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**CONJUGAL RIGHTS OF CONVICTS OR PRISON INMATES IN INDIA
CONCERNING ARTICLE 21 OF THE INDIAN CONSTITUTION**- Raisa Mariette Pinto¹**Abstract**

This article expands on the conjugal rights of prisoners that fall within the scope of the 'Right to Life' and 'Person Liberty' under Article 21 of the Indian Constitution, further elaborating that a convict or prison inmate shall not be deprived of such right simply because of conviction. A prisoner, whether a convict, undertrial or a detainee, does not cease to be a human on conviction and is entitled to their fundamental rights as enshrined under the Constitution. The article also discusses the right to procreation, which survives incarceration. It makes appropriate suggestions for the continuance of prisoners as a part of society, not their exclusion.

Introduction

In light of the recent Punjab Haryana judgment, the current status of conjugal visitation/rights of prisoners and those under trial is widely discussed and debated. Prisons being state subjects brings into question the separation of powers, leaving little to no scope for union or judicial interference.

To better understand such a personal and sensitive topic, it remains pertinent to take a step back and walk through the rich and vital history of not only the prison law of India but also the prison statutes of various other countries.

Prisoners and their Status Under Article 21

According to the definition under the Prisoners Act,² there is a convict, an undertrial, and a civil prisoner who may be detained under preventive detention law. None of the three categories of

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prisoners lose their fundamental right to be placed inside a prison. However, it is essential to remember that certain restrictions may be placed on them due to their conviction or involvement in a crime. Thus, it is a well-acknowledged fact that a person (prisoner) is deprived of his liberty by the procedure established by law, which must be reasonable, fair and just as laid down in the landmark judgment of **Maneka Gandhi v. Union of India**.³

A simple perusal of the case of **State of Andhra Pradesh v. Challa Ramkrishna Reddy**⁴ leads us to understand that "*a prisoner, be he a convict or undertrial or a detenu, does not cease to be a human being. Even when lodged in jail, he continues to enjoy all his fundamental rights, including the right to life guaranteed to him under the Constitution*". Further, the court asserts in another instance that although several factors lead a prisoner to commit a crime, he is nevertheless required to be treated as a human being and is entitled to all the fundamental human rights, human dignity and human sympathy.⁵

Article 21 declares, "*No person shall be deprived of his life or personal liberty except according to a procedure established by law.*"⁶ It is not denied that a convict whom the law bids to live in confinement stands denied some fundamental rights, like the right to move freely or practice a profession. Nonetheless, such convict shall continue to enjoy other constitutional guarantees, including the precious right guaranteed by Article 21 of the Constitution.⁷ This Court has culled out the rights of prisoners, including their fundamental rights, in a large number of decisions,⁸ few of which have been cited above.

The Right to Procreate Under Article 21

²Section 3 the Prisons Act, 1894.

³1978 1 SCC 248 1978 2 SCR 621 AIR 1978 SC 597.

⁴AIR 2000 SC 2083.

⁵S.C. Order in Re- Inhuman Conditions in 1382 Prisons dated 5th February 2016. W.P. (C) No. 406 of 2013.

⁶Article 21, Constitution of India 1950.

⁷D. Bhuvan Mohan Patnaik &Ors. vs. State of Andhra Pradesh &Ors., (1975) 3 SCC 185.

⁸State of Maharashtra v. Prabhakar Pandurang Sanzgiri AIR 1966 SC 424, D. Bhuvan Mohan Patnaik v. State of A.P. 1975 3 SCC 185, Charles Sobraj v. Supdt., Central Jail, Tihar AIR 1978 SC 1514.

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Under the provisions laid down in Article 21, it is ascertained by the Supreme Court that the right to procreate is an inherent part of Article 21 in the case of *Suchita Srivastava and Another v Chandigarh Administration*.⁹ Procreation is understandably a deeply personal topic. Some may argue that procreation is essential to human existence, but the ultimate choice lies in the hands of the ones bringing such offspring to life. It is not a decision that is to be made by statute. In a recent landmark judgment, **the Punjab and Haryana High Court**¹⁰ held that the 'Right to Procreate' falls within the purview of the right to life and personal liberty enshrined in Article 21 of the Constitution. Additionally, while answering the imperative question of whether 'the right to procreation survives incarceration, and if so, whether such a right is traceable within our Constitutional framework?' the honourable judge answered in the affirmative and recognized the 'right to conjugal visit' and 'right to procreation' as a fragment of the 'Right to Life' of Prisoners. In consonance with the above judgments, it is fair to conclude that despite the fact of their incarceration, it is unfair to draw an iron curtain between fundamental rights—especially those enshrined under Article 21-- and prisoners.

The Institution of Jail and its Evolution

The institution of '**jail**' stands as the oldest penal establishment, initially established for the detention of individuals awaiting trial and the execution of sentences. The concept of 'imprisonment' was introduced in the 16th century as a method of punishment. Throughout centuries, jails or prisons have been synonymous with inflicting torture and terror upon their inmates. In the 19th century, the notion of institutional correction emerged, making limited progress toward individualized measures for offenders. In the 20th century, advanced nations shifted their focus to strategies aimed at helping offenders reduce the likelihood of recurring criminal activities. This marked a shift towards the reformation of convicts for the better.

The 1919 Jail Committee Report¹¹ represented a significant shift in prison administration, moving from a punitive focus towards a more reform-oriented approach. It recognized the need for improvements in the Indian Prison Administration, suggesting measures such as providing

⁹(2009) 14 SCR 989.

¹⁰Jasvir Singh v State of Punjab.

¹¹Report of the Indian Jails Committee, 1919-1920, Volume 1.

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prisoners with productive work and education. The report also recommended aftercare programs to support the rehabilitation of released individuals.

Prisons, as enforcers of the law in civil society, operate through judicial orders for incarceration. Inmates within these facilities are both instruments and subjects of the justice delivery system. Given the judiciary's role as the primary executor and promoter of the rule of law, its responsibility for prison conditions is crucial. With Article 21 of the Constitution guaranteeing a dignified life for all, including inmates, the courts bear a heightened duty in advocating and implementing jail reforms.

The judgment of **Sunil Batra-I**¹² has significantly advanced beyond contemporary norms by prioritizing the **re-humanization of prisoners**. It stated that *"positive experiments in re-humanization-meditation, music, arts of self-expression, games, useful work with wages, prison festivals, sramdan 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. In the prison context, social justice has a functional versatility hardly explored."*

Further, **Sunil Batra-II**¹³ phenomenally liberated the jail inmates from the atrocities inflicted through mental torture and psychic or physical pressure, and it brought a catenation of radical changes in prison conditions, one of which is *liberal visits by family and friends of prisoners*. The judgment delved deeper into the petrifying effects of loneliness on jail inmates, as is evident from the following passage: - *"Visits to prisoners by family and friends are 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 Art. 19 and its sweep."*

¹²Sunil Batra vs. Delhi Administration & Ors., (1978) 4 SCC 494.

¹³Sunil Batra vs. Delhi Administration, (1980) 3 SCC 488.

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Further, even as per the 1973 report of National Advisory Commission "*prisoners should have a 'right' to visitation*" and that "**correctional officials should not merely tolerate visiting but should encourage it, particularly by families...**"¹⁴...it also urged that corrections officials should not eavesdrop on conversations or otherwise interfere with the participants' privacy". **Sunil Batra-II** 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' rights and shall be respected.*"

The author thinks it is only fair that since India follows the reformatory theory of penology, prisons being the most accepted and common form of punishment, family visits can help prisoners reform and rehabilitate. Prison officials can use such visits as an incentive to obtain obedience from inmates. Such rights are not very popular in India because no legislation governs them. However, it is pertinent to note that no legislation prohibits the same. Further, these rights are not encouraged due to the lack of funding and the overcrowding of the jail premises.

The case of *Maharaj v Secretary, State of Madras*¹⁴ has changed society's perspective that prisoners are wild beasts who do not deserve the basic amenities necessary for living a life with dignity. Although the judiciary has highlighted the importance of dignified living conditions in jail cells, we observe a severe laxity in implementing such judicial advice.

The court rightly held that "*conjugal rights are an essential aspect of a man's right to life.*" Upholding that the right to conjugal visit is within the ambit of prisoners' right to life, prisoners are entitled to the same. The judiciary has consistently emphasized that punishing individuals for wrongdoing does not negate their fundamental humanity. Inmates' conjugal rights are the same as their marital rights outside the prison walls. These rights, which are universally acknowledged as belonging to married couples, include the freedom to associate with one another, to form a household together, and to share in all the benefits of a romantic

¹⁴(1994) 5 SCC 188.

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partnership, including the ability to procreate.¹⁵ The Courts have on several occasions determined that such relations are of utmost importance for the re-socialization and rehabilitation of the prisoners.

There has been a lot of talk about how long-term offenders' access to spouses and live-in partners might help reduce sexual tension and gay behavior when discussing conjugal rights. Instead of having a conjugal visit in the strange and humiliating prison environment, the educated writers strongly believe that inmates who do not belong to the highest security categories should be allowed periodic home leave. As a means of keeping in touch and easing tensions, the authors propose that certain maximum-security inmates who are married might spend a weekend or day in a family hostel outside of the prison gates.

On the contrary, in addition to the inherent unfairness of depriving a prisoner of his basic fundamental rights, one could speculate that such a curtailment is justified in light of the individual's unlawful behaviour. In cases where only one of the spouses is convicted of an offence, a pertinent consideration arises: does the prohibition on a convicted prisoner engaging in a conjugal relationship with his innocent wife, especially for procreation, impose upon the fundamental rights of the wife? Such a question would be answered in the affirmative, considering judgments delivered by the Apex Court.

The Indian Scenario, in Comparison with the International Scenario

Extensive research into other constitutions and the human rights ideas of the time led to the incorporation of the fundamental rights into our own. Because the Indian Constitution's authors wanted to ensure that the courts could not be bound by the narrow interpretation of a specific era, these basic rights and principles have the broadest possible applicability. The petitioners' plea does not appear to violate any law as no such right is explicitly stated in codified law. Because the right to procreate does not infringe upon any rule or law, its denial is considered arbitrary and unjust; furthermore, it constitutes a heinous breach of Article 21 of the Constitution.

¹⁵Bharati Law Review, April – June, 2018 CONJUGAL RIGHTS OF PRISONERS Dr. Shruti Goyal.

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Garbhadhan, meaning "attaining the wealth of the womb," is one of sixteen sacraments (sanskaras) in Indian philosophy and culture. Its sacred and religious purpose is to maintain family lines through marriage. In addition, each individual has four Purusharthas, or goals in life, according to Hindu philosophy: Dharma, Artha, Kama, and Moksha.

Inmates have the same access to the rights guaranteed by a number of international conventions. Furthermore, there are a number of distinct instruments that pertain specifically to the rights of prisoners. From the human rights aspect, **the Universal Declaration of Human Rights**¹⁶ is a milestone document. Additionally, two covenants¹⁷ have effectively covered the availability of human rights for all without any discrimination.

The Nelson Mandela Rules¹⁸ in its Rule 58 has recognized the conjugal visits as follows:

1. Prisoners shall be allowed, under necessary supervision, to communicate with their family and friends at regular intervals:
 - (a) By corresponding in writing and using, where available, telecommunication, electronic, digital and other means; and
 - (b) By receiving visits.

In cases when conjugal visits are permitted, inmates of any sex should be free to use this privilege without bias. In order to provide equitable and fair access in terms of safety and dignity, protocols must be established and facilities must be made available.

Human Rights Norms and Prison Sex: A Global Perspective is an academic article that provides a synopsis of the topic across different countries. It would be wise to read the article because of how instructive it is¹⁹. The text provides crucial information on the Conjugal Rights of Inmates

¹⁶Article 16 deals with right to marry and family.

¹⁷International Covenant on Civil and Political Rights, 1966 [General Assembly resolution 2200A (XXI)]; International Covenant on Economic, Social and Cultural Rights, 1966 [General Assembly resolution 2200A (XXI)].

¹⁸United Nations Standard Minimum Rules for the Treatment of Prisoners vide United Nations General Assembly Resolution A/RES/70/175.

¹⁹Brenda V. Smith, *Analysing Prison Sex: Reconciling Self- Expression with Safety*, Humans Rights Brief (2006)

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— Inmates in other nations are allowed to have sexual relations with their wives, partners, and family members, and these encounters are categorized as intimate or conjugal visits.

1. **Brazil** has implemented a "conjugal visit," which allows prisoners to visit with family and friends without physical restriction, and an "intimate visit," which allows prisoners to receive visits from their partners or spouses in individual prison cells.
2. In the **Czech Republic**, the Director of prison may allow married couples to visit rooms designated for intimate contact. It also allows prisoners to receive visits from four close relatives at a time.
3. In **Spain**, inmates who cannot leave the institution may receive conjugal/intimate visits once a month for one to three hours.
4. Further, **Denmark** has implemented a "prison leave" system for prisoners with sentences over five months. The leave can last from one day to an entire weekend. Denmark "see[s] leave as a helpful tool in maintaining a stable atmosphere in the prisons and by keeping contact with relatives outside it is believed that fewer prisoners try to escape".
5. In **the USA**, federal prisons do not allow conjugal visitations. However, many states allow conjugal visitation programs. These visitations are subject to various restrictions provided by the concerned state. The oldest conjugal inmate visiting program is at the *Mississippi* State Penitentiary in Parchman. In addition to conjugal visitation, the prison authorities also use the program of home furloughs. Various states in the USA also have programs for conjugal visitations.²⁰ For example, in California, the first conjugal visit program was instituted in 1968 and has been expanded since then. The California inmates can visit their children, spouses, siblings and parents in modular homes on the prison grounds.²¹ Similarly, conjugal visitation programs are also available in *New York*,²² *New Mexico*, *Washington* and *Connecticut*.

²⁰Carolyn Simpson, "Conjugal Visiting in United States Prisons", Columbia Human Rights Law Review, Vol. 10, 978-79, pp. 643-671, at p. 662.

²¹Rachel Wyatt, "Male Rape in U.S. Prisons: Are Conjugal Visits the Answer", Case Western Reserve Journal of International Law, Vol. 37, Issue 2, 2006, pp. 579-614, at p. 600.

²²Bonnie E. Carlson, "Inmates and their Families: Conjugal Visits, Family Contact and Family Functioning", Criminal Justice and Behaviour, Vol. 18, No. 3, 1991, pp. 318-331, at p. 319.

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6. The European Convention on Human Rights is the basis for claims regarding conjugal visiting rights and artificial insemination in Europe. Along with the freedom to marry, the Convention also protects the right to privacy and the right to one's family life. No public authority may infringe upon an individual's right to respect his or her private life, family life, or home, as stated in Article 8 of the Convention, unless required to do so by law or for expressly mentioned purposes (such as public health, safety, or morals) in a democratic society. According to the Convention's Article 12, a prisoner who reaches marriageable age has the right to marry and establish a family in accordance with the laws of their home country.

Exploring international case law on the subject is driven only by the need to absorb the growing judicial consensus. It is clear that the rights to conjugal visits, procreation, and artificial insemination facilities have only been partially recognized in the United States and Europe. These rights are fundamental to liberty and human dignity, as stated in the Eighth Amendment, and are further subject to reasonable and proportionate restrictions.

Conclusion

Many different languages and cultures coexist in India. It has its own set of norms, expectations, social mores, fears, and forbidden practices. The goal of punishment, according to criminologists, is retribution, prevention, public protection, reformation, and rehabilitation of offenders, among other attainable goals. An increasing number of programs are focusing on rehabilitation and reformation as a means to discourage recidivism and promote reintegration into society by way of individual accountability.

There can be no disagreement, and the A.P. High Court correctly noted in Ms. G. Bhargava that matters such as allowing convicted individuals to see their spouses for the sake of procreation fundamentally belong to the purview of legislators. It is ultimately up to them to figure out how to make it work, whether that's by law or executive order. What must be considered, however, is that prisoners and other incarcerated individuals constitute a socially isolated group as a result of

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the judicial system's execution of its sovereign powers. In order to carry out the execution of court decisions, the justice delivery system makes use of correctional centers and jails.

Prisoners and their partners can benefit much from the choice to grant them conjugal rights, which supports the reformative method of incarceration. Also, since most of the people behind bars are young adults (between the ages of 18 and 34), this strategy will help with re-socialization and keeping inmates' life from coming to a halt.

As the bedrock of penal law, provisions such as "parole," "furlough," and "temporary release" should be represented. Imagine if the old prisons were renovated using modern technology and architecture. If that is so, the government shouldn't think twice about granting prisoners temporary "parole," "furlough," etc., so they can have sexual relations with their partners or have children. But this needs to be put into action taking into account the offence's nature and the prisoner's behavior.

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