal visits. It has focused on the opinion of various people at the matter of conjugal visits.

**STATEMENT OF PROBLEM**

Every person on this earth has been given right to enjoy their human rights<sup>1</sup>. Under Universal declaration of human rights and other declaration and conventions sexual and reproductive health has been put under high standards. It talks about both men and women. It states that it is the responsibility of the state to take care of the reproductive rights of the people. They do have a responsibility to provide such an opportunity where they can participate in their reproduction related rights. Indian constitution too provides human rights along with several fundamental rights to each and every person with reasonable restrictions.

While Article 21 is being enjoyed by everyone. A person can be deprived of Article 21<sup>2</sup> only by a procedure established by law. My problem is whether these fundamental rights along with human rights<sup>3</sup> are available to prisoners or not. Whether Article 21 under Indian constitution “Right to life” includes “Right to reproduction of prisoners”, or prisoners are being deprived of this evergreen fundamental right and human right.

Since various conventions have declared “Right to reproduction” as human right then why there is a legislative vacuum in India. India being a democratic country with lengthiest written constitution is fighting for this right. The problem of author is why a person behind the bar is fighting for his human right.

Deprivation of “Right to reproduction” does not deprive only one person who is behind the bar instead, it deprives the legal spouse of that person also who is not a party at fault. Under Indian law, an innocent person should not suffer, then why the law is not capable of protecting the other person’s right. Is this not against Indian law? The couples and individuals have right to decide when to have child and when not, what should be the spacing in them.<sup>4</sup> The author has done a

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<sup>1</sup> International conference on human rights 1968

<sup>2</sup> The constitution of India adopted in 1950

<sup>3</sup> Universal Declaration of human rights

<sup>4</sup> Cairo program of action 1994

comparative study with American and European states which provides this right to reproduction to prisoners by way of conjugal visits<sup>5</sup>.

While prisoners in India are still deprived of this right. They have not been provided with any way to enjoy this right. Here comes the other problem of author whether “conjugal visits “can be a means to give prisoners their right to reproduction. After doing a lot of research the author comes to a problem which most of the states do have along with those states who do have the right (by conjugal visits). The problem of author is that in most of the state who have given this right (by conjugal visits), it is given to male prisoners. Only one or two states have given this right (by conjugal visits) to female prisoners. Indian law does not have any special legislation for reproductive rights. Indian judiciary, which has faced few cases on right to reproduction, has given its judgment by reading Article 21<sup>6</sup> in a very broad manner.

So the problem of author is whether in forthcoming cases judiciary will always protect its prisoner’s right of reproduction under Article 21 or the state needs separate legislation over it. Right to reproduction is very wide. It includes reproductive health, policies; right to abortion etc., so the problem of author will be whether a woman in prison has a right of abortion in critical conditions.<sup>7</sup>

### **PROBABLE OUTCOME**

As per my study, the probable outcome will be that at present Indian judiciary is not able to protect its prisoner’s right to reproduction. The problem of conjugal visits may soon be solved. India being a democratic country is much concerned for the rights of their citizens. Moreover right to reproduction is a human right and it has no relation with the incarceration. After doing a comparative study, there may be a problem in drafting legislation in India for reproductive rights of prisoners because of the social and economic problems. Indian judiciary is protecting right to reproduction of prisoners by reading Article 21 in a broad way. Cases for conjugal visits are coming frequently. So as per my study either the right will be

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<sup>5</sup> In Hungary and Mexico

<sup>6</sup> Jasvir Singh & Anr. vs. St. Of Punjab &ors.

<sup>7</sup> High court on its own motion vs. The State of Maharashtra, 2016.

protected under Art 21 as now or soon legislation will be drafted for it. As per my first question the outcome may be that yes Indian judiciary is trying to protect prisoner's right of reproduction but is not able to execute it completely.. As per my second question, conjugal visits are a means to fulfill these rights in many countries but there can be some other ways also. So finally my outcome is that yes Indian judiciary is protecting prisoner's right to reproduction but there several loopholes in it which needs to be fulfilled as soon as possible. We need a proper legislation for it and hope government will take its responsibility.

### **RESEARCH METHEDODOLOGY**

I have adopted doctrinal research methodology including primary and secondary data.

For completing my thesis, the approach for research is a basic and fundamental research. First I have done a comparison of the reproductive rights in India with American and European countries. So first dealt with a comparative method then I will analyze the rights given under Indian legislation and foreign legislation .I have dealt with the declarations, conventions and other secondary source of law for completing my theses. So I have done a doctrinal research. I have done a qualitative research by taking opinion of several people on this problem, case study and the culture of India and other states.

### **HYPOTHESIS**

Incarceration deprives a person of the rights which are normally enjoyed by a person, due to obvious reasons. But however there are certain rights fundamental in nature, which cannot be taken away merely because a person has been put behind bars. The concept of parole which is being used as a means to reform a criminal has its own limitations; the concept of conjugal visits can be brought within the theory of criminal justice system to bring little love behind the steel bars. And thus the concept of reformative jurisprudence which is asserted to be the guiding principle of modern criminal justice system would be strengthened.

**IDENTIFICATION OF ISSUES (RESEARCH QUESTIONS):**

- (1) Whether right to reproduction as guaranteed under Indian constitution is to ensure prisoners right to reproduce, Article 21?
- (2) Whether conjugal visits in prison /special homes can be practiced as a means to ensure reproductive rights of prisoners?
- (3) Whether prisoner's right to reproduce includes right to abortion in context to facility?

**SCOPE OF RESEARCH**

In my research I have taken, a new emerged right of prisoners (conjugal visit) in India. From so many rights of prisoners, I have selected reproductive rights of the prisoners. From the reproductive rights of prisoners, I will be focusing on conjugal visits. I have mainly researched how the judiciary is protecting "right to reproduce" while a person is behind the bars. Right to reproduction is a very vast and inclusive term, so I have focused myself to conjugal visits and its effect. My research is not based only to Indian judiciary but also to other countries. Judiciary in protecting their prisoner's right to reproduce. First I have done a research on reproductive right. To write a paper on this problem it's very necessary to know what it is. (Reproductive right). Then I have researched why it is necessary to prisoners also. By the help of various conferences, declaration, conventions, the author has explained the reason behind adopting this right. Right to have conjugal visits is a newly emerged problem in India.

There is not specific legislation for it in India, while some American and European countries do have it properly. Through various cases, I will deal with the origin of conjugal visit right in India and in other countries. I have also researched whether conjugal visit is only means to fulfill this right of prisoners or there can be other ways also. My scope of research will include the effect on society and others, caused by giving these rights (privilege) to prisoners. I have included the rights and laws through which Indian judiciary has protected its prisoners till now, but it will also include the reason for delay in adopting these rights fully and finally. I will be dealing with reasons for delay in justice. If till now, there is no law for protection of this rights then it's necessary to discuss the efforts done and the result of those efforts. My research also includes

gender equality in issue of conjugal visit right. Conjugal visit right has mainly given to male prisoners, so I have researched on this problem. The most important thing in my research is the views given by common people on the concept of conjugal visits. In last of my research, I will be dealing with the probable outcome. After dealing with the questions, reading articles, what I have understood from this topic and according to that, I will give my own views over it and suggestions to do it better

## **REPRODUCTIVE RIGHTS**

Before moving further we need to know what reproductive rights are. Reproductive rights are those rights which are given to couples in deciding every matter related to their family planning, their children and the health of the females. Reproductive rights are available to everyone and state has a duty to enforce reproductive rights. Reproductive rights are the fundamental rights. In support of my definition I have given conventions and declarations which talks about these rights.<sup>8</sup>

### **(1.1) CONVENTIONS AND DECLARATION WHICH RECOGNIZED THIS RIGHT:**

#### **CAIRO PROGRAMME OF ACTION 1994<sup>9</sup>**

Reproductive rights was coined at the 1<sup>st</sup> international meeting on women and health in Amsterdam Holland, in 1984. The expression “reproductive rights” was enshrined in the international conference on population and development held in Cairo, Egypt 1994.

“The International Conference on Population and Development Programme of Action, reproductive rights are based on the right of couples and individuals to decide free from discrimination, coercion and violence whether to have children, how often and when to do so, having the necessary information and means to make such decisions. It is also connected with their right to the highest attainable standard of sexual and reproductive health.”<sup>10</sup>

**The Beijing Declaration and Platform for Action:** The convention affirms the same principles as adopted in ICPD. The Convention relating to the Status of Refugees<sup>11</sup>, the Convention on the Elimination of all forms of Discrimination against Women (CEDAW)<sup>12</sup>, the Convention on the Rights of the Child (CRC)<sup>13</sup>, and the Convention on the Protection and Promotion of the Rights

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<sup>8</sup> Reproductive rights are Human rights, Center for Reproductive rights.

<sup>9</sup> Adopted at the International Conference on Population and Development, Cairo 5-13th September 1994, available at <http://www.unfpa.org/publications/international-conference-population-anddevelopment-programme-action> accessed on 18/02/15.

<sup>10</sup> Paragraph 7.3 of ICPD.

<sup>11</sup> Convention relating to the Status of Refugees, 28 July 1951, 189 UNTS 150, (entered into force 22 April 1954).

<sup>12</sup> Article 16(e), Convention on the Elimination of all forms of Discrimination against Women, 18 December 1979, 1249 UNTS 193 [CEDAW].

<sup>13</sup> Article 2, Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3 [CRC]

and Dignity of Persons with Disabilities (CRPD)<sup>14</sup> points that gender discrimination should be stopped.

### **PROCLAMATION OF TEHRAN:**

In 1945, the United Nations Charter included the obligation "to promote... universal respect for, and observance of, human rights and fundamental freedoms for all without discrimination as to race, sex, language, or religion". However, the Charter did not define these rights. Three years later, the UN Universal Declaration on Human Rights (UDHR), the first international legal document to delineate human rights; the UDHR does not mention reproductive rights. Reproductive rights began to appear as a subset of human rights in the 1968 Proclamation of Teheran, which states: "Parents have a basic human right to determine freely and responsibly the number and the spacing of their children".<sup>15</sup>

This right was affirmed by the UN General Assembly in the 1969 Declaration on Social Progress and Development which states "The family as a basic unit of society and the natural environment for the growth and well-being of all its members,<sup>16</sup> particularly children and youth, should be assisted and protected so that it may fully assume its responsibilities within the community. Parents have the exclusive right to determine freely and responsibly the number and spacing of their children."<sup>17</sup>

### **WORLD HEALTH ORGANIZATION**

It defines reproductive rights as "Reproductive right of all couples and individuals to decide freely and responsibility the number, spacing and timing of their children and to have the information and means to do so.

"Women's sexual and reproductive health is related to multiple human rights, including the right to life ,the right to free from torture, the right to health, the right to privacy ,the the right to education and the prohibition of discrimination. The committee on economic, social and cultural

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<sup>14</sup> Convention on on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities 13 December 2006, 2515 UNTS 3.

<sup>15</sup> "Proclamation of Teheran". *International Conference on Human Rights*. 1968. Archived from the original on 2007-10-17. Retrieved 2007-11-08.

<sup>16</sup> Freedman, Lynn P.; Isaacs, Stephen L. (1993). "Human Rights and Reproductive Choice". *Studies in Family Planning*. **24** (1): 18–30. Doi:10.2307/2939211. JSTOR 2939211. PMID 8475521

<sup>17</sup> Declaration on Social Progress and Development



rights and the committee on the elimination of discrimination against women have both clearly indicated that women's right to health includes their sexual and reproductive health. This means that states have obligation to respect, protect and fulfill rights related to women's sexual and reproductive health.

The special Reporter on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health maintains that woman are entitled to reproduction health care services, goods and facilities that are;

- (a) Available in adequate numbers:
- (b) Accessible physically and economically ‘
- (c) Accessible without discrimination;
- (d) Of good quality”<sup>18</sup>

Guarantee of women's equal rights in deciding “freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.<sup>19</sup> Women's right to education includes “access to specific educational information to help to ensure the health and well being of families, including information and advice on family planning.”<sup>20</sup>

From the above conventions and declarations it is clear that Right to reproduction does not only mean to have a child it also have a right not to have a child. It gives choice to a woman to escape from having a child if she does not want it. She must have a choice not to have a baby or even if she conceives it right to abortion must be given in necessary cases. Reproductive rights also take care of the health of woman and put an obligation on the states to make them available with all the basic facilities necessary for good health of mother and her child.<sup>21</sup>

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<sup>18</sup> Sexual and reproductive health and rights ,united nations human rights office of the commissioner, [www.ohchr.org](http://www.ohchr.org)

<sup>19</sup> Under Article 16 of CEDAW

<sup>20</sup> Under Article 10 of CEDAW

<sup>21</sup> Reproductive rights ,[family.findlaw.com](http://family.findlaw.com)

**MEN AND REPRODUCTIVE RIGHTS**

When we talk of reproductive right, we generally think of woman. But if we see whether it is possible to get the status parenthood without involvement of male and female. So in my opinion reproductive right should be available to both men and women. If we want to put men and women in the same line then they must be given equal rights. It is not always necessary that those reproductive rights can be linked with females only. Three international issues in men's reproductive health are sexually transmitted diseases, cancer and exposure to toxins.<sup>22</sup>

The national center for men<sup>23</sup> came up with the issues related to reproductive rights of men e.g. *adoption, false paternity and right over frozen embryos*. Recently men's reproductive rights were in debate in US. They claimed that in gender justice along with females, males should also have right to get abortion. Means that when wife gets pregnant or a female gets pregnant by a male, in the initial time males should have the right to abort the child and choice related to all future responsibilities. Female should also be left with same options. [<sup>24</sup>][<sup>25</sup>]

If we talk about the reproductive rights of minors, in most of the states minors have not been given any right to reproduction. Women who are under the age of 18 can also avail this right and good health but with certain exceptions. They cannot be made available with all the rights as to an adult. For having a child all states has fixed different age for women. In that case in my opinion most of the reproductive rights should be given to minors also.<sup>26</sup>

“The focus of reproductive rights has been on protecting the reproductive rights of women, and reproductive rights are part of women's rights. For biological and social reasons women are more directly affected than men by decisions with respect to reproduction; decisions which in turn are shaped by issues related to gender equality, stereotypical gender roles and the role of women in society more broadly. Reproductive rights matters are crucially important to women as

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<sup>22</sup> Best, Kim (Spring 1998). "Men's Reproductive Health Risks: Threats to men's fertility and reproductive health include disease, cancer and exposure to toxins". Network. Family Health International: 7–10. Retrieved 2008-01-02

<sup>23</sup> Incorporated in 1987, is dedicated to the advocacy of men's equal rights. They educate the public about how men have been hurt by sex discrimination and they also counsel individuals and families who have been damaged by discrimination against, violence, forced fatherhood etc.

<sup>24</sup> *Roe v. Wade* 410US113 argued in 1971 and decided in 1973. (Texas law of abortion).

<sup>25</sup> McCauley Melanie G (1998). "The male abortion: the putative father's right to terminate his interests in and obligations to the unborn child". *The Journal of Law and Policy*. **VII** (1): 1–55. PMID 12666677

<sup>26</sup> *Supra*, 6

they affect women's mental and physical integrity, their health and sexual autonomy, "their ability to enter and end relationships, their education and job training, their ability to provide for their families, and their ability to negotiate work-family conflicts in institutions organized on the basis of traditional sex-role assumptions".<sup>27</sup>

No matter we should involve men also in reproductive rights .For the equality it is necessary to keep men and women at equal level. "Men's general knowledge and attitudes concerning the ideal family size, gender preference of children, ideal spacing between child births, and contraceptive method use greatly influence women's preferences and opinions"<sup>28</sup> The society which do provide equal right and status to men and women will also share equal rights of reproduction.

The non-involvement of men and boys in matters related to reproductive rights contributes to "the poor preparation of men for adulthood, contraceptive use, and safe sex".<sup>29</sup> As men are usually responsible for the decision making processes within families, including with regard to reproduction, family size and contraception use, involving men can assist in the process of empowering women.

From the above idea and explanation of reproductive one thing can be understood that reproductive rights along with right to have a child includes right not to have a child or to abort it.

Now when we have understood that these rights are available to everyone does not mean that these are available to prisoners also.

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<sup>27</sup> Siegel, Reva B., "Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression". (2007) Faculty Scholarship Series. Paper 1137.

<sup>28</sup> Macellina Y Ijadunola, Titilayo C Abiona, Kayode T Ijadunola, Olusegun T Afolabi, Olapeju A Esimai and Funmilola M Ola Olorun, "Male Involvement in Family Planning Decision Making in Ile-Ife, Osun State, Nigeria" (2010) African Journal of Reproductive Health, December; 14 (4).

<sup>29</sup> Kumar Anant, "Role of Males in Reproductive and Sexual Health Decisions" (2007), The Bihar Times

**1.2 -cases which recognized these rights of prisoners in India**

**REPRODUCTIVE RIGHTS IN INDIA**

- “Reproductive Health was given an international consensus definition at the ICPD in 1994. At its core is promotion of reproductive health, voluntary and safe sexual and reproductive choices for individuals and couples, including decisions on family size and timing of marriage. Sexuality and reproduction are vital aspects of personal identity and are fundamental to human well being fulfilling relationship within diverse cultural contexts. As chair of Partners in Population and Development, India recently reaffirmed the commitment to the 1994 ICPD Programme of Action in the Delhi Declaration following the ‘International Inter-ministerial Conference on Investing in Demographic Dividend’ on November 26, 2014”.<sup>30</sup>

Its two important clauses which ensure the importance of reproductive rights of women are:

“Informed free choice being essential to the long-term success of family-planning programme. Any form of coercion has no part to play. Governmental goals for family planning should be defined in terms of unmet needs for information and services. Demographic goals while legitimately the subject of government development strategies, should not be imposed on family-planning providers in the form of targets or quotas for the recruitment of clients “.<sup>31</sup>

“Highlighted how investing in quality of family-planning programmes is often directly related to the level and continuity of contraceptive use and to the growth in demand for services. “Family-planning programmes work best when they are part of or linked to broader reproductive health programmes that address closely related health needs and when women are fully involved in the design, provision, management and evaluate on of services.”<sup>32 33</sup>

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<sup>30</sup> 13<sup>TH</sup> International inter ministerial conference on population and development: priority population and development challenges in the context of SDGs .

<sup>31</sup> Clause 7.12 of ICPD

<sup>32</sup> Reproductive rights of women retrieved from <http://iasscore.in/national-issues/reproductive-rights-of-women>

<sup>33</sup> CLAUSE 7.13 OF ICPD

The problem of gender justice is a universal problem. All states claim that they are fully capable in providing gender justice but from coming issues it does not seem to be done.”*It is well said that justice should not only be done, it should also be seen to be done*”.

In the same way if we claim gender justice it should not be mere words, it must be actually done. In India when we talk of reproductive rights it seems that neither Indian judiciary nor state has put efforts in enforcing these rights. From below given issues we can judge how judiciary protects reproductive rights of their prisoner’s.

**Sterilization case:**

In sterilization camp in Chhattisgarh 16 women die while 15 women die every month across the country .All this happened because of the family planning operation.<sup>34</sup> S.C. directed center to put an end to sterilization camp within three years. It also directed to make strengthen the primary health care centre system and also objected that it’s high time when men and women both should be treated with dignity, respect and full health care. In case of sterilization they should be treated as human beings not as animals or as mere statistics in the sterilization programme.<sup>35</sup>If we talk about the health care provided to women in India we can see that in a sterilization camp in Niwari health centre where women were sleeping on floor.

From this we can understand that which type of health care is being provided to women in India. The centers are overcrowded and no arrangements are available to women. Women who complained of weakness were given glucose drips on the floor itself. From the local sources it came in limelight that after operation no edible things were provided and no arrangements were done in case they stay there.<sup>36</sup>

From above situation we can get a picture how well reproductive rights of females are protected.

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<sup>34</sup> Aditi tandon, Sterilization [www.tribuneindia.com](http://www.tribuneindia.com)

<sup>35</sup> Hindustan Times ,September 14,2016.

<sup>36</sup> Purvi jain and anupam pateria, Hindustan Times, Bhopal/ Sagar.

**Prisoners have right to conjugal visits: HC**

"A society which is currently involved in academic and intellectual debates on 'gay-rights' or the recognition of 'third-gender', cannot shy away nor can it keep concealed under the carpet the pragmatic concept of conjugal visits of the jail inmates," the court observed. "To say it differently, time has come and before it is too late, the stake-holders must sit together and deliberate upon this crucial subject and take a holistic view."<sup>37</sup>

India is still a step backward that all other countries in matter of conjugal visits. It has no laws for procreation. In a case filed in Andhra Pradesh H.C. refused the wife of inmate to allow for conjugal visit.<sup>38</sup>

In the case of *jasvir singh vs. state of Punjab*<sup>39</sup>, Justice Surya Kant pronounced that all convicts have a right to procreate while incarceration unless and until reasonably not classified.

“The Punjab and Haryana High Court has allowed conjugal visits and artificial insemination facility for jail inmates subject to certain conditions. Ruling that ‘right to life and personal liberty’ guaranteed by the Constitution also includes the right of convicts or jail inmates to have conjugal visits and artificial insemination, the court said the same would be regulated by a legally established procedure that will be the sole prerogative of the state. Till date, nowhere in India are jail inmates permitted to have conjugal visits or artificial insemination facility. The court directed the Punjab government to constitute a jail reforms committee, headed by a former High Court judge, to formulate a scheme for creation of an environment for conjugal and family visits for jail inmates and to identify categories of inmates entitled to such visits. Other members of the committee shall include a social scientist, an expert in jail reformation and prison management, amongst others.”<sup>40</sup>

This was the first case which clearly indicated that soon India will allow prisoners to have sex for propagation of own species. The case has also interpreted Article.21 very beautifully. It has proved that right to life under Art. 21 can be interpreted in any way for protecting right of any

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<sup>37</sup> Ajay Sura, “High court allows jail inmates to have sex with their partners”, Times Of India: January 7, 2017.

<sup>38</sup> Ms. G. Bhargava, President M/s Gareeb Guide (Voluntary Organisation) v. State of Andhra Pradesh, PIL No.251 of 2012 decided on 16th July, 2012

<sup>39</sup> CWP No. 5429 OF 2010 (O&M), Decided on 29.05.2014.

<sup>40</sup> Sanjeev Verma, “Prisoners have right to conjugal visits:HC “ published by The Indian Express, January 7, 2015 <http://indianexpress.com/article/india/india-others/prisoners-have-right-to-conjugal-visits-hc/>

person whether it be a prisoner or other citizen. In *State of Andhra Pradesh v. Chalaram Krishna Reddy*<sup>41</sup> it was held by the court that incarceration does not mean renunciation of his/her fundamental rights. Any person who has been convicted or not or even if he is under trial has the right to enjoy the fundamental rights including “right to life”. It is his/her basic human right which does not go away with the imprisonment.<sup>42</sup>

**Brief study of case:**

In the given case the petition filed by the Jasvir and Sonia the convicts to allow them for conjugal visits within the jail premises. They gave examples of the American and European countries for allowing visits. Both the husband and wife kidnapped a 16 year boy for ransom and then killed him. This was a murder and they were convicted for that. Both were given death penalty but the death penalty. They requested the court to provide them facilities for conjugal visits so that they can procreate because the convict was the only male child of his family and wanted to have a child for their parents. He stated that this was not for sexual pleasure for their own but for their parents. They stated that they just want to fulfill the wish of their parents so that their parents can live in hope that child. The convicts were married before 8 months only. Their plea was rejected. Court said in the prisoner’s act 1894 no where it is mentioned to allow inmates for conjugal visits. They do not have any right for conjugal visits. More over the act says that in case of incarceration both the husband and wife should be segregated. So in that case it is impossible to allow them for conjugal visits. Even or constitution and other acts are silent on this right.<sup>43</sup>

They knocked on the door of H.C. and S.C. but all went into vain. Their death sentence was upheld by H.C. whereas sc changed death penalty of Sonia into life imprisonment. Now both the husband and wife have pleaded for procreation, here counsel argued very efficiently that Article 21 is a new path for interpretation. He argued that right to life does not only constitute to protect yourself. But it also includes the protection of species also. As per human rights every couple has right every couple has a right to procreate and contribute in the progress and protection of species. This case brought a new challenge before the Indian judicial system. Like other western

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<sup>41</sup> *State of Andhra Pradesh v. Chalaram Krishna Reddy* (2000) 5 SCC 712.

<sup>42</sup> Subham srivastava, “reproductive rights of prisoners: legal and institutional challenges.”

<sup>43</sup> Dr Sunaina, “Judicial Introspection of Conjugal Rights Vis A-Vis Human Rights Of other prisoners.

countries there is no right for conjugal visits in India while other countries have given right a long back.

**Analysis of the judgment**

The court restricted itself to the following questions of law:

- Whether while incarceration right to procreation can be given and if it can be provided whether it is given under our Grand norm (constitution)?
- Whether in our penological system provided creation of facilities to exercise the right to procreation during incarceration?
- Whether article 21 which is the savior and one of the most prominent article, which cannot be suspended even at the time of emergency includes right to procreate in jail, right to conjugal visits and artificial insemination.
- The most important is even if it provided or given under article 21 is it available to all kinds of convicts?



**What does court say?**

“Right to procreation survives incarceration. Such a right covered by ambit of Article 21 of Constitution read with the Universal Declaration of Human Rights. The penological interest of the state ought to permit creation of facilities for the exercise of right to procreation during incarceration, may be 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.”<sup>44</sup>

In Article 21 “LIFE” word does not only mean life. Right to Life mean every aspect of life should be protected which is capable making a man’s life complete, which should also be meaningful.<sup>45</sup> It has been visible that Art 21 has to be interpreted along the International charters on human right. As Article 21 can be interpreted widely .Here judiciary have a duty to protect the right of the accused .Right to life being very broad in nature consists of right to privacy also Article 12 of United declaration human rights 1948.

*“The woman’s right to make reproductive choices is also a dimension of “personal liberty “as understood under article 21. It is important to recognize that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman’s right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproduction choices such as a woman’s right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. Furthermore, women are also free to choose birth control methods such as undergoing sterilization procedures. Taken to their logical conclusion, reproduction rights include a woman’s entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children. However, in the case of pregnant women there is also a “compelling state interest” in protecting the life of the prospective child.”<sup>46</sup>*

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<sup>44</sup>Ajay Sura,” Court allows jail inmates to have sex with their partners”;Times of India, January 7,2015

<sup>45</sup> Hina Iliyas,”Right to privacy under Art. 21 and related conflicts “.

<sup>46</sup> Suchita srivastava v. Chandigarh Administration, AIR 2010 SC235.

**1.3 cases which led to the recognition of reproductive rights in American and European countries**

**Definition of prisoner:**

A prisoner is “a person legally committed to prison as a punishment for a crime or while awaiting trial”<sup>47</sup>

**“One who is deprived of his liberty; one who is against his will kept in confinement or custody. Person restrained of his liberty upon any action, civil, criminal, or upon comuian-d-rnent.”<sup>48</sup>**

"To quote Winston Churchill, The humanity of a society can be judged by the treatment of its prisoners."

The United Nations’ Basic Principles for the Treatment of Prisoners, 1990 states that “except for those limitations that are necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights”.<sup>49</sup> The Universal Declaration of Human Rights provides that men and women of full age have the right to marry and form a family.<sup>50</sup>

From the definition we can understand that prisoners are the person who is deprived of liberty so it will be very difficult for them to enjoy the rights which are available to common people. Prisoners are not deprived of all the rights but cannot enjoy all the rights. In present time our judiciary is doing more efforts in protecting prisoner’s rights. They are given a better life than former prisoners. The judiciary protects their rights in all possible way and makes them available with all facilities. They are also given a chance to reform them so that they can also have good life after serving their sentence.

From above content we came to know what reproductive rights are. Who are all people to whom these rights are available? In further chapters I will be discussing how these rights are made

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<sup>47</sup> Oxford living dictionary

<sup>48</sup> Black’s Law Dictionary

<sup>49</sup> United Nations’ Basic Principles for the Treatment of Prisoners, 1990, adopted and proclaimed by General Assembly resolution 45/111 of 14 December 1990

<sup>50</sup> Article 16(1), Universal Declaration of Human Rights.

available to prisoners and how judiciary is protecting their rights. I have divided my whole dissertation in two parts to co relate with my questions and chapters. Along with right to procreation I will be discussing some portion on abortion of prisoners or rights of those prisoners who enter in prison with pregnancy. In first part I will be discussing the source these rights emerged and efforts done by judiciary in protecting these rights.

In case of prisoners the right to reproduction is available both to male and female. The best way to fulfill this right is by conjugal visits.

It's a time given to significant one /spouse/family to meet the other in prison. A Conjugal Visit is a scheduled extended visit during which an inmate of a prison is permitted to spend several hours' even days, in private with a legal spouse. While the parties may engage in sexual intercourse, the generally recognized basis for permitting such a visit in modern times is to preserve family bonds and increase the chances of success for a prisoner's eventual return to life outside of prison. Additionally, the incentive of conjugal visits means that the inmates are strongly motivated to comply with the various day-to-day rules and regulations of the prison. As a result, inmates consciously avoid any infringements that may disqualify them from having their conjugal visit.<sup>51</sup>

### **History of conjugal visit in USA:**

In 19<sup>th</sup> century there were approx 17 states which were providing the facility of conjugal visits but the number has decreased .In USA the first prison which allowed the conjugal visit was the Mississippi base prison Parch man Farm. At that time prisoners were kept as slaves and for keeping these slaves more active and to keep the slavery system alive for more years they started sending women at the end of the weeks. "Conjugal visits as an incentive for the (mostly black) inmates to work harder in the prison's farming industry, according to lawyer Patrick Rodgers. On Sunday afternoons, the prisons brought in prostitutes who charged 50 cents for their services. "Sex was used as the proverbial dangling carrot for increasing inmate productivity." From that time conjugal visits founded its roots .Although the reason behind visits of women at that time

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<sup>51</sup> Shanella Henry Norwood, "allow conjugal visits in Georgia". <https://www.change.org/p/allow-conjugal-visits-in-georgia>.

was derogatory from today's point but gave evolution to visits. This gave rise to more family visits and gradually it established a route to evolve as a right.<sup>52</sup>

At present only 4 states allow conjugal visits: New York, California, Connecticut and Washington.<sup>53</sup> Although conjugal visits started late back in USA but at that time purpose for that was else. In 1974 finally a case came which decided the fate of conjugal visits for prisoners<sup>54</sup>. In that case and at that time it was decided by the court that husbands do not have right as per the constitution to have sexual relations with their wives while they have been imprisoned.<sup>55</sup>

"The drama and legal battles associated with conjugal visits began to gain traction after this ruling, and close to 40 years later, the laws have evolved in several states. Proponents of the ruling in *Lyons v. Gilligan* argue that sex should not be a right granted in prison, and by allowing a convicted felon to have sexual relations -- or, any relation with a free civilian in an unsupervised environment -- there is an increased chance of contraband entering and leaving the prison, in addition to violence and the spread of diseases.

- These visits -- also known as an 'extended family visits' -- are currently allowed, in some form, in eight states: California, Colorado, Connecticut, Mississippi, New Mexico, New York, Washington and Wyoming:
- California and New York, implemented conjugal visits for homosexual prisoners. In 2007 it was announced that it would allow conjugal visits in California will be allowed for those of the same gender.<sup>56</sup>

The policy, which was enacted after consideration of a 2005 California law, required domestic partners both same-sex and heterosexual individuals to receive the same rights as straight couples who are married.

California also allows overnight visits with family, which was extended to LGBT inmates. In 2008, then Governor David Patterson ordered New York state agencies to recognize same-sex marriages and civil unions that were performed in other states.

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<sup>52</sup> Conjugal visits: Rules And History

<sup>53</sup> Victoria cavaliere, how conjugal visits work; may 24, 2016

<sup>54</sup> *Lyans vs. Gilligan* 1974, USA

<sup>55</sup> Decided by ninth circuit court

<sup>56</sup> Announced by California department of corrections.

Similar to California, it was decided that homosexual prisoners were not to be discriminated against; however, same-sex conjugal visits were not allowed until 2011.”<sup>57</sup>

### **REPRODUCTIVE RIGHTS IN EUROPEAN UNION:**

European Countries are always a step further in all fields. When we talk about reproductive rights in Europe they have European convention on human rights which talks about the reproductive rights. Most of the European countries have allowed conjugal visits. But in case of reproductive health European countries are not much ahead. In an article a detail analysis of reproductive health in European countries has been given.

Poland, Latvia, Lithuania, Georgia Armenia, Croatia etc. the countries which are a step behind in providing good health to their citizen in the matter of contraception and abortion. There is a lack of reproductive education in these countries. In many countries women gets unintended pregnancy which led to abortion.<sup>58</sup>

Over 85% of European women (all ages) have used some form of birth control in their lives.<sup>59</sup> Europeans as an aggregate report using the pill and condoms as the most commonly used contraceptives.<sup>60</sup> Family planning has become prominent throughout the region and most taboos concerning sexuality have been lifted or diminished.<sup>61</sup> “Youth sexual and reproductive health centers have been established across most of the region.

In Sweden, approximately 80% of girls and 17% of boys have visited these youth centers, which provide all or nearly all services youth need at little to no charge.”<sup>62</sup> “Sweden has the highest percentage of lifetime contraceptive use, with 96% of its inhabitants claiming to have used birth control at some point in their life. Sweden also has a high self-reported rate of postcoital pill

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<sup>57</sup> Jeffrey Hartinger,sex behind the bar.”

<sup>58</sup> Written by Christina zamper,legal adviser for Europe (center for reproductive rights) in consultation with wanda nowicka with assistance of astra organization and members.

<sup>59</sup> De Irala, Jokin; Osorio, Alfonso; Carlos, Silvia; Lopez-Del Burgo, Cristina (2011). "Choice of birth control methods among European women and the role of partners and providers". *Contraception*. **84** (6): 558–64. doi:10.1016/j.contraception.2011.04.004. PMID 2207818

<sup>60</sup> ibid

<sup>61</sup> Ketting, E; Esin, A (2010). "Integrating sexual and reproductive health in primary health care in Europe: Position paper of the European Forum for Primary Care". *Quality in primary care*. **18** (4): 269–82. PMID 20836943

<sup>62</sup> ibid

use.”<sup>63</sup> “A 2007 anonymous survey of Swedish 18-year-olds showed that three out of four youth were sexually active, with 5% reporting having had an abortion and 4% reporting the contraction of an STI.<sup>64</sup> Similar centers exist in Estonia, Finland, and Portugal.”<sup>65</sup>

“Views on sexual practice vary throughout the region. For example, in the United Kingdom (UK), sex among youth is generally looked down upon and seen as a problem in need of solution. In the Netherlands, sex between youth is viewed as normal and therefore not discussed in terms of solutions, but rather in terms of ensuring safe practices. That being said, the UK tends to focus on stopping sexual behavior, while the Netherlands focuses on building self-esteem and healthy relationships.”<sup>66</sup>

The Grand Chamber reiterated that 30 of the States which had ratified the European Convention on Human Rights (ECHR) allowed for conjugal visits for prisoner.

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<sup>63</sup> Supra note 35

<sup>64</sup> Larsson, Margareta; Tydén, Tanja; Hanson, Ulf; Häggström-Nordin, Elisabet (2009). "Contraceptive use and associated factors among Swedish high school students". *The European Journal of Contraception & Reproductive Health Care*. **12** (2): 119–24.

<sup>65</sup> *ibid*

<sup>66</sup> Supra note 36

**CHAPTER 2**

**RIGHT TO REPRODUCTION IN PRISON:**

**2.1 RIGHTS COVERED UNDER REPRODUCTIVE RIGHTS:**

Women's reproductive right and sexual rights are her health rights. In a paper presented by an expert member of CEDAW, the author said that reproductive rights include following rights:

- (1) Right to life
- (2) Right to liberty and security of the person
- (3) The right to health care and information
- (4) The right to non discrimination in the allocation of resources to health services and in their availability and accessibility.
- (5) Right to privacy in making sexual and reproductive decisions
- (6) Right to informed consent and confidentiality in relation to health services.<sup>67</sup>

The author has stated earlier reproductive rights are the basic rights given to couple. Under reproductive rights we can include some more other rights also:

- (1) Right to legal and safe abortion
- (2) Sterilization and contraception method should be free without any coercion
- (3) Every woman should have good quality of reproductive healthcare and it should be easily accessible to everyone
- (4) Reproductive education should be imparted free of cost and if it is not possible then it should be informed<sup>68</sup>
- (5) Education is very necessary, so education about sexually transmitted infections should be given

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<sup>67</sup> Dr.Carmel Shalev ,”Right to sexual and reproductive health-the ICPD and the Convention on the elimination of all forms of discrimination against women .March 18,1998.

<sup>68</sup> Amnesty international USA(2007)”Stop Violence Against Women:Reproductive rights”.

(6) Education of FGM should also be given<sup>69</sup>

My third question of research is about the facilities provided for abortion and in explanation to that the author would like to explain in following lines .In India the overcrowding has created the problem of hygiene. The jails as district and tehsil level tolerate much. Inmates in these jails are not even tested for specific infectious diseases. A check up at the beginning is done but after that no regular or routine checkups are done. The inmates are not provided a proper health check up. In the landmark case of parmananda katra vs. union of India<sup>70</sup> ,The court stated that it's the obligation of the state to preserve the life of every person whether he is an innocent or a criminal liable to punishment. The UDHR has already sated that that state should maintain health, and well being of all.The ICESR furthermore states that prisoners have a right to get the highest attainable standard of physical and mental health. The right to health and care in case of HIV, detention and first generation right and right of privacy and confidentiality should be given. It is the right of every prisoner to get the health care and proper sanitation facilities at least at the level of those who are outside. The conditions of prisons in India are very bad. They are overcrowded and bad facilities. So in that case the state has an obligation to take care of health. The prisoners are vulnerable to get various diseases because no hygienic facilities are provided. Many of the jails have reported of contracting HIV and other diseases. In that case we talk of a pregnant prisoner, is this not the responsibility of state to provide a good sanitation facility to them so that they can deliver a healthy child.

### **CONDITION OF WOMEN IN PRISON**

#### **INDIA**

In India where women are more respected and a country where many women are at a high post, A country where women plays a great role in leading the state, in that country the conditions of women in prison are misrebale.We talk about gender justice, equality and to take women at the equal level of men but in reality nothing is done. Here the judiciary of India has resulted badly. The problems of women are not heard. Women are continuously neglected, tortured and abused. A woman is even raped. The news of custodial rape is not new to anyone. The needs of women

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<sup>69</sup> "Human Rights and reproductive choice".Studies in Fmaily planning.

<sup>70</sup> 1989



are rarely taken into consideration. Then women in prison are subjected to abuse, they are even asked to strip up for medical checkup. A society where our popular and most talented leaders gives statement that the clothing of women excites a male, on the other hand women prisoners are left alone in the custody of police men, no female guard is appointed, they are asked to change their clothes in prison itself<sup>71</sup>.Is this the way a woman should be treated? The United Nations rules for the treatment of women prisoners and non custodial measures for women offenders' 2010 covers following areas:

- Areas of admission
- Healthcare
- Treatment of women and children who accompany her.<sup>72</sup>

**EUROPEAN COUNTRIES:**

**STATUTES**

- European convention for the prevention of torture and inhumane or degrading treatment or punishment
- Minimum rules for treatment of prisoners of 1957,and declarations and principles
- United Nations convention on the rights of the child of 20 November 1989.
- Resolution of 18<sup>th</sup> January 1996 on poor condition in prisons in European union

In spite of so many conventions and rules the problem of women in prison is same all over the world. Every where women are subject to abuse, physical and mental torture. The problem hygiene, health food, health care is prevalent everywhere. In Europe it is duty of the guards to provide health benefits and proper treatment to those inmates who are drug addicted.

Reproductive rights include safe abortion also. Unlike other countries abortion in India is dependent upon restriction imposed by law. In case of prisoners women prisoners are not provided with safe and healthy abortion .The prison is not effluent in providing facilities for a pregnant woman and in case of any danger ,of safe abortion. In a case it is stated by the court that neither we should look differently at prisoner than other pregnant women. In Europe pregnant women with children are entitled for a more spacious cell or individual cell only in terms of diet

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<sup>71</sup> Chouhan and dhyani,"The deplorable condition of women prisoners in India".February 4,2014.

<sup>72</sup> Asha bhandari,"socio-legal status of women prisoners and their dependent children:Astudy of central jails of rajasthan.

and hygiene, while pregnant women are entitled to a antenatal and postnatal care and parenting classes of a standard equivalent to those who are outside and the same level of facility as provided to them.<sup>73</sup> But after looking the conditions of the prison it is difficult to say that women inmates are having minimum facilities. An inmate is free to terminate her pregnancy if she does not want to give birth to the child. The reason behind that can be anything but what is the responsibility of state here. State should provide inmate proper facility to terminate the pregnancy as per the MTP Act. But the concern of author is that where inmate are not provide basic necessities or health care it does not sound good to provide them with all facilities for abortion. In every statute and law it is given that both the mother and child should be treated good and good health care should be provided but nothing like this can be seen. Reproductive rights talks about the care of both mother and child. The condition of women prisoners is not going to change. But several developments can be seen in American and European countries.

**RECENT DEVELOPMENTS:**

“Recent developments there are encouraging signs that new approaches and plans are being produced in various parts of the world. There are changes planned in several of the relevant public services such as the police, probation services and community facilities, and reflected in initiatives of nongovernmental organizations. The trend is towards more emphasis on alternatives to custody, with more effort towards assessing and supporting women in their own place of residence in cases where they have committed a non-violent or minor offence. The legal and criminal justice systems are also changing, with new restorative justice approaches. During recent years, prison systems in many countries have developed initiatives such as mother-and-baby units for imprisoned mothers; in most countries in Europe it is possible for babies and small children to stay with their mother in prison, up to an average age of 3 years. Nonetheless, this option raises difficult problems and dilemmas. Ideas relating to health promotion in prisons, especially in women’s prisons, are developing.”<sup>74</sup>

The first standard was

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<sup>73</sup> Report on the situation of women in prison and impact of the imprisonment of parents and family life 5<sup>th</sup> February 2008.

<sup>74</sup> Moller,fraser,gathererand bergh,”imprisonment and women’s health:concerns about gender sensitivity,human rights and public health.17<sup>th</sup> September 2010

- The government of Thai initiated a project and it was called Enhancing Lives of Female Inmates (ELFI) in 2008<sup>75</sup>, it eventually leading to the development of a supplement to the United Nations Standard Minimum Rules for the Treatment of Prisoners. The supplementary rules (“Bangkok Rules”) were approved in December 2010 by the government.
- Second was Committee which was formed “of the United Nations General Assembly at its 65th session .The committee provided clear guidelines for all the countries all over the world.<sup>75</sup> The Rules were framed and aimed to raise awareness and set important standards for the safety and good health of prisoners. They proved to be a useful tool for human rights and prison organizations to advocate for better conditions as well as gender-sensitive care and diversion schemes for imprisoned women worldwide.
- The third was WHO Regional Office for Europe and UNODC .Both of the institution are following up on their Declaration on Women’s Health in Prison and for that they have developed practical checklists and guidance notes. The checklists framed by the organs will focus on following three levels:

(i) Ministers and policy-makers;

(ii) Prison management;

(iii) Prison health staff. The aim is to support Member States with practical means to assess their current situation regarding women prisoners’ health and the health services provided. The checklists and guidance notes are expected to be published later this year.

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<sup>75</sup> Available at (available from: <http://www.un.org/News/Press/docs/2010/ga11041.doc.htm>).

2.2 NESSECITY FOR PROVIDING THESE RIGHTS TO PRISONERS:

(1)Over the time judiciary has developed itself very broadly and efficiently. This chapter broadly explains the different rights which constitute the reproductive rights. Article 21 “*no one shall be deprived of his life and personal liberty except according to procedure established by law*”.<sup>76</sup> Earlier the way of interpreting the article was not that much broad as of today .The words “life” and “personal liberty” has perverted itself in covering a vast area and various rights.

Interpretation of Article 21 by our honorable judges:

- Bhagwati,j; Article 21”embodies a constitutional value of supreme importance in a democratic society.”
- Iyer,j; article 21 is “procedural magna Carta protective of life and liberty.”
- Justice V.R.Krishna Iyer “*convicts are not mere reason of the conviction devoided of all the fundamental rights which they otherwise possess.*”<sup>77</sup>

Right to life and personal liberty can be interpreted in various aspects. As per our constitution Article 21 is the heart and soul and it cannot be suspended even at the time of emergency. Article 21 is the base from which every person whether citizen or non citizen has derived its right to live happily along with the exceptions. Article 21 is our fundamental right and as per various judgments, precedents and observations it is available to prisoners also.

Along with fundamental rights every person has human rights also. Although there is no where it is expressly given but since U.N. has declaration over Human rights, it’s available to anyone. India is a member of various human rights declarations and conventions. (Cairo declaration 1994).Right to reproduction as per U.N. declaration of human rights is available to every person. Ever person has full right to enjoy their human rights, no matter on which side of the bar they are. This is a right which is necessary so that people could regenerate their species. Under Indian constitution no where it is written anything about right to reproduction but we can implement this right under Article 21.

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<sup>76</sup> The constitution of India as amended by The constitution (ninety-seventh amendment) Act 2011 ,bare Act with short notes.

<sup>77</sup> Sunil Batra vs. Delhi Administration ,1978 retrieved from vlr0790,conjugal visits ,www.legalservicesindia.com

In the case of Sunil Batra vs. Delhi Administration<sup>78</sup> has observed so many rights for the inmates.

- “Para 9: fundamental rights do not flee the person as he enters the prison although they may suffer shrinkage necessitated by incarceration. Our Constitutional culture has now crystallized in favor of prison justice and judicial jurisdiction. Court has a continuing responsibility to ensure that the constitutional purpose of the deprivation is not defeated by the prison administration.
  
- 11. “Whether inside prison or outside, a person shall not be deprived of his guaranteed freedom save by methods 'right, just and fair'.”
  
- 12. A prisoner wears the armor of basic freedom even behind bars and that on breach thereof by lawless officials the law will respond to his distress signals through 'writ' aid. The Indian human has a constant companion-the court armed with the Constitution.
  
- 16(i) the most important right of a prisoner is to integrity of his physical person and mental personality. No prisoner can be personally subjected to deprivations not necessitate by the fact of incarceration and the sentence of court.
  
- iii) Visit to prisoners by family and friends are a solace in insulation: and only a dehumanize system can derive vicarious delight in depriving prison inmates of this humane amenity. Subject, of course, to search and discipline and other security criteria, the right to society of fellow- men, parents and other family member cannot be denied in the light of Art. 19 and its sweep.”<sup>79</sup>

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<sup>78</sup> AIR 1579, 1980 SCR(2)557.

<sup>79</sup> Para 9,11,12,16(i),16(iii) of Sunil batra v. Delhi Administration AIR 1579,1980 SCR(2)557.

- *In kharak Singh's case also*

The S.C. has observed that under Article 21 “right to life” does not only mean to live life and personal liberty can be interpreted in various aspects. As per our constitution Article 21 is the heart and soul and it cannot be suspended even at the time of emergency. Article 21 is the base from which every person whether citizen or non citizen has derived its right to live happily along with the exceptions. Article 21 is our fundamental right and as per various judgments, precedents and observations it is available to prisoners also.

Along with fundamental rights every person has human rights also. Although there is no where it is expressly given but since U.N. has declaration over Human rights, it's available to anyone. India is a member of various human rights declarations and conventions. Right to reproduction as per U.N. declaration of human rights is available to every person. Every person has full right to enjoy their human rights, no matter on which side of the bar they are. This is a right which is necessary so that people could regenerate their species. Under Indian constitution no where it is written anything about right to reproduction but we can implement this right under Article 21. It does also include various other basic necessities which are necessary to live a life. Like in labor law different types of living wages have been classified in which a minimum wage or fair living wage is necessary to live. In the same way right to reproduction do constitute a major right and has a different role in the life of prisoners. When right to life is present to normal person, it must be available to a person who is behind the bars.

### **2.3 VARIOUS MEANS THROUGH THIS RIGHT CAN BE FULFILLED.**

As per morality, culture and thinking of the people it is obvious to get negative comments more on it, to deny this right to prisoners. In their opinion they have done a crime, that's the reason they are behind the bars. But as per my research and opinion it's not fair worthy enough to deprive a person of his /her human right .Because it does not take away the right of one person but of the spouse also, which is not the party at fault. Depriving that person from enjoying his/her right is again a violation of right. Depriving an inmate of reproductive rights may effect at the other prisoners and the society also. For fulfillment of reproductive rights to prisoners is only available either by “conjugal visits” or by “artificial insemination”. If we do have a look on how the conjugal visits started in U.S.A. and the reason behind that -we can understand “power of

emotions and love”. So it’s very necessary to keep the prisoner in touch with their family members along with rules necessary. keeping a person in touch with their family may turn them good procreate humanity in them .If a prison puts some criterion to meet their legal spouse or family members for which he /she has to work and put efforts to reform their mentality and behavior then it’s good for the person and the society both. There are so many neither prisons which facing problem because prisoners are getting no other environment; neither love nor good companionship which may make the situation worse in the prison.

Right to reproduction in case of prisoners can be done either by conjugal visits or artificial insemination. Where conjugal visits had much more good and fruitful effect. It will not only fulfill the right to reproduction but also will give them a better situation and much work as a medicine for turning towards reformation. Conjugal visits have also resulted in positive way as various other prisons where conjugal visits are not allowed prisoners are also committing rape on other inmates and creating chaos. In a case it was found that in prison due to overcrowded prisons ,prisoners were coming into contact with the disease like AIDS because women were supplied from outside.

The Recent Case Law in the United Kingdom on artificial insemination:

**The Mellor Case**<sup>80</sup>

“In The Queen on the Application of Mellor v. Secretary of State for the Home Department the Court of Appeal upheld judgment by Forbes J dismissing an application from a prisoner who was seeking access to artificial insemination. At the time of the judgments, Gavin Mellor was serving a life sentence, having been convicted of murder in 1995. The tariff element of his sentence was due to expire in 2006, although it was possible that he could be granted temporary release prior to that date. His wife, whom he married in prison in 1997, would be 31 when his tariff expired in February 2006. Mellor was challenging Home Office policy which, whilst not operating a blanket ban on artificial insemination, allows access to appropriate facilities only in exceptional circumstances. Mellor claimed that the refusal to allow him access to AI facilities breached his right to respect for private and family life under article 8 of (ECHR), and his right to marry and

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<sup>80</sup> Mellor v. secretary of state for the home department

found a family under Article 12. The court rejected Mellor's claim, taking the view that one of the purposes of imprisonment was to punish the criminal by depriving him of certain rights and pleasures which he could only enjoy at liberty, including the enjoyment of family life, the exercise of conjugal rights and the right to found a family. In his judgment, Lord Phillips argued that a policy which generally accorded prisoners the right to conceive children by AI would 'raise difficult ethical questions and give rise to legitimate public concern'. He also discussed the difficulties of creating a de facto single-parent family, contending that it is both legitimate and desirable that, when considering whether to have a general policy of facilitating AI for prisoners or the wives of prisoners, the state should consider the implications of children being raised in those circumstances. This case was brought by a prisoner in relation to his own rights, not that of his partner, although as Mellor pointed out in his initial letter of application, his wife also had a right to found a family. Article 8 appears to protect de facto family life: under Article 12, it could be argued that, following the decision of the ECHR in *X & Y v. Switzerland*, if the applicants are married they have therefore founded a family<sup>81</sup>. Depending on how 'founding a family' is defined, if a male prisoner is denied access to facilities for AI, then in order to exercise her own rights his partner would either have to have sex with someone other than her husband, or conceive through formal or informal Artificial Insemination by Donor (AID), and thus bear a child of whom her husband would not be the biological father. Thus the partners of prisoners denied access to AI are themselves eligible to challenge the policy on the grounds that their own rights are being infringed, although to date only one prisoners' wife has sought to challenge the denial of AI facilities on these grounds, with no success either initially or on appeal.<sup>82</sup>

In Europe these landmark case gave permission to all the prisoners who were having a hope to become father or wanted a family. The human rights court said that denying a person from sending or giving sperm to their wives is like depriving a person from having children. So if the government does such an act it will be a breach of human rights<sup>83</sup>.

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<sup>81</sup> Williams (2002) 'Have the Courts Got it Right?- The Queen on the Application of Mellor v Secretary of State for the Home Department', *Child and Family Law Quarterly*, Vol. 14, No.2.

<sup>82</sup> The most recent ruling in this ongoing legal dispute is *Kirk Dickson, Lorraine Dickson v. Premier Prison Service Ltd., Secretary of State for the Home Department* [2004] EWCA Civ 1477

<sup>83</sup> *Dickson v. the United Kingdom* (application no. 44362/04).



The Dickson case: <sup>84</sup>

“In October 2003 Kirk Dickson applied for facilities to artificially inseminate his wife, which was refused. In his letter refusing access to AI facilities, the Secretary of State set out his policy for responding to such requests, which is very close to that considered by the court in Mellor. Lorraine Dickson, his wife, failed in her subsequent application for judicial review. Lorraine Dickson, herself an ex-prisoner, befriended Karl Dickson, who is serving a mandatory life sentence, via the prison pen friend scheme and married him in 2001. She has since been released from prison. Her husband will not be eligible to apply for release on license until 2009, by which time she will be 51. Mr. Dickson has no children; Mrs. Dickson has two adult children and one school-age child another relationship. In seeking permission to apply for judicial review, her barrister argued that there were ‘exceptional circumstances’ why AI facilities should be provided: however Pitchford J said that the Prison Service were justified in refusing such facilities, and in taking into account that their relationship had not been tested outside the prison; the ‘violent circumstances’ of Kirk Dickson's offence; and the fact that he would not be with the child during a large part of the child's formative years. Lorraine Dickson already has three children by other relationships, and the judge refused to accept that the couple’s desire to have a child ‘trumped all other considerations.’ The Dickson’s then sought permission to appeal this earlier decision, and asked for an extension of time in which to do so. In September 2004 the Court of Appeal ruled on this application and refused the Dickson leave to apply for judicial review, stressing the validity of the Prison Service policy, and describing the Home Secretary’s decision to refuse AI facilities as ‘an exercise of discretion and proportionality.’”<sup>85</sup>

On the basis this judgment six more persons have applied for giving their sperm to their wives. Allowing someone to have children while he is in prison will cause good. The reason behind that is that in case of long serving prisoners till the time they will come out they will be too old to have a child or it may be that at that time their wife may not be in that position to bear a child

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<sup>84</sup> ECHR 15Dec 2007.

<sup>85</sup> Helen Cod, Policing Procreation: Prisoners, Artificial Insemination and the Law; Genomics, Society and Policy 2006, Vol.2, No.1, pp.110–117 <http://www.lancaster.ac.uk/fss/journals/gsp/docs/vol2no1/HCGSPVol2No12006.pdf>

The applications follow the above given landmark case the story follows like this, Kirk Dickson met his wife in jail when she was serving sentence for some fraud. At that time he met her through pen pal and then married. The husband who is serving a long sentence appealed for artificial insemination but his application was rejected and blocked by the government of the state of chamber but later the Strasbourg tribunal of human rights heard the appeal and allowed them to put their issue. In the tribunal the case was decided in favor of the petitioner. The tribunal ruled that it was blocking their right of parenthood and violation of article 8 of human rights convention of European Union. The convention clearly indicates that everyone should be given a right to privacy and family. Right to have family is right of every person.

The chamber ruled that for granting permission the rules set by the government are very high and more than expectation. They lie in the exceptional circumstances. It said that the government should not allow till the time there is no strong reason for refusal or the case lie in some exceptional cases. We have seen each case as different. The situation differs in every matter and case by case. A spokeswoman for the Ministry of Justice confirmed that applications from six prisoners requesting access to artificial insemination services were pending a decision by the justice secretary, Jack Straw. The ruling is one of several involving prisoners originally brought under Britain's Human Rights Act that has proved controversial. There was anger in some quarters when Strasbourg ruled that prisoners must be allowed to vote. The government is compelled to implement the ruling, but has yet to set a date for when it will do so.”<sup>86</sup>

The inmate submitted the following complaints: The applicants complained about the refusal of access to artificial insemination facilities, relying on Article 8<sup>87</sup> (right to respect for private and family life) and Article 12 (right to marry and found a family) of the Convention.<sup>88</sup>

In my opinion it's good to allow conjugal visits as first of all it is a human right of every person without any exception. Moreover there are no side effects of conjugal visits. It may increase burden on the administration and the government but will result in good for prisoners.

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<sup>86</sup> Jawie Doward Home affairs editor, “Prisoners demand right to be fathers”, Sunday February 2009.

<sup>87</sup> Article 8 and 12 of European convention on Human rights.

<sup>88</sup> European court of human rights 873,4/12/2007.press released by the registrar. Grand chamber judgment .Dickson vs. The U.K.

To fulfill the right of procreation of prisoners there is only limited modes or procedures. For other normal person there can be various measures for reproductive rights .A person can hire a surrogate mother also (surrogacy not allowed in India but allowed in many European countries).But these rights are not available to person incarcerated .One means through which this right can be fulfilled Is artificial insemination This is the same means which does not violate any law nor does put any burden over the administration for fulfilling the rights.

Artificial insemination can be a safe mode in spite of conjugal visits but both are rarely available to prisoners.

In a case in USA the court allowed and gave a green signal to inmate to send their semen to their wives for artificial insemination.

#### **2.4 states which have given this right to prisoners:**

Lists of countries which have provisions for conjugal visits for their prisoners is are given below:-

##### **Australia**

Like western countries Australia do not have provision for conjugal visits in all the states .The capital territory of Australia and the city of Victoria allows prisoners for conjugal visits .While other states of Australia do not provide prisoners for conjugal visits.

##### **Brazil**

Brazil a South American country is in the level of California which along with prisoners allows heterosexual and homosexual prisoners for conjugal visits'. There is no gender discrimination in Brazil. But the homosexual relationship is allowed only for males not for females. The conjugal visits for female visits are strictly regulated.

##### **Canada**

Canadian prisons are very much cool with their inmates. They have provided their inmates with so many facilities which other prisons do not provide. Canadian prison allows all the inmates for conjugal visits and family visits except those who are not eligible for this. Those prisons that do not fall under the category of good behavior are not allowed to go for family visits. They also do not allow those prisoners who may result or prove injurious or who have a violent nature and may prove dangerous for their family .All the competent inmates are allowed a visit for 72 hrs.

These visits are provide every two months. Eligible visitors are like family members, spouse or any person with whom the inmate have a close relation. They provide lodging and food but on charge. A regular contact is also maintained by the guard at the time of visits.

### **Denmark**

Denmark also allows visits for inmates. For the visits they have a separate hall named as the state prison of east jutland. In Denmark conjugal visits or family visits are allowed to only those inmates who have been sentenced for more than 8 years. The inmates are provided a visit for total 47 hrs. Per visit.

### **Germany**

The conjugal visits in Germany are also prevalent but they allow only those inmates who get approval. The inmates are allowed to spend some time with their loved ones. This helps them to deepen the bond between them. Every visitor before entering the prison is properly searched and a proper check up is also done. In 2010 an inmate murdered his girlfriend and after murdering he himself committed the suicide. This incident was criticized and questioned the security of the prison.

### **Republic of Ireland**

Ireland a country of United kingdom country. UK do not provide conjugal visits .They are strictly against the concept of conjugal visits. In case of right to reproduction several cases were filed. In chapter one I have discussed two cases of artificial insemination. Various petitions have been filed for allowing conjugal visits but every time petition was rejected by the court. In Ireland the first case of conjugal visits was the case of Marie and Noel Murray, an anarchist married couple imprisoned for a 1976 murder, but court rejected their appeal for conjugal visits. The supreme court of Ireland ruled that those who have been imprisoned do not have any constitutional right to beget children while imprisonment.

### **Israel**

Israeli prisons allow conjugal visits for both heterosexual and homosexuals. In 2013 homosexual partners were allowed for conjugal visits. The Israel Prison Service (IPS) allows conjugal visits on some set standards .For approval of conjugal visits it are mandatory to prove good behavior

and fulfill other requirements. The visit of an inmate can be upheld if there is confusion or apprehension of security or proved misconduct or misbehavior. The prison allows conjugal visits for those inmates who either have a legally married spouse or are in a relationship for at least 2 years and have proved a good behavior.

### **Mexico**

Mexico is well known for conjugal visits. It allows all the inmates for conjugal visits. For conjugal visits an inmate do not need to stand on the provision of being married. They allow everyone. The visitors are allowed to stay in the prisons with their imprisoned relative quiet for a long time but these types of visits are not allowed each time. Mexico also allows gay prisoners to visit their gay partners or spouse. This was done in a result of ban on discrimination in 2003.

### **Russia**

In Russia prisoners are allowed for an extended visit for 17 to 18 days but on proved good behavior. They also get family visits for one month. In an interview with former assistant to Russian parliament, told how he spends his time in the prison and also about conjugal visits. He told that on paying fee he was allowed to live in a hotel for conjugal visits. He also told that whenever he wanted to visit his family he was allowed to visit with two guards to accompany him.

### **Spain**

In Spain, prisoners are allowed conjugal visits every four to eight weeks. They are held in private rooms and can last up to three hours. Couples are provided with condoms, shower facilities, and clean towels.

### **Turkey**

Since April 2013, Turkish General Directorate of Prisons and Detention Houses offers conjugal visits as a "reward" to the well-behaved prisoners.

### **United Kingdom**

United Kingdom is comprised of four states. England, Wales, Scotland and northern Ireland. UK do not allow conjugal visits. Like other European countries conjugal visits or extended family

visits are totally ban in U.K. The inmates are allowed to go for family visits if they give a guarantee that they will return. Inmates are allowed for conjugal visit in very serious cases. Prisoners are allowed if the administration has a belief that inmate will not abscond that prisoners who are in open prisoners are allowed for the visit that closed cell prisons. In a case of Christopher Pollock he stated that conjugal visits should be allowed because not allowing inmates for conjugal visits violating their rights and it's not less than making mockery of judicial system. When other countries are providing visits why U.K. is lacking this facility.<sup>89</sup>

### **United States**

In the case of *Lyons v. Gilligan* (1974), the United States District Court for the Northern District of Ohio held that right to go for conjugal visit is not a constitutional right .This case led to the question whether denial of conjugal visits is violation of human right enshrined in article 8 of the declaration of human rights and fundamental rights in the constitution of America.<sup>90</sup>

Certain requirements for allowing conjugal visits:

The United States of America and U.K. do not allow conjugal visit for prisoners in custody. Every state in USA has its own provisions for governing the prisoners' .In USA many states do not provide conjugal visit while at present only four states allows these types of visits. In each prison be it of Asian or European good behavior is first priority. No inmate allowed who has not proved himself as a good person or has not changed a little bit. Following are few points which need to be kept in mind while allowing conjugal visit.

- For the purpose of security it is necessary to have a background checkup of the visitors. Any visitor can not be allowed without any security check. Prison also has criteria for medical checkup. They must be free from any sexually transmitted disease. Sexually transmitted disease may create serious problem in prison. Various incidents have been found in prison of different states that prisoners came in contact of these diseases which is harmful for everyone. It is good to check both inmate and visitor before and after visits in order to avoid nay kind of danger of illegal activity. The inmates or visitors may indulge in any kind of smuggling or pother activity which may be dangerous for prisoners and the security of the state.

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<sup>89</sup> Drug dealer climis ban on conjugal visit"makes partner suffer" telegraph.co.uk

<sup>90</sup> *Lyons v. Gilligan*, 382 F. Supp. 198 - Dist. Court, ND Ohio 1974

I have already discussed in chapter number one the emergence of conjugal visits in America. The conjugal visit was started by state of Mississippi in late 1990 for prisoners. At that prisoners were allowed for visits so that they can good relation with their wives and family which will give them satisfaction and ability to work more. But at present the motto behind this privilege is to reform the prisoners and rehabilitate them. At present all the states which provide these visits allows visits for same sex conjugal visits. The visits are allowed on the ground that inmate must be married before incarceration while New York stated that it will allow visits for those inmates also who have currently married. They have totally focused on rehabilitation on prisoners.

### **India**

If we talk about the conjugal visits in India the first case for conjugal visit was filed in the HC of Punjab and Haryana. After hearing the case, High Court held that the right of married convicts and jail inmates to have conjugal visits or artificial insemination for pregnancy was a fundamental right but not a constitutional right and it also stated that while incarceration to conceive a child is not a privilege. To allow prisoners for visits is only to fulfill the human rights. In reproductive rights the rights of both prisoner and its spouse are co related .In order to protect the human rights and fundamental right of the spouse it becomes necessary to fulfill the rights of prisoners. In other continents these rights are prevalent from 19<sup>th</sup> century .Many of the states have allowed these rights independent of any discrimination e.g. marital status and gender. These visits have been allowed in Muslim countries also. They allow inmates for visits as per their marital status.

### **2.5-EFFORTS AND REFORM DONE IN ORDER TO PROTECT THE RIGHT**

- Right to reproduction has been enumerated in many conventions and it has been declared by U.N. also that reproductive rights are the human rights of every person and nobody can separate it. If we talk about India efforts put by Indian judiciary are appreciable. It is putting 100% efforts in protecting its prisoner's right. After the landmark judgment in *Jasvir Singh and Ors. Vs. State of Punjab and Ors.* Case it can be said that judiciary is much concerned about the rights of its prisoners. In sterilization case also the judgment of S.C. was praiseworthy.
- Talking about European countries they have protected the rights of their prisoners very well. In fact they have ECHR which is active in protecting the rights of its

prisoners. They have provisions for the conjugal visits also. In the above given chapter I have discussed two cases also (Dickson and Mellor) that how judiciary protected their rights. Most of the European countries are liberal with their prisoners but on the other side U.K. is much stringent .It has not allowed conjugal visits to its prisoners. People of U.K. are continuously trying to protect this right but every time they see failure. So we can say that in U.K. they are not much interested in protecting the rights of their prisoners.

- Now the last we will talk about America. In the American continent most of the state protect prisoner's right of reproduction and if we talk about U.S.A., the originator of conjugal visits is day by day curtailing this right. The number of states has fallen from 17 to 4 in allowing conjugal visits.U.S.A. is having the most crowded prison and the largest number of prisoners in its prison.

The condition of women in USA prisons are very well than others. They take full care of their reproductive rights. They do not lack in sanitation facilities also. If talk about abortion, its not illegal in most of the countries. So abortion is no problem but in India we need to pay attention on it.



## **CHAPTER 3 REPRODUCTIVE RIGHT**

### **3.1 EFFECT ON PRISONER, FAMILY, SOCIETY AND PRISON ON DENIAL OF CONJUGAL VISITS.**<sup>91</sup>

Conjugal visits were basically allowed to prisoners for the betterment of prisoners. But since it needs a pure cautious field for its enforcement somewhere it is creating a burden over the society and the government. In case these visits are being denied they may have some adverse effect on the others also. Conjugal visits have both pros and cons. The state or the birth place of conjugal visits is somewhere now is in a mood to deny and abolish this rule. Conjugal visits are not based on federal basis but are based on state basis. Every state under the federation has its own right to allow or deny the visits. Conjugal visits may result in many good consequences like it will increase the connection between the family and the prisoner, it will put a platform for good behavior and it will also reduce recidivism.<sup>92</sup>

In California and New York, they are called family visits and are designed to help keep families together in an environment that approximates home. Some research shows that they can help prisoners better integrate back into the mainstream after their release. Studies cited by Yale law students in a 2012 review of family visitation programs showed that the programs could work as powerful incentives for good behavior, help reduce sexual activity among prisoners and help strengthen families.

### **3.2 EFFECT ON SOCIETY AND GOVERNMENT ON ALLOWING THIS RIGHT**

Allowing conjugal visits needs a lot of preparation. The administration has a duty to work after considering its consequences also. In a prison any outsider cannot be allowed without any check up. Like in India there is a delay in executing the orders of the court for allowing the conjugal visits because it takes a lot of work and financial assistance. It's not easy to allow conjugal visits.

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<sup>91</sup> Barini chakroborty, First state to approve conjugal visits prepares to end program

<sup>92</sup> Suzanne Raga, "9 arresting facts about conjugal visits".retrived at 4:34 6<sup>th</sup> march

For administration it is a kind of burden and needs a lot of care. Various points which needs to be taken while preparing for conjugal visits:

- We need a proper staff for the maintenance of prisons .If female and male are allowed a proper and good number of staff will be required for its management.
- We need to take care of security issues also. Allowing an outsider may prove fatal. So its good to have a good security, management and administrator to handle the cases.
- A huge amount of money is required to maintain the cells.
- For conjugal visits separate cells are also required.<sup>93</sup>
- In case prison allows female also, there should be a proper medical facility. In case a female prisoner gets pregnant they require a personal care taker for them. Daily routine checkups are also necessary for keeping prisoners in good health. After the delivery of the child till some month the government has a duty to take care of it.
- Cleaning management and staff is also required.etc.

In Mississippi<sup>94</sup> a program called Mississippi program called the holiday suspension program is allowed from 1<sup>st</sup> December to 1<sup>st</sup> march. In this the inmates who are in prison for 3 years and have proved to be good in behavior are permitted to go home for 10 days.<sup>95</sup>

“Mississippi was the first state to introduce conjugal visits—and even provides the prostitutes—but even they abandoned them two years ago. Their decision to cancel the costly program elicited protests from prisoners’ families and rights groups that said the visitations, though infrequent, promoted family bonds and improved prisoner morale.”<sup>96</sup>

In United sates prisons have given prisoners special and good facility.<sup>97</sup> While other prison does provide other household necessities. This also includes toiletries, condoms and lube to their inmates. United States provides best prison facilities like apartments with living and dining rooms, DVD player and other things of luxury.<sup>98</sup>

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<sup>93</sup> Red house at Mississippi prison

<sup>94</sup> Mississippi and new mexico stopped allowing the visits as of February 1,2014 and may1,2014.

<sup>95</sup> Conjugal visits at Mississippi state penitentiary

<sup>96</sup> Victoria cavaliere,”How conjugal visits work” 24<sup>th</sup> may, 2016.

<sup>97</sup> Cabins, trailers,or apartment-style housing.

<sup>98</sup> Suzanne Raga,”9 arresting facts about conjugal visits”

All the above points are only an extra burden over the society and the administration. They have to spend a lot over the maintenance of the prisons. The whole burden comes over the shoulders of the administration for their safety, security and health issues. This burden somewhere indirectly puts burden over the society also. It very much understood that administration is not going to uplift this burden over its shoulders only. For every function and maintenance of these prisons society has to pay. The money for this will come from nowhere but from the pockets of the public. They have to give a portion of their salary to these prisoners for their enjoyment.

“Christopher B. Epps, the prison commissioner, plans to end the program Feb. 1, citing budgetary reasons and “the number of babies being born possibly as a result. The state Representative Richard Bennett, Republican of Long Beach, wants the practice stopped, and he said no amount of protest would change his mind. He said he learned about conjugal visits a few years ago when an elementary school principal told him a student of hers had shown up with a photograph of a new sibling. The student’s mother was incarcerated. The baby had been conceived during a conjugal visit.

In 2012, Mr. Bennett introduced a bill to end the visits. It did not get much attention, so he will try again when the Legislature meets this month. He said he was aware of Mr. Epps’s plans, but wanted a permanent ban. Officials have not offered any figures on the number of babies born or the program’s cost.”<sup>99</sup>

“Most states either strictly prohibit conjugal visitation, or severely limit this contact while incarcerated, thereby naturally limiting the procreative abilities of most prisoners.”<sup>100</sup> The rationale for denying conjugal visitation has been described as the penological interest in "preserving institutional order and discipline, maintaining security to protect against escape or unauthorized entry, and achieving prisoner rehabilitation."<sup>101</sup> Several states, including California, have prohibited conjugal visits for inmates serving life sentences without the chance of parole.

<sup>102</sup> In New York, prisoners are considered civilly dead if they are sentenced for life and cannot be

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<sup>99</sup> *ibid*

<sup>100</sup> Ronald L. Goldfarb & Linda R. Singer, Redressing Prisoner's Grievances, 39 GEO. REV. 175,203 (1970).

<sup>101</sup> Kristin M. Davis, Inmates and Artificial Insemination: A New Perspective on Prisoners' Residual Right to Procreate, 44 WASH. U. J. URN. & CONTEMP. L. 163, 171 (1993).

<sup>102</sup> CAL. CODE REGS. Tit. 15, § 3174(e)(2) (2001) (prohibiting family visits to inmates serving a life sentence without parole or a parole date set); see also N.Y. CIV. RIGHTS LAW § 79 (McKinney 2002) (stating that persons

married or enter a marriage contract after they are incarcerated for life.<sup>103</sup> New York has also limited conjugal visitation for prisoners if they have AIDS because the state has a substantial interest in preventing the spread of communicable diseases.<sup>104</sup> Legislative history in California reveals that the purpose of the regulation regarding prohibited conjugal visitation for life-term inmates is to promote "institutional security or public protection."<sup>105</sup> The decision to limit such contact rights directly affects one's ability to procreate. Thus, limiting contact rights indirectly supports the penological interest of deterrence and the state's interest in minimizing the financial burdens.

In my opinion it is somewhere wrong to put burden over the society for this. Why general people have to pay for it. They are paying a portion of their income for those criminals.

### **3.3 EFFECTS ON OTHER PRISONERS:**

Allowing conjugal visits may cause adverse effect over other prisoners. They may also demand for conjugal visits. Many prisoners have described criteria for conjugal visits. Every person in prison is not allowed for conjugal visits. Like prison at Mississippi do allows prisoners to have conjugal visits and also allows them to go home but only on good behavior. If the prison is allowing an inmate to have a visit to their legal spouse then other prisoners will surely ask for it. In 21<sup>st</sup> centuries where we have allowed homosexuality may prisons do allow transgender and homosexuals also to go for conjugal visit?

As per strict rule of prison every person coming for conjugal visits need to show her identity and only legal spouse is allowed. But it is impossible that in prison everyone is married. So it may be that other inmates may ask for their right also. I mean inmates who are not married. It's very difficult for Indian culture but in western style inmates may ask for marrying their girl friend or may request to allow their girlfriends for conjugal visits. It may create a big question mark if an

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servicing a life term sentence are deemed civilly dead and, thus, this statute indirectly states that lifetime inmates are incapable of having conjugal visits); R.I. GEN. LAWS § 15- 5-1 (2001) stating civilly dead inmates cannot be married); Dep't of Corr. v. Roseman, 390 So. 2d 394 (Fla. Dist. Ct. App. 1980) (suggesting that a rule that prisoner cannot marry if they are serving a sentence of twenty-five years or more before parole, are death row inmates, or are those who seek to marry within the system is not constitutionally invalid).

<sup>103</sup> Miner v. N.Y. Dep't of Corr. Serv., 519 N.E.2d 301, 301-02 (N.Y. 1987)

<sup>104</sup> Doe v. Coughlin, 518 N.E.2d 536 (N.Y. 1987).

<sup>105</sup> Prisoners: Conjugal Visits: Hearing on S.B. 1382 before the S. Comm. on Judiciary, 1992 Leg., Regular Sess. (Cal. 1992).

unmarried guy who has totally passed the test for conjugal visit may ask for allowing its fiancé, his girl friend or other girl. “In countries like Venezuela and Brazil, unmarried persons are allowed weekly “visits.” In Colombia, where not all prisoners receive a cell and bed because of overcrowding, conjugal visits are routine. About 3,500 women arrive at prisons each Sunday to meet intimately with their husbands or boyfriends.”<sup>106</sup> These are the prisons which allowed the conjugal visits for everyone, but this scenario is not prevailing in every prison. Here conjugal visit concept may create a problem for the administrators. Everyone in prison cannot be allowed to go for conjugal visits. So either like Venezuela and Brazil each one should be allowed to have visits or not one. Equality should be done to everyone.

**Positive effect:**

“Supporters of the move say that apart from the fact that conjugal right is fundamental, allowing prisoners to have sex and thereby have offspring would make it easier for them to be rehabilitated when they are released. *“If the wife has a positive influence on the prisoner, the reformation process can be faster,”* says Maharashtra’s former jail minister Jaspal Singh. Currently, when spouses do get a chance to visit, it is under the watchful eye of the guard. In some cases they just get to wave out to their family members from a common cage in the visitors’ area.

Prisoners who have money can bribe the guards and sneak in a sex worker, says Sam pat (not his real name), a former convict at the Yerawada Central Jail in Pune. Homosexual sex is more common. “One would hear stories of prisoners in the barrack turning to each other for sexual gratification even though they were straight,” says Ferreira. “Allowing conjugal visits would not force them into such acts.”<sup>107</sup> All prisons allow conjugal visits only on good behavior every prisoner cannot be allowed for visit. The prisoner must have a good record. From the definition of prisoner we can understand why a person is imprisoned.

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<sup>106</sup> Victoria cavaliers How conjugal visits work” <http://www.vocativ.com/underworld/sex/conjugal-visits-work/>

<sup>107</sup> Sex and the prison, The Telegraph, India; February 4, 2015.

[https://www.telegraphindia.com/1150204/jsp/opinion/story\\_11377.jsp#.WKVv3tJ97Mw](https://www.telegraphindia.com/1150204/jsp/opinion/story_11377.jsp#.WKVv3tJ97Mw)

*“One who is deprived of his liberty; one who is against his will kept in confinement or custody. Person restrained of his liberty upon any action, civil, criminal, or upon commandment.”<sup>108</sup>*

If conjugal visits are allowed then it will increase the chances of prisoners to transform them into good person. It will also full the reformatory theory of punishment. An accused is imprisoned to pay for what wrong or damage him has done. Earlier the definition of imprisonment was to torture prisoners, implement harsh punishment over them but in today’s scenario the motto has changed .State focuses much on their reformation. In a number of cases <sup>109</sup> the Hon’ble Apex Court has diluted the concept of jail as a symbol of torture and pain and has moved towards reformatory jurisprudence and has started concentrating on ways and means which would help the offender to reform, re-socialize and abstain from repeating the offence.<sup>110</sup>

Conjugal visits have resulted in positive manner. In an article the author stated that conjugal visit and family visit in programme in Canadian prison proved as a useful tool in transforming inmates criminal behavior into good behavior. The author states the story of an inmate name Lee Chapels who was allowed frequent conjugal visits .The correctional system of Canadian prison aimed at transforming the behavior of inmates so that they can successfully reintegrate themselves into society after they are released from prison.<sup>111</sup>

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<sup>108</sup> Supra24

<sup>109</sup> State of Maharashtra v. Prabhakar Pandurant Sanzgiri AIR 1966 SC 424; Sheela Barse vs. State of Maharashtra (1983) 2 SCC 96; Ramamurthy vs. State of Karnataka (1997) 2 SCC 642.

<sup>110</sup> Srivastava,supra note 55 at 99

<sup>111</sup> Geordon Omand,”conjugal visits help Canadian inmates reintegrate into society”. The Canadian press. correctional investigator howard sapers cited research showing inmates who maintain close family bonds have a lower likelihood of reoffending.(DREAMSTIME).

## CHAPTER4

### 4.1 Protection of Reproductive Rights of prisoner's in India.

The fundamental rights of people of India are secured under Part-III of Indian constitution and Article 21<sup>112</sup> of this part guarantees safe life and personal liberty of an individual in all respect. The scope of Article 21 is quite vast and covers all the aspects of human life. What all is personal and is legally justified and correct, is taken care under this law of constitution, but not on the account of interfering others' liberty and life. Article 14 ensures equality before law and constitution, same way Article 21 stands equal to all. The reproductive right too, is protected and guaranteed to all men and women of India equally under Article 21.

The people of India are given equal opportunity to reproduce and enjoy a happy sexual life. Definitely the choice of, when to have children and how many, is a pure decision pending with couple; but still due to biological differences in man and woman, the later is much more affected by this important decision of their life. But what, if the female counterpart doesn't want to give birth after conception. Can she adopt some means of contraception at her own accord and will? Though she is liberalized by the law and constitution to take this decision individually, but she won't be left to do so due to social causes and hence the decision no more remains personal to her. She is suppressed by the socio economic forces of the family, society, and the culture therein.

#### According to the 1994 Cairo Programme of Action:

*"Reproductive rights embrace certain human rights that are already recognized in national laws, international human rights documents and other relevant United Nations consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes the right of all to make decisions concerning reproduction free of discrimination, coercion and violence as expressed in human rights*

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<sup>112</sup> Constitution of India 1950.

*documents. In the exercise of this right, they should take into account the needs of their living and future children and their responsibilities towards the community.”<sup>113</sup>*

In ICPD four qualitative and quantitative goals were set:

- (1) Universal education,
- (2) Reduction of infant and child mortality
- (3) Reduction of material mortality
- (4) Access to reproductive and sexual health services including family planning.<sup>114</sup>

Despite some legislative protection of reproductive rights in India, reproductive self-determination is not yet a reality for many Indian women. Low levels of access to contraception and lack of control over reproductive choices and health decision-making often mean that Indian women give birth too early in life and too frequently. Exacerbating this is poor nutrition, low levels of education, poverty, unhygienic living conditions and a public health system that fails to provide adequate antenatal care, access to safe abortion, emergency obstetric care or post-natal care. This is the brief picture drawn of, how the reproductive rights of a common woman are being protected in India. Unlike olden days, now with the uplift of societies and development of civilization, the citizens of India are getting educated and have acquired a higher perspective for women. The steps have been initiated by the government to bring the women at par to men in all respect; also the rights of women have been placed above to that of men. These all steps taken by the government have been implemented, to stop all the discrimination against women and make the women superior than its male counterpart. The result of these admirable actions has resulted as a improvement in the no. of female to male ratio. Though not hundred percent but still we are near to minimise the differences between male and female and ensure equal rights to both; after all the constitution of India is equal to all citizen.

Now in the case of prisoners of India incarcerated during their youth or for their complete youth or sentenced to death; how will the Article 21 protect their right to reproduce? Each prisoner is a human being first and therefore being human, allows them to enjoy facility of Article 21, though not completely but still to a limited extent. A prisoner let it be a male or

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<sup>113</sup> “Report of the international conference on population and development” UNFPA,1995.

<sup>114</sup> *ibid*



female, does have some personal desires that include physical, mental or social desires and familial/social responsibilities; and when it comes to reproductive desire it no more remains personal, rather becomes bilateral. In many European countries the reproductive rights has been limited to procreation and necessary means have been sought to achieve this. There are cases, where either of the couple is incarcerated at an early age and both wish to have their offspring; with due consideration of the judiciary they have been permitted to procreate while fulfilling some security norms. Though in much of the cases this facility has been extended to male prisoners only but still there are few countries whose law allows men and women prisoners for procreation equally. The means assorted to protect the reproductive rights of prisoners may differ from country to country. **Conjugal Visits** is one of those methods/ means adopted to conserve the reproductive right of these prisoners.

*“A conjugal visit is a scheduled period in which an inmate of a prison or jail is permitted to spend several hours or days in private with a visitor, usually their legal spouse. The parties may engage in sexual activity. The generally recognized basis for permitting such visits in modern times is to preserve family bonds and increase the chances of success for a prisoner's eventual return to life after release from prison. Additionally, they serve as an incentive to motivate inmates to comply with the various day-to-day rules and regulations of the prison, and to avoid any infringement which might disqualify them from having a conjugal visit. The visit will usually take place in designated rooms or a structure provided for that purpose, such as a trailer or a small cabin.”<sup>115</sup>*

Jasvir and Sonia v.st.of Punjab and Haryana was the first case which succeed in getting the privilege of having conjugal visits. The judgment was published in the many of the reputed news papers. The highlights of the case taken from an article of ‘*The Indian Express*’ is appended below-

**“Prisoners have right to conjugal visits: HC”**

Justice Surya Kant made it clear that ordinarily all convicts, unless reasonably classified, are entitled to the right to procreation while incarcerated.

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<sup>115</sup> Hartinger supra note 33

In the history of India in 2015 in the case of *Jasvir v. State of Punjab and Haryana*, honorable Judge declared that allowing jail inmates to have sex with their partners is their fundamental and human right. Why they should be deprived of this right? In most of the countries conjugal visits have allowed so that reproductive rights of each person could be fulfilled. The priority of judiciary is to protect the right of its citizens, no matter where they are. An innocent should not be punished for that wrong which he has not committed. Inmates have been given various fundamental rights then how can we deprive them from human rights which cannot be taken away in any case.

The Punjab and Haryana high court made a remarkable judgment in the case of *Jasvir Singh*. The court allowed for the conjugal visits as well as for the artificial insemination. The right to go for conjugal visit was interpreted under article 21 of the constitution. As the author has already stated in chapter one how judiciary has interpreted this right to protect the right of the inmate. When we talk about how judiciary is protecting the rights of its prisoners article 22 and 20 can also be co related. Both of the rights are fundamental rights and protect the interest of the prisoners.

**Article 20: Protection in respect of conviction**

- Article 20(1) can be explained that law should not punish or convict any person except, if that person violates the law that is in force at that time. Neither any person should be punished more than what he deserves. eg. Any one who committed theft can be held liable and punished for dacoit. Law says that punishment should always be in proportion. It also says that no person should be punished for any offence which is not violation of law at this time. He should also be not punished for any act done earlier which at that time was not an offence but due to change in law now it has become an offence. A person should only be punished for violation of any law which is offence at present.
- Clause two of the same article says that there should not be jeopardy means any person convicted earlier cannot be convicted and punished again for the same offence. When the accused or convict has paid whether in term of monetary or in form imprisonment he should not be held liable for the same offence again by different departments.

- Clause 3 states that any person convicted can be forced or pressurized to give a false sentence against himself, means a convict cannot be a self witness. Confession against himself is not held valid till the time convict does not give by his consent. No force should be allowed.

Even a Narco test<sup>116</sup> cannot be done against the will of the convict. From article 20 it can be inferred that judiciary tries to protect the right of prisoners in all possible ways. Every where the motive has changed from punishment to reformative jurisprudence .The prisoners are protected from cruel and unusual punishment. In all the cases judiciary wants to save the rights of the prisoners and gives them a chance to reform.

- **Article 22**

Article 22 protects the rights of the prisoners in case they have been imprisoned or sentenced Any person arrested have a right to legal aid and other rights.

The supreme court of India and us has propounded certain universal rights of prisoners given below:

- (1) Access to fundamental rights with restriction
- (2) Right to live with human dignity
- (3) Right to health and medical treatment
- (4) Right to speedy trial
- (5) Right to life and personal liberty
- (6) Right to free legal aid
- (7) Right to bail when case is pending
- (8) Right to be released if date is due
- (9) Right to education
- (10) Right to receive books and magazines in the jail
- (11) Right to reasonable wages for work
- (12) Right to security of life inside the jail
- (13) Right to interaction with society

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<sup>116</sup> Selvie vs. state of karnatka

Some special right to women prisoners:

- (1) Right to female guard for female security
- (2) If prisoner is pregnant ,all necessary facilities

The Punjab and Haryana High Court has allowed conjugal visits and artificial insemination facility for jail inmates subject to certain conditions. Ruling that ‘right to life and personal liberty’ guaranteed by the Constitution also includes the right of convicts or jail inmates to have conjugal visits and artificial insemination, the court said the same would be regulated by a legally established procedure that will be the sole prerogative of the state. Till date, nowhere in India are jail inmates permitted to have conjugal visits or artificial insemination facility. Justice Surya Kant made it clear that ordinarily all convicts, unless reasonably classified, are entitled to the right to procreation while incarcerated.

“Such a right may deny the same to a class or category of convicts as the aforesaid right is not an absolute right and is subject to the penological interests of the state,” he added. The court directed the Punjab government to constitute a jail reforms committee, headed by a former High Court judge, to formulate a scheme for creation of an environment for conjugal and family visits for jail inmates and to identify categories of inmates entitled to such visits. Other members of the committee shall include a social scientist, an expert in jail reformation and prison management, amongst others.”

Justice Surya Kant, however, declined the prayer for conjugal rights and to procreate within Patiala central jail premises made by petitioners Jasvir Singh and Sonia Singh. The husband has been sentenced to death while the wife’s death sentence was commuted to life imprisonment by the Supreme Court. They were convicted for kidnapping and murdering the 16-year-old son of a Hoshiarpur jeweler, Abhi Verma, in 2005.

“The circumstances which led to the petitioners’ incarceration are far grave in nature and different from those where one of the spouses was totally innocent and possessory of all human rights without any curtailment, unlike the instant case where both of them are convicts,” said

Justice Kant. The judge added that even the most liberal view taken by some of the European or American courts would not justify the claim put forth by the petitioners.

The court said, “The penological interest of the state ought to permit the creation of facilities for the exercise of right to procreation during incarceration, may be in a phased manner... however, the same is subject to reasonable restrictions, social order and security concerns.”<sup>117</sup>

The following, amongst other issues emerge from the determination:

- Whether while incarceration right to procreation can be given and if it can be provided whether it is given under our Grand norm (constitution)?
- Whether in our penological system provided creation of facilities to exercise the right to procreation during incarceration?
- Whether article 21 which is the savior and one of the most prominent article, which cannot be suspended even at the time of emergency includes right to procreate in jail, right to conjugal visits and artificial insemination.
- The most important is even if it provided or given under article 21 is it available to all kinds of convicts?

If 3<sup>rd</sup> point is answered in the affirmative, whether all categories of convicts are entitled to such right(s)? The jail inmates in India fall broadly in two categories:

- (a) The convicts – who no longer carry presumption of innocence; and
- (b) The under-trials – who are presumed innocent until found guilty by the court.

The Legislature and the Judiciary both have been largely influenced by such classification while guaranteeing or curtailing fundamental, human or civil rights of the jail inmates. The convicts who are proven guilty are not entitled to each and every fundamental right guaranteed to a person under our Constitution.

Few more cases may be examined as here under pertaining to the preserving of fundamental and human rights of the incarcerated or convicted<sup>118</sup> –

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<sup>117</sup> The Indian Express

**Case-I** in D. Bhuvan Mohan Pataki's. State of Andhra Pradesh court said that the convicts can be deprived of their fundamental. As per article 21 rights to life and liberty is given to everyone. It does not matter whether he is imprisoned or not. Conviction may refrain a person from enjoying other rights but fundamental and human rights are available to every person. He can be denied or treated as animal or should receive inhumane treatment because of incarceration. Article 21 is available to everyone. The court stated that anything which vitiates the motive of fundamental right cannot be held valid. So any provision in violation of fundamental right should be segregated immediately and prisoners should be treated as human.

**Case-II** In Sunil Batra Vs Delhi Administration and Others, The Supreme Court made an attempt and put effort to create humane condition in the jail." Justice Krishna Iyer considered the core issue, whether a prison ipso facto outlaw the rule of law, lock out the judicial process from the jail gates and declare a long holiday for human rights of convicts in confinement or the prison total eclipses judicial justice for those incarcerated under the orders of a judicial Court? The dictum very emphatically espoused the cause of jail-inmates holding that 'Prisons are built with stones of Law' and so, when human rights are hashed behind bars, constitutional justice impeaches such law."<sup>119</sup>

In the case Supreme Court said that the jurisdiction of the jailer is "safe keeping". A jailer plays the role of a guardian in prison, his/her work is safe guard the rights of the prisoners and keep them safekeeping in custody or jail or under the supervision of the jailer does not mean to torture them or treat them as animal or deprive them from fundamental rights. In the case of Prem Shankar Shukla where prisoners were discriminated on the basis of rich and poor and as per their status they were handcuffed. Here Supreme Court said that this type of provision is violation of article 21.<sup>120</sup>

"Sunil Batra-I, amongst other things, ruled that the condemned prisoner like Batra shall be merely kept in custody and shall not be put to work like those sentenced to rigorous imprisonment. Such like convicts shall be entitled to amenities of ordinary inmates in the prison like games, books, newspapers, reasonably good food, the right to expression, artistic and other,

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<sup>118</sup> Human Rights Law Network

<sup>119</sup> Prisoners right:some landmark judgment.

<sup>120</sup> Prem Shankar Shukla vs. delhi administration.

and normal clothing and bedding. It was further held that condemned prisoners cannot be denied their right to eat, sleep, work or live re-humanization of the prisoners. It stated that “positive experiments in re-humanization meditation, music, arts of self-expression, games, useful work with wages, prison festivals, shramdaan and service-oriented activities, visits by and to families, even participative prison projects and controlled community life, are among the re-humanization strategies which need consideration. Social justice, in the prison context, has a functional versatility hardly explored.” In the context of Section 30(2) of the Prison Act it was held that such prisoner is not to be completely segregated except in extreme cases of necessity which must be specifically made out.”<sup>121</sup>

Sunil Batra Vs Delhi Administration, phenomenally liberated the jail inmates from the atrocities inflicted through mental torture, psychic or physical pressure and it brought a catenation of radical changes in prison conditions like-

- (a) Separation of under-trials from convicts in jails.
- (b) Their right to invoke Article 21 of the Constitution.
- (c) Separation of young inmates from adults.
- (d) Liberal visits by family and friends of prisoners.
- (e) Ban on confinement in irons.
- (f) The duties and obligations of the Courts with respect to rights of prisoners;  
and
- (g) Re-defining the duties of District Magistrate etc.

Sunil Batra-II delved deeper and held that “visits to prisoners by family and friends are a solace in insulation; and only a dehumanized system can derive vicarious delight in depriving prison inmates of this humane amenity. Subject, of course, to search and discipline and other security criteria, the right to society of fellow-men, parents and other family members cannot be denied in the light of Article 19 and its sweep”.

**Sunil Batra-II** In this case where the jail convict wrote a letter to a judge stating that the jail warden is inflicting torture on another prisoner because money. The jail officials demanded

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<sup>121</sup> Devyani srivastva, “illegal practice of handcuffing continues in India”. Common wealth human rights initiative.

for money from visiting relative of the prisoner and on non fulfillment of the demand the prisoner was tortured. The anal rupture of the prisoner was because the money demand was not fulfilled. In the entire scenario jailer, official of the jail and even the doctor were involved. In this case very forcefully ruled that “we see no reason why the right to be visited under reasonable restrictions, should not claim current constitutional status. We hold, subject to considerations of security and discipline, that liberal visits by family members, close friends and legitimate callers, are part of the prisoners’ kit of rights and shall be respected”.<sup>122</sup> Here the court reiterated that “handcuffs and iron bespeaks a barbarity hostile to our goal of human dignity and social justice”

In this case supreme court stated rejected the doctrine of “hands-off”<sup>123</sup>.The court explained that when a person enters a prison his/her fundamental rights does not flee. Fundamental rights are always available stick to any person .This can be said that their jurisdiction may slightly be curtailed or they may shrink a little bit but this cannot taken in other way that they are fully separated. Now the courts have rejected this doctrine and courts resolve the constitutional claims of prisoners and it is their duty.

**Case-III** In The court of Andhra Pradesh also the petition was filed by the president of an organization for allowing conjugal visits. In this a public interest litigation was filed and requested the to direct the state of Andhra Pradesh ,director general and inspector general of prisons to establish the facilities for executing conjugal visits .It is the right of the prisoners. It said that those serving long term imprisonment should be allowed to go for conjugal visitation so that they can get an opportunity of begetting the child. It is because long serving inmates till the time they will come after the serving imprisonment their wives may not be able physically to conceive a child or male also. The deprivation of this right is has increased the number of homosexuality in the prison and it is increasing the HIV/AIDS among the prisoners. The petition was dismissed as under the Prison rules, 1979 of Andhra Pradesh states to release an inmate in case of any emergency only. The Court rejected the claim observing that if conjugal visits are to be allowed keeping in view good behavior of the prisoners, “chances of the

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<sup>122</sup> Supreme court of india ,sunil batra vs delhi administration

<sup>123</sup> The hand-off doctrine dominated thinking about correctional law in America during the 19<sup>th</sup> century.American courts regarded inmates as “slaves of the state.” Judges believed prisoners had no right because they had forfeited them as a result of their crime and judges didn’t interfere with the administration of correctional institutions because they didn’t want to violate the principle of separation of power.In other words,the court did not want to interfere the with the authority of the executive branch to administer prisons.



environment getting disturbed cannot be ruled out as it will have an adverse impact on the other inmates of the jail who have not been selected and extended such benefit...” and that “the issue raised in the writ petition being a policy decision is within the domain of the State...”.<sup>124</sup>

Observation of court:

- The writ petition was dismissed because petition does not contain any merit.
- Although article 21 confers right on every citizen to live with dignity but as stated in article personal liberty can be taken away in accordance with the procedure established by law. Here the liberty given to person can be curtailed or taken away for the time they are in prison. Same is with the conjugal visit. That is right to live with the spouse will also be taken till the time of incarceration .Means right to conjugal visits does not survive incarceration.
- To allow inmates on their behavior or other merits will leave mark of discrimination on other inmates and it will create more difficulties. It cannot be done to allow some selected inmates to get this privilege while others are discarded.
- Another reason is that the prisoners act and the law of prison of Andhra Pradesh do not allow inmates to go outside the cell only in case of emergency that to subject of various qualifications.

In the case the judge stated to allow the conjugal visits we need to amend our law and system and rest of the things depends on the executive department.

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<sup>124</sup> The Andhra Pradesh High Court, Ms. Bhargavi president m/s. gareeb guide .

**Legislature for Conjugal visits in India.**

As of now there is no specific legislation formulated to protect the right of prisoners to procreate. But the following judgement were made in context to above petitions-

**Judgement**

- The State of Punjab was directed to constitute the Jail Reforms Committee to be headed by a former Judge of the High Court. The other Members shall include a Social Scientist, an Expert in Jail Reformation and Prison Management amongst others.
- That the jail committee should prepare a catalogue for allowing inmates and their family members for conjugal visits. They should classify the inmates on the basis of their behaviour.
- The committee has responsibility to provide such other options whether an inmate can live in open prison and such facilities could be maintained so that the inmate can spend more time with their family and friends. They will also mention the infrastructure to be formed.
- The jail committee will provide emphasis on reformation and rehabilitation .They will provide services and facilities in the same context. The visits should be like the it can create good environment and reform the inmate.
- To suggest ways so that the relation between the inmate and its family can be better and they can create more connectivity among them.
- The Jail Reforms Committee shall suggest ways and means of enhancing the facilities for frequent linkage and connectivity between the convict and his/her family members.
- The Jail Reforms Committee shall prepare a long-term plan for modernization of the jail infrastructure consistent with the reforms to be carried out in terms of this order

- The Jail Reforms Committee shall make its recommendations within one year after visiting the major jail premises and it shall continue to monitor the infrastructural and other changes to be carried out in the existing jails and in the Prison Administration System as per its recommendations.
- The Jail Reforms Committee shall be allowed to make use of the services of the employees and officers of the State of Punjab, who is further directed to provide the requisite funds and infrastructure including proper office facilities, secretarial services, travel allowances and all necessary amenities and facilities, as required by the Jail Reforms Committee.

**Implications of the Judgment:**

The judgment given by Punjab and Haryana high court, the court observed that article 21 includes right to procreate .Any convict can be denied his fundamental right till the time he is alive. Punishment is inflicted only for what he has done not for his innocence .In order to punish a person for his wrong done we cannot punish him for what he has not done In the case the husband has been given death sentence while the punishment of wife has been turned into life imprisonment. The life of husband will expire the day he will be hanged but till that time his right to life and other right will be protected. At most a prisoner's right to movement is restricted .But right to movement does not mean that right to confinement or other harsh and cruel implications. Court observed that convicting any person does not mean that he has become a animal or non human. He still remains a human being and he cannot be treated as a animal. He has right to live a decent life. The motive behind punishing and imprisoning a person is to reform him so that he can be a better person and should not be a burden upon the society when he release.

Punishment is inflicted so that the convict can realize that he has done some wrong and for that he is suffering that pain. The purpose of punishing a criminal justice is to prevent or disable the offender from committing the offence again: to deter other people from committing crimes. According to Manu punishment is necessary because it will deter other persons from committing the same offence and will help people to keep under control; it will always be in their mind even if they are sleeping. For two hundred years the meaning and motive behind inflicting punishment has totally change. Now punishment can be co- related with social reform.

**Punishment prevalent at present** (Theories)

**RRETRIBUTIVE THEORY:**

It is “an eye for an eye and tooth for tooth concept”, this theory was prevalent in past. Under Retribution theory the same punishment or same amount of punishment was given to the offender. In Muslim countries it is still prevalent. The philosophy of expiatory theory says that we suffer punishment because the debt which is due to the state in return of the wrong done.

**Deterrent theory:**

This theory explains that punishment is given to deter the person from committing the same offence again. Unlike retributive which gives the punishment itself this theory creates fear in the mind of the people and keeps them away from committing the offence. The objective of the theory is to put warning in the mind of the persons and put an example in their mind that if they will commit the same offence or any offence they will also be punished. This theory by creating apprehension in minds of the people may keep people from committing crimes and this may help in reduction of crime. It sets an example for those who have same kind of mind like the convict.

**Preventive theory:**

This theory aims at putting some actions or other means through which the crime rate can lower. In retributive theory the criminal is itself punished or is removed from the society, but this does not mean that it will lower the rate of crime. For that we need to do some act which can prevent or dismiss the crime before it is actually done. Preventive theory focuses that while crime is being committed it is very difficult to return it. So it's good that some steps be taken to curb the bud in the initial time. It will make in the mind of the criminals that even if they think about it and try to execute it they will be punished. e.g. In case dacoity, its preparation is a crime.

**Reformative theory:**

Reformative focuses on the reformation of prisoners. Commitment of crime is not the result of a single factor. Various factors led to crime. A convict cannot think of committing crime every time. So it's better to give a chance to the convict so that he may release that committing portion from his mind. We may give such convicts an environment in which they can transform them into a good person.<sup>125</sup>

The above given theory of reformation can be fulfilled by providing inmates a good and socio-economical environment. By changing their feelings their mind can also be changed. In this if a convict on regular basis have some conversation with their family and friends it create a great effect upon his/her mind. The psychological factors work a lot. When convict will suffer

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<sup>125</sup> A.K.Jain, "administration of justice: theories of punishment

pain and realize his/her mistake, it will surely change his mind. A close connection with family will also help in changing their behavior. A hope to meet their loved ones will transform them into a good person.

On the basis of good conduct two statutes were formed:

- (1) The Punjab Good Conduct Prisoners' Probationer Release Act, 1926
- (2) Punjab good conduct prisoners (temporary release) Act 1962

Act of 1926 releases the inmates on the guarantee that they will live a good and respectful life and will earn their livelihood. This behavior of the prisoners was judged on the basis of their actions in prisons. Means proving good behavior was priority all the time. No prisoner can be released if it proves to be harmful to the society and the family. While releasing a prisoner they all taught that they will live a good life. They will not be burden on the society and family. They will spend their life in the same way like others.

A new legislation namely; Punjab Good Conduct Prisoners (Temporary Release) Act, 1962 was enacted after the independence. Under Section 3(1) of the Act the State Government may release the prisoners temporarily for a specified period, if it is satisfied that:

- (1) in case of death of a family member or if anybody is seriously ill
- (2) The government releases the prisoners on temporary basis for agricultural purposes. If it is necessary for prisoner to grow crops and other agricultural work because nobody is ready to help him at that time. In case of sowing and ploughing of the farm.
- (3) If there is marriage ceremony of daughter or son
- (4) Under section 4 of the act if prisoner proves his good behavior. It appears that prisoners have a good behavior and now it will create no harm and his offence is petty or a small time period is left then he can be released early.
- (5) Under section 6 of the act if prisoner is dangerous then he cannot be released
- (6) Any other ground which is sufficient to release him. The ground of good behavior is available only in small cases not in heinous cases or any case which does not permit for release. If it can be suspect that the prisoner can be harmful or injurious to the security of state or country he cannot be released on ground of good behavior.

The author has already mentioned that on conjugal visits there is not particular and express legislation. So when we talk about or questions how judiciary will protect the right of its prisoner in the particular case of jasvir and Sonia and cases in future on the same problem. Till now judiciary has interpreted article 21 to protect the right to reproduction by co-relating it with the said article. But situation cannot be same every time. Two questions which are mandatory to answer are:

- What is the jurisdiction of article 21. Whether conjugal visits can be brought within the ambit of article 21?
- How to protect the right of the victim and how to protect the right of the prisoner so that the human rights of prisoners are also saved?

In the above given question it is very clear that judiciary has to protect right of both the victim and the convict and also to punish the convict for what he has done. Human rights are the savior of convicts. They states that everyone is entitled to human rights whether it be normal person or convict. A convict cannot be treated as a animal .It even proclaims that they have a right to procreation. The purpose of judiciary is like parents .They will punish you for wrong done so that in future you don't dare repeat it. But at the same time it will help you in reforming and overcoming these faults .The judiciary plays a dualist person. Its purpose is not to punish only but also to reform .For this the theory of punishment have evolved. A convict cannot be left to lead a life like animal or of no use. It will somewhere create a burden on the society. So it's good to reform them. It relates the right of convict with the right of its spouse whose right will be unnecessarily violated if convict is prohibited to procreate. But what about the victim?. The victim is the person who suffers lot. If judiciary allows the culprit to lead a happy and fruitful life it may about to murder of sentiments of the victim. Instead of punishing the culprit we are in a planning to allow them to enhance their family. This is against the law. We cannot do injustice to the victim. In the case of Sonia where they killed a16 year old boy for how judiciary can allow them to have their own child. How that child will lead his/her life. The acts done by his parents may put his/her life in danger .who will take care of that child. Judiciary cannot think about the right of only parents. It has to take care about the future of the child also. If parents are like that what kind of education and culture they will give to their child. Is this the work of judiciary? In what way judiciary is protecting the right of its people. This will surely create a clash between

the right of the convict and the victim. People will start taking the law in their hand. They may create a feeling of hatred and revenge. For now as crime rate is increasing, it will enhance the crime. It is very necessary for judiciary to create a balance between the human rights of the prisoner and the justice to be done to the victim. Otherwise no one will ask for justice and everyone will do justice on its own. These misbalances can lose the charm of justice. The authority of justice may fade and people may start losing their trust on judiciary.

It is much needed that judiciary should fix its priority. Its primary function is to punish the culprit and give justice to victim .After the conviction is done the reformation and rehabilitation of the convict comes at the later stage. It can be put under the secondary function of the judiciary. The purpose behind saying this is to make judiciary more trustworthy. Judiciary must prioritize its preferences. It can put human rights of prisoner and justice to victim in the same level. The justice to victim comes first then to reaffirm the convict and non-violation of their human rights. They must suffer at-least for what they have done. If a person who has committed murder under sec.300 of IPC, he is allowed to conjugal visits, Then the burden on him will be less .He will not be as much guilty as he needs to be. The scenario in India is not like other countries. But if or state also started providing the visits and other facilities like them, so what will be the point of giving them punishment. The visits should not be allowed is all situations. In most of the cases of heinous crime offenders are treated like animals. They are kept in remand under probation of offenders. They are not given any privilege in the guise of human rights. Crime done means done and the responsibility lies on the shoulders of the judiciary to bring everything at its proper place and give justice to the victim.

While critically analyzing the case it can be said judiciary is much focused on the protection of its prisoners. Because the offender of heinous crime in the given case are not treated like other offenders for the same crime. The petitioners have demanded for conjugal rights and gave example of western and American countries. When other countries are following the practice why they cannot be allowed for the visit .But in the opinion of the author there should be a difference in protecting human rights of inmates who have done a heinous crime and those who have done petty crimes. Unlike India other countries do count petty crimes under the offence and crime and also punish for that .There also all the prisoners are not allowed for conjugal rights. Moreover the other countries have their own law and culture and we have work according to our



culture and law. We need to protect the right of both the victim and the convict. If an inmate has a human right then a victim also has the human right. In fact the weighted of victim's right is more .So priority should be given to her. In the given the high court gave the remarkable judgment. The concept is new to the Indian law so in the opinion of the author it should be referred to a larger bench so that it can be fully recognized. The judiciary cannot allow inmates who have committed such a heinous crime to have this privilege. Both the husband and wife have committed this crime. They must be given punishment for them. They must have a realization what they have done.

Also, the rights of the victim and his pleadings cannot be simply ignored in the name of human rights of the prisoners because human rights should be made available to all not just a category. If prisoners' human rights have been taken care of, then it becomes the bounden duty of the judiciary to take equal care of the human rights of the victim as well. The petitioner in this case had murdered a boy. Does life have no value? Is it appropriate to provide conjugal rights to the murderers? Will the father of the deceased ever report a crime in future if the comfort zone of the petitioners is kept on increasing? Right to life is so vast that anything can be incorporated within its ambit. But at some point, a line of margin must be drawn beyond which the judiciary or the legislature should be reluctant to move else the balance of criminal justice system will certainly collapse.

“A person does not lose his human rights merely because he has committed some offence as he also has some dignity which must be protected. However, at the same time conferring conjugal rights to the prisoners within the jail premises requires re-consideration of a larger bench of the High Court or the Supreme Court as far as the concept of human rights is involved. By rendering favor to the prisoners, the balance of criminal justice system may get disturbed and a situation may arise when one day jails might become resting centers or the victims may stop reporting the matter to the police and start taking law in their own hands to punish the guilty.”

There are many other factors that may arise as a consequence to the formulation of legislation for protection of reproductive rights of prisoners as –

1. The privilege given to prisoners in the form of conjugal visits may be a way to escape from the liability and the crime they have done. They may think although they have committed a crime still they are getting benefit from it unlike others. But in reality and according to opinion of public they never deserve it. They are criminals and murderers'. They does not deserve these privileges.

2. Once these rights have been given, is it not possible that they can demand again for some other right and facility in guise of child? They may request court to remit their punishment so that they can get a chance to up bring their child. Or they may try to escape from liability by saying that mother has attached to the child and now child cannot live without mother. Any situation may arise where it can become necessary for the benefit of child to give them more privilege.

3. In India judiciary takes much time to solve a case; there are thousands of cases pending in every court. In that situation if an accused who has imprisoned and not provided this right and till the time he gets the justice his time to become parents has gone, it will create feeling of hatred in the accused. He may become a serious criminal or may be dangerous for our society.

Therefore due consideration should be made before formulating any law, permitting conjugal rights or protection of reproductive rights of prisoner. The motto or objective behind formulating such legislation should not be, to deliver a harass full message to the victim or their family but to reassure the feasibility of human rights and right to life and liberty to the convict and family members thereof. The right of progeny is each and every one's want, wish or will and not law.

**4.2 DELAY IN FORMULATION OF LEGISLATION:**

The role of judiciary is to protect the right of its citizen, if they unreasonably violated. It does not discriminate between a prisoner and a citizen. A prisoner is deprived of its right other than those necessary. In protection of reproductive right, as per my study Indian prisons are not like same as American and European countries. In the case of *Jasvir v. State of Punjab and Haryana* the judgment has been passed by Justice Surya Kant to allow prisoners for conjugal visits. But it's been 2 years from now and there is no proper function on the part of administration. The reasons for delay can be:

(1)-It is very difficult for the people of India to accept this that criminals are given privilege

(2) The cultural and socio, economic problem

(3) The administration department is not much active in reforming the conditions. It was ordered by court to form a committee over it and provide inmates with facilities necessary for it. But till now no remarkable step has been taken.

(4) There is no codified law or any statutes which talks about this kind of right to prisoners. The literal interpretation of judiciary is to protect its citizens and punish culprits. In today's time the role of judiciary has increased. I protect its prisoners also from those acts which are inhumane in nature and protect them from unnecessary harm. Here judiciary has done its part but part of execution is in the hand of executors.

(5) Prisons are made only for prisoners. Now they need extra land and facilities. It's difficult to suddenly change the scenario of prison to family friend prison. It needs time and a proper plan and system.

(6) The financial system of India is not good like American and European countries. For establishments of special cell and all facilities a huge financial amount is required. The creation of such types of cell and prison requires man power also. We need all facilities. Safety of visitors is also very necessary.

(7) Nothing can be created in one day. Allowing conjugal visits and provide inmates facilities require good amount of time. A sudden change cannot be done so quickly.

(8) As per the law formulation in India for allowing conjugal visits legislation need to be formed. And the process for formulation will take a long time.

All the above points are reasons for delay in allowing conjugal visits.

When talking about other reproductive rights: The social and economical conditions of India are that its difficult for government to apply .The administration in India is not good. Where on one side judiciary is doing its work fine, the administration in not working properly. The conditions of prisoners are very bad in most of the prisons but nobody is paying attention. In the public interest litigation filed by the Bhargavi and its organization the PIL was dismissed on several reasons. The reason was given that it will affect the other prisoners and its not appropriate to provide conjugal visitation on the basis of good behavior. The organization also stated that allowing visitation will reduce the homosexuality increasing in prison and it will make inmates more efficient and it will also fulfill their right to reproduction but petition was dismissed. The court denied directing any one for providing the facilities of conjugal visits. The reason for delay is only carelessness of the government. The prisons are overcrowded. No facilities like other countries are provided here. The provisions have been framed only on papers but in actual scenario its nothing. For allowing visitation and other facilities we need to change our law and other provisions or a separate law should be codified on this. The provisions for abortion, family planning and health are not implemented properly. Nobody is much vigilant in reforming the conditions of prisoners. The problem of sanitation and health care is as same. The sole responsibility of improving conditions of prisoners is on government. The government should take care of both men and women health, sanitation and others problems. But here nobody is even concerned about it. No matter is taken seriously unless something happens at high level. It is the duty of government to focus on their prisoners; they should not be left to be treated as animals.

## Chapter 5

### Definition of conjugal visit:

**“a visit to a prisoner, by the spouse of the prisoner, especially for sexual relations.”<sup>126</sup>**

Conjugal visits are a scheduled visit of prisoners with wife or spouse in which legally married spouses are given opportunity to spend some time in private. They may indulge in sexual activities also.<sup>127</sup> Conjugal visits are not always between the spouses but it can happen between family members also. Conjugal visits generally happen in less security prison.<sup>128</sup> Prison of Connecticut allows conjugal visit only in presence of a child. Husband and wife alone cannot meet together. So conjugal visits always can be interpreted wrongly or in context of spouse only.<sup>129</sup> Inmates who are family members can even ask for a visit.<sup>130</sup>

### **5.1 WHETHER IT IS AVAILABLE ONLY TO MEN?-**

I meant from this that whether conjugal visits are available only to men or females. We have already seen in above chapters that there are many states which allow conjugal visits. It is not limited to males only. As per the records of today in U.S.A. only four states are left which allow conjugal visits. While if we look at European countries most of the European countries allows conjugal visits. Even Arab countries are also a step further than others in fulfilling rights of prisoners. Like other states they have allowed conjugal visits for male and females both .While allowing visits it seems that they are fully determined in fulfilling their rights. They have given two conjugal visits to bigamous prisoner. In the next heading the name of those states has been given which allow female prisoners also. So from that point it is difficult to say that only male prisoners are allowed to conjugal visits. If only male prisoners will be allowed then it will be discrimination on the basis of gender and violation of the right of women. Though Conjugal visit is not a constitutional right and easy to made available to everyone. It is given on hard and good behavior .But if a female has proved herself to be capable of that and has completed all necessary

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<sup>126</sup> Oxford living dictionary

<sup>127</sup> Urbandictionary.com

<sup>128</sup> Sex behind bars.

<sup>129</sup> Goldstein,Dana”conjugal visits”.

<sup>130</sup> ibid

requirements then she should also be allowed like men. While allowing conjugal visits certain and regulation has been put this needs to be followed. Most the prisons allow married couples to have visits with their legal spouse. In California a case was registered in which a prisoner put application for conjugal visit with a woman and her child with whom he used to live before imprisonment .His application was rejected and request for conjugal visit was refused because both were not married to each other in fact both were married to some other person. So even if you are married you could not be allowed to visit any random visitor. Either legal spouse or family is allowed according to rules and laws of prison.<sup>131</sup>

### **5.2 PRISONS WHICH ALLOW CONJUGAL VISITS FOR FEMALES**

**Mississippi prison**-In the prison of Mississippi females are allowed .They is also given separate rooms to spend some time with their family and spouse. They are also provided with necessary facilities.<sup>132</sup>

**Canada**-The prison of Canada also allow conjugal visits for females. They also allow same sex prisoners. In an article at national post it was given that a family conceived three children on family visits.

**Saudi Arabia**-Saudi Arabia being an Islamic state allows conjugal visits for male and female. Since it's an Islamic state it has also kept in mind their laws. If a male or female is single (monogamous) they allow conjugal visits once a month and if a male has two wives they allow the prisoner twice a month for conjugal visits.<sup>133</sup>

**Belgium**-The prisoner of Belgium do allow conjugal visits for females and also for same sex.<sup>134</sup>

**Brazil**: Brazil prison does not allow females for conjugal visits. Gender discrimination still prevails there. Female's prisoners who are pregnant do not get proper treatment .No medical treatment is provided and many of them are isolated and put in the cell without any cause.<sup>135</sup>

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<sup>131</sup> Deborah C. England "States that allow conjugal visits"

<sup>132</sup> Raga,supra note 81

<sup>133</sup> Prisoners right "even Saudi Arabia allows prisoners to receive conjugal visits"

<sup>134</sup> *ibid*

<sup>135</sup> Supra note ,72

**5.3 CONJUGAL VISITS IN AMERICA, U.K AND USA:**

**INDIA:** India is still very far in the race of providing conjugal visits. In 2015 the HC of Punjab passed a judgment for allowing inmates to have conjugal visits<sup>136</sup>. No rules or further efforts have been done in executing the orders. There are no specific laws for conjugal visits. On the basis of Article 21 inmates have been given these rights. Conjugal visits in India are still far behind. The culture of India does not allow conjugal visits. Like other countries

**USA:** United State (Mississippi) was first to allow inmates for conjugal visit rights. Earlier there were 17 states but now there are only 4 states which allow the visits. Although there is gender discrimination but they provide visits for homosexuals.<sup>137</sup>

**UK:** Great Britain and Northern Ireland do not allow conjugal visits. Several petitions have been filed for allowing conjugal visits but every time petition has been declined.<sup>138</sup>

As per my 5<sup>th</sup> chapter and its sub heading what we can conclude is that whether men and women both are able to get the conjugal visits or not and if women are also in the same category then what are the states which allow conjugal visits.

In my opinion and after looking at above chapters it is clear that most of the states allow conjugal visits for men and there are very few states which allow conjugal visits for females. The reasons for not allowing the conjugal visits can be many. It may to maintain peace and system in the prison or it may be some other factors.

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<sup>136</sup> Supra note 6

<sup>137</sup> Connecticut in USA

<sup>138</sup> Petition submitted at 2010-2015 conservative democrat coalition government.  
<https://petition.parliament.uk/archived/petitions/47426>

## **CHAPTER6**

### **6.1Opinion of common people**

These opinions were given by common people of U.K. In respect of a case .The British government denied inmate to meet his wife. Court held that by not allowing inmate for conjugal visits the government has breached article 8 of the Human Rights Act.

- “Let them suffer. That is what prison is for. If they want children they can have them without regular sex with their partners on the outside some significant percentage will just smuggle in drugs. In fact they should only speak to outsiders through glass’.
- ‘I think I’m losing the will to live ...they are in prison for a reason... surely they are supposed to have less rights? As for children that’s what the UK really needs right now ... convicted criminals breeding like rabbits and producing more one parent families’.
- ‘Just when you think the EU couldn’t come up with more out of touch bollocks they always surprise you’.
- Such wisdom Erwin! And to prevent a child’s right to a mother and father being violated, why not bring in a regulation allowing for automatic parole 9 months after conjugal relations leading to conception?’
- ‘Although I see Erwin James’ point about sexual frustration, I think he’s on shakier ground reference the right to a family. Doesn’t it encompass a child’s right to have its parents, as well as a prisoner’s right to ‘father’ a child? Perhaps the putative child’s welfare ought to be considered first in this instance?’



- ‘On what planet is it a good idea to let a woman who is in jail become pregnant when she will have to give birth in jail, probably restrained, and then give her baby away?’
- ‘What about unattached prisoners? Are you suggesting that the state pays sex workers to service these people?’
- ‘I can perfectly see that allowing conjugal rights would enable a prisoner to let off steam and have some physical intimacy with a woman he cares about. It must also make the atmosphere inside prison less tense. Indeed, it seems to be a win-win situation suiting everybody’.”<sup>139</sup>

Conjugal visits help deter mounting frustration that could potentially be disruptive.

- “Although conjugal visits seem like a luxury for prisoners, there is a valid argument for them. Criminals, in general, tend to be very frustrated, angry people. Being locked in a small cell all day only contributes to that frustration. Conjugal visits give prisoners an outlet that deters frustration from mounting. Thus, conjugal visits indirectly keep prison populations in check.
- If a prisoner is given this right, they are given too much. Growing up with a mother who works with "bad" people, I have seen prisons. They have cable television, quality workout equipment, and three square meals a day. Prisons are no longer the dark places that we all think. Letting inmates see their families and have sex with their spouses will make prisons to "fluffy" and not deter criminals from their negative acts upon society.”<sup>140</sup>
- “That study also pointed to the familial benefits conjugal visits could bring, "improving the functioning of a marriage by maintaining an inmate's role as husband or wife,

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<sup>139</sup> Erwin james,” conjugal visits” March 2009. <http://www.insidetime.org/conjugal-visits/>

<sup>140</sup> Should prison end conjugal visits retrieved from [debate.org](http://debate.org).

improve the inmate's behavior while incarcerated, counter the effects of imprisonment, and improve post-release success by enhancing the inmate's ability to maintain ties with his or her family." Researchers also noted the possibility of reducing sexually transmitted diseases by reducing inmate-to-inmate contact."<sup>141</sup>

Isabelle

09-25-2003, 03:21 PM

- “You can either believe that people in the system should not be allowed to marry and have conjugal visitation in the slammer OR think regular contact with visitors significantly enhances an inmate's quality of life and establishes a lifeline between the inmate and the free community. Believing that ties with loved ones are critical to inmates' successful return to the community and visiting helps maintain these relationships. I think prisoners deserve -0- rights. After all aren't people serving time for doing crimes supposed to lose the rights and privileges law-abiding folk enjoy? Once we allow marriages behind bars, aren't we opening a proverbial can of worms in the can, and inviting requests to host other significant ceremonies in the slammer? Prison isn't supposed to be fun. We don't allow inmates to vote, or dine out or catch the latest movie at the multiplex and we shouldn't permit them to get married or have conjugal visits while incarcerated. Conjugal visits should be abolished because, in prison, some inmates are "situational homosexuals." When an inmate's spouse or lover comes for a conjugal visit, HIV can be brought into the prison or taken out to the community beyond the prison gates. Condoms are not handed out in prison for conjugal visits. The visit is scheduled in a room or trailer and that is the only duty of the prison system. They don't care if safe sex is performed. What about the children that are born because of a conjugal visit? Who is going to support that single parent? Food stamps, welfare and aid for dependent children? Is that fair to the community to have to pay for that? Then there is the question of whether children should be separated from their incarcerated parents or exposed to prisons. The effects of such visits on the child when

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<sup>141</sup> Reasons prisoners should have more sex retrieved from <http://www.attn.com/stories/3280/conjugal-visit-benefits>

the visit ends, the effects on the child of seeing the often frightening physical structure of prisons, and the possible long-term effects on the child of living in a prison for short or long periods of time are all significant issues. The current states that allow conjugal visits are: California Connecticut Mississippi New Mexico New York & Washington. Reserve the real ball and chain for the prisoners, and leave matrimony and sex to those who can flourish in the union on the outside.”

**Eris lover**

09-25-2003, 03:39 PM

- In this the person gave the opinion that prisoners already have so many rights and freedom. They are in cell, they have committed crime and that’s why their freedom is curtailed. Still judiciary has provided many facilities like fridge, T.V., phone and other facilities. Still we say prisoners are not given any freedom. We do not treat them as animals or inhumane conditions. They are also a part of us. If a guy is married or a girl is married then depriving him/her from visits will remove right of their spouse also.

**Unknown**

09-25-2003, 04:07 PM

- “What about the children that are born because of a conjugal visit? Who is going to support that single parent? Food stamps, welfare and aid for dependent children? Is that fair to the community to have to pay for that? Then there is the question of whether children should be separated from their incarcerated parents or exposed to prisons. I'm so confused. Aren't you a single parent, Isabelle? Not all prisoners are incarcerated for decades at a time. What if the father is due to be released in a few months? Your main reason for abolishing conjugal visits is, well, interesting. Are you aware that homosexual sex does not automatically lead to HIV? Once we allow marriages behind bars, aren't we opening a proverbial can of worms in the can, and inviting requests to host other significant ceremonies in the slammer? To what other significant ceremonies are you

referring? If someone wants to marry an incarcerated person, I don't see what business it is of mine.”<sup>142</sup>

09-25-2003, 04:12 PM

- My husband works in corrections, so I hear a lot about these sorts of issues. Our state doesn't allow conjugal visits, but it does allow inmates to marry, and to leave the institution to attend funerals. I'm opposed to both.

**Leaper**

09-25-2003, 04:38 PM

- Are there any studies that show if conjugal visits reduce at all the rate of prison rape in the states that allow it? If so, that might be one reason to keep such programs.

**Crazy Foe**

- 09-26-2003, 07:07 AM :

He said that any incarcerated person is not totally wiped out. Once they will be released they can enjoy their rights and privileges which other men and women have got. Originally posted by

- **Isabelle**

Here Isabelle said that prisoners have no right .Their basic rights have been protected by the constitution of U.S. Moreover they have other rights not to be treated as animal or in inhumane condition. The prisoners work is to serve the punishment given to them. Till the time they are alive they will be protected but in my opinion privilege or other rights should not be given.

09-29-2003, 08:11 AM

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<sup>142</sup> Prisoners Privileges Regarding Marriage & Conjugal Visits

- Some people say what the point of sending convicts to prison is. They are there for punishment and should suffer it. They should not be allowed to conjugal visits or any other facilities.
- From above given view it is clear that most the people are not in favor of granting visits to inmates while some of them have a point to categorize them while others say it must be restricted to some qualifications. Many of them says that they should not get this right at all .The reason behind this is that they are criminals and till the time they are serving they do not have any right of enjoyment. Many of them have talked logically that we should focus on their reformation and to reduce rape and diseases in prison its beneficial for society to allow conjugal visits. I have given my opinion regarding this below.

#### **6.2 VIEW OF THE AUTHOR**

After having a thorough research and case reading it seems to author that reproductive rights should be put on the side of prisoners. For committing a crime there can be hundreds of reason. No one is criminal by birth. We need to understand why a person became a criminal. There must 50% of prisoners who would be in search of a sole option and opportunity to prove that they are good. Many of them must be regretting. Earlier our judiciary was not much vigilant .It was ignorant from the reformative jurisprudence but now everywhere judiciary is trying to reform their inmates. Earlier the retributive theory of punishment focus on retaliation but later on the concept changed. And now the rehabilitation and reformation is most focused. In reformation family and conjugal visits have helped a lot. Although in case of conjugal visits many persons have given their opinion that it's not fair to provide conjugal rights to prisoners. The argument put by others is that person convicted must suffer the pain and torture. In the opinion of author it not corrects. Depriving a person of his right cannot turn him into a good person .Deprivation of any right is not the solution of any problem. A person cannot be mould until and unless he has a motive or reason behind it. On humanitarian ground it's wrong to deprive them of their basic right. Conjugal visits in fact have proved good in transforming inmates into a good person. As per my opinion conjugal visits should be allowed. Allowing conjugal visits is right or wrong can be a debatable topic. It has its pros and cons .It creates burden on administration and people but

this the duty of state. Now a day the purpose is judiciary to reform criminals not to punish or torture them. Punishing or torturing any prisoner can make them more harsh and aggrieved. They may think of revenge and retaliation. So it's good to give them one more chance to prove themselves good. Till now prisoners have been given many right e.g. voting, conducting election etc. Then why it's wrong to provide them with reproductive rights. The approval of conjugal visits depends on culture, environment and social circumstances of the country. Like in India it's a great challenge to for judiciary and administration to make provisions for allowing conjugal visits. In my opinion conjugal visits shall be allowed on basis of some fixed standards. Most of the prisons have put a criterion of proving good behavior for allowing conjugal visits. In my opinion along with good behavior there must be some qualifications which would be necessary for allowing conjugal visits. This right should be given at a low cost. Prisoner must do a hard work to be eligible for conjugal visits.

In view of author it's not a bad practice to grant visits. But there should be some discrimination between inmates for visits. Everybody cannot be granted the visits .Prisoners that may cause injury to society or family should not release or allowed for visits. In my opinion for allowing visits following requisites should be considered:

- (1) Long term criminals should be allowed
- (2) Criminals who have good mentality and have committed crime due to abetment or some other justified reason
- (3) Criminals who are not injurious
- (4) Who have proved good behavior after incarceration
- (5) Who are not criminals on regular basis
- (6) A past record should be kept in mind
- (7) Where it seems that punishment is beneficial in transforming their behavior and mind
- (8) Any person injurious to the security or integrity of state should not be allowed
- (9) A prisoner who commits rape, murder or any heinous crime should be allowed on strict basis with security.
- (10) Prisoners with psychological problem or criminal tendency should not be allowed. These people may be injurious to anyone. Cases have come where visitors are harmed by inmates at the time of visit.
- (11) Criminals barred by law or specially restricted people

All the above given points should be considered while granting liberty to prisoners. Allowing a prisoner for visits may create adverse effect on victim. We should not misinterpret it. This not the liberty given to prisoner to enjoy it. It is the human right which creates an obligation on state not to deprive criminal from that. If we will totally put a restriction on the criminals. It may give authorities and administrators to act as dictatorship over criminals. The purpose behind incarceration is not treating them like slaves or animals. Earlier the rights of prisoners were not defined because of which custodial death, custodial rape, misconduct with prisoners came into limelight. Children which commit crimes cannot be tortured or punished like adults. Punishing them will create bad effect on them. They may commit more crimes in future. So we should focus more on their reformation than punishing them.

**CHAPTER 7**  
**CONCLUSION**

Human rights are those rights which are attached to man from his birth. No one can separate them from themselves in any case. So is the case with prisoners. Human right protects prisoners from the discrimination. In absence of human rights it would have been much difficult to protect prisoners from inhumane treatment. Prisoners are not animals. We don't have any right to treat them like an enemy. When a prisoner enters a prison, his fundamental right does not flee. A prisoner has all fundamental right and a right to enjoy these rights. When all human beings are enjoying their fundamental rights why a prisoner should be deprived from them. Earlier the motive of judiciary was to punish criminals but now our judiciary has molded itself towards the reformative jurisprudence. Most of think that a prisoner should be totally devoid of its right but is this fair to from their basic rights, at least not from human rights. Here in my paper I have explained how our judiciary is trying hard to protect the rights of its prisoners. Where we have given prisoners right to vote and abortion and other rights why they should be deprived of their reproductive rights which has double benefit, one is that it is helpful in reforming prisoners and other is that it's good for human species. But in my opinion it seems very difficult because the condition of women in prison is not as per expectation. The condition of women in prison is worse somewhere. They are suffering for basic necessities. Reproductive rights also cover the health of the prisoners so it's the obligation of state to provide good and healthy environment in prison. If all the prisoners will be allowed good environment it will reduce the burden of the state. In case of sanitation and hygiene almost all the states in world are suffering from same problem. When we talk of conjugal rights and other modes of procreation, as per research European countries are most forward where as states of America initiated very well but now a low number of states has left with conjugal visit facility. In Europe and America reproductive rights of prisoners are protected. In American prison rights of prisoners protected in every aspect. The prison of Mexico and other states provide full facility to their prisoners. In the above given chapters the author has discussed how American prisoners have safeguarded the rights of



prisoners. They have given right for artificial insemination also. In European countries most of the countries have allowed conjugal visits but if we talk about reproductive rights states like Armenia, Latvia etc. are very much active in fulfilling these rights. But providing conjugal visits does not mean that the condition of women in prison is good. Women constitutes a very low percent of prisoners still states are not fulfilling their obligation.

In India the condition of prisoners is like other prisons. In recent years judiciary is trying to protect its prisoners and trying to bring them at the level of other persons. The case of “jasvir” of Punjab and “Bhargavi” case has shown that Indian judiciary wills not left any stone unturned. Though there is no codified law for these but since Indian is member of various conventions it can implement them from those conventions .The ultimate motive of judiciary is to protect the right of its people. Judiciary does not discriminate among people on any matter; it is only performing its function.

**Suggestions:**

Steps taken by Indian judiciary are appreciative but its fulfillment is still on the discretion of executive. In my opinion it's time to take step for protecting reproductive rights of its prisoners. The state needs to enhance the condition of prisons .A good and efficient infrastructure is needed because most the prison are overcrowded .All over nation in all the jail women constitutes a very less percentage. It's not difficult for state to maintain the prisons. India is a developing country; it will be beneficial for the state to maintain a level with other countries. When court has decided that prisoners have a right to conjugal visitation then state should think about it and make it possible as soon as possible. Although it's difficult to do such changes in a little span of time but for prisoner's reformation it can prove as a big step. For this legislation needs to be framed. While framing legislation one thing needs to be kept in mind. While protecting rights of prisoners, right of victim or any innocent person should not be curtailed or violated. The first priority should be given to victim then to prisoner's right. It is very necessary to maintain a balance of between the prisoner's and victim's right. After this only it will be possible to maintain peace and protect every ones right. Rest of the things depends on the law makers and our executive.

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