



UNIVERSITY *of* LUSAKA

**CONJUGAL VISITS FOR INMATES AS A HUMAN RIGHT – THE ZAMBIAN
CONTEXT: LESSONS DRAWN FROM INDIA AND OTHER JURISDICTIONS.**

BY

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LLMHRL23121929

**Research dissertation submitted for the approval of the University of Lusaka
Senate in partial fulfilment of the requirements for the award of the Master of
Laws Degree in Human Rights Law (LLM)**

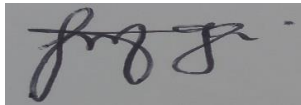
University of Lusaka

October, 2023

DECLARATION

I, declare that this dissertation titled “**Conjugal Visits for Inmates as a Human Right – The Zambian Context: Lessons Drawn From India And Other Jurisdictions,**” which is hereby submitted to the School of Postgraduate Studies at the University of Lusaka as part of the requirements for the award of the Master of Laws (LLM) degree, is my original work and has not previously been submitted for the award of a degree at this or any other tertiary institution.

The sources that have been used or quoted have been indicated and duly acknowledged as complete reference. Any errors or omissions are solely the author’s.

A handwritten signature in black ink, appearing to read 'Joanne Mwaanga', is centered within a grey rectangular box. Below the box is a horizontal dotted line.


JOANNE KAWAMA MWAANGA

October, 2023

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RECOMMENDATION

I, **MULENGA BESA** recommend that this dissertation titled “**CONJUGAL VISITS FOR INMATES AS A HUMAN RIGHT – THE ZAMBIAN CONTEXT: LESSONS DRAWN FROM INDIA AND OTHER JURISDICTIONS.**” authored by **JOANNE KAWAMA MWAANGA** prepared under my supervision, be accepted for examination. I have checked it carefully and I am satisfied that it meets requirements pertaining to the format laid down by the university regulations governing Master of Laws dissertations.



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ABSTRACT

The purpose of this research was to discuss conjugal visits for inmates as a human right in the Zambian context and drawing lessons from India and other jurisdictions. This research focused on examining whether or not conjugal visits as a concept in human rights should be adopted in Zambia. This research also examined the rights of inmates with a focus on conjugal and other related rights. Furthermore, this research went on to examine the international best practices governing human rights of inmates and conjugal visits for inmates.

In addition, the research also discussed various international instruments and cases which advocate for the rights of inmates and that where conjugal visits are allowed, they should be applied without discrimination, and female prisoners should be allowed to exercise this right on an equal basis with their male counterparts. This research found that in Zambia, the Zambia Correctional Service Act does not expressly provide for conjugal visits but that it provides for the Commissioner General to allow an inmate to be absent from the correctional centre with permission. This can be viewed as an opportunity to implement conjugal visits for inmates in Zambia through the establishment of an independent committee. The research also recommends that there is a need for Zambia to adopt conjugal visits as a matter of human rights so as to ensure that prisoners enjoy their rights.

This research was qualitative in nature and relied on primary and secondary sources. The sources were obtained through desktop research. The primary sources that were relied on were mainly statutes while the secondary sources included review of books, journal articles, and online sources.

DEDICATION

To my parents, Jonah Rex Mwaanga and Annie Manda Mwaanga who gave everything they had to ensure that I got the best education. Their sacrifices, love and support have not been in vain.

To my husband, Dr Chewe Takusanikwa for his unconditional love and support without which this journey would have been much harder.

To all persons whose voices are unheard, I hear you and this work is for you as we continue the long walk, in search of human dignity.

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I would like to thank God for this opportunity to gain more knowledge and understanding in a field of study that I am very passionate about.

I wish to thank my family – my husband and children for their encouragement and understanding when I was not always available due to my studies. I am grateful.

I wish to also extend my profound gratitude to my supervisor Mr. Mulenga Besa, who was always on hand to give guidance and feedback.

ACRONYMS

International Covenant on Civil and Political Rights (“ICCPR”)

African Charter on Human and Peoples' Rights (“ACHPR”)

European Convention on Human Rights (“ECHR”)

Grand Chamber (GC)

Human Rights Council (HRC)

European Court of Human Rights (ECtHR)

Inter-American Court of Human Rights (I-ACtHR)

African Commission on Human and Peoples’ Rights (AfCHPR)

United States of America (USA)

STATUTES AND TREATIES

African Charter on Human and Peoples' Rights

European Convention on Human Rights

International Covenant on Civil and Political Rights 1966

Punjab Good Conduct Prisoners (Temporary Release) Act, 1962

The Constitution of India [India], 266 January 1950

The Constitution of the Republic of South Africa, 1996

The Constitution of Zambia, Chapter 1 of the laws of Zambia

Universal Declaration of Human Rights [1776]

Zambia Correctional Service Act No. 37 of 2021 (ZCSA 2021)

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CHAPTER ONE

INTRODUCTION TO THE STUDY

1.0. INTRODUCTION

The human rights discourse has continued to advance as more aspects of human life and wellbeing are brought to the fore through advocacy and realisation. Imprisonment is one phenomenon which has a bearing on human rights. This is so because it is meant to deprive the convict of certain civic rights and liberties. It involves separating the individual from the immediate society into incarceration for a period of time. In extreme cases, the convict serves a life sentence. One of the impacts is deprivation of contact with intimate partners. This brings into question whether the prisoner has rights to have close contact with their spouse (conjugal rights).¹

Across the globe, the conjugal visits programme dates back to the early 1900s in Mississippi and contemporary practices have several countries undertaking the programme in America, Europe, Asia and Africa. It has been argued that allowing conjugal visits works to reduce sexual problems among inmates and that denying the innocent spouse is a punishment. The rights of inmates must be protected at all times, and they should enjoy all rights which accrue to any other person except those that are reasonably associated with liberty.²

1.1. BACKGROUND OF THE STUDY

In recent years, the right to life has received significant consideration in terms of prisoners' rights to procreation. This entails the rights of inmates to have private conjugal visits with their spouses. Countries are adopting this practice and constructing facilities and putting in place policies to allow conjugal visits. This has made conjugal visits a right rather than a privilege. Countries which have adopted this practice allow prisoners to meet their spouses on a regular basis in specially designed cabins as long as they meet the set

¹ Cavan, Ruth Shonle, and Eugene S. Zemans. "Marital Relationships of Prisoners in Twenty-Eight Countries." *The Journal of Criminal Law, Criminology, and Police Science*, vol. 49, no. 2, n.d., pp. 133–39. JSTOR, <https://doi.org/10.2307/1140923>. Accessed 10 Apr. 2023.

² Kajawo, Samson, *Conjugal Visits in Prisons Discourse: Is it Even an Offender Rehabilitation Option in Africa?* (March 22, 2021). *Advanced Journal of Social Science*, Available at SSRN: <https://ssrn.com/abstract=3922917>

criteria. For example: a valid marriage certificate; medical certificate; acceptable behaviour; severity of the charge/sentence and length of jail time. In some cases, the prisoner can go home for a number of days. Among the countries well known for allowing conjugal visits are parts of Australia, Belgium, Brazil, Canada, Denmark, France, Germany, certain states in India; Israel, Russia, Spain, the United States, Saudi Arabia and Oman.³

In Africa, the practice of conjugal visits has not received much attention although there are emerging concerns and advocacy. In 2013 Swaziland introduced conjugal visits for inmates.⁴ Kenya recognises conjugal rights but has no laws allowing inmates' conjugal rights.⁵ Nigeria has not domesticated the Mandela Rules and therefore has no law allowing conjugal visits for inmates.⁶ Like other African countries cited, South African law allows limited contact between inmates and their spouses but without expressly allowing conjugal visits.⁷

In Zambia, there has been a level of advocacy in recent years, calling upon the government to allow conjugal visits for prisoners and their spouses. The calls have been for government to create the necessary facilities for the humane and dignified enjoyment of intimacy. Zambia has not created appropriate facilities for prisoners to enjoy their sexual intercourse rights neither have there been any express legislative and policy reforms in this regard.

Sex has been recognised as an indispensable biological function, sought after by sexually healthy individuals and integral for their wellbeing and survival. Despite the lack of sexual

³ Rahman Md ziaur , 'Conjugal visit: an emerging human right ' [2022] New Age Opinion <https://www.newagebd.net/article/182554/conjugal-visit-an-emerging-human-right> accessed 8 April 2023

⁴ Phakathi Mantoe , 'Eswatini: Allowing Conjugal Visits - a Premature Adjudication?' [2012] Think Africa Press <https://allafrica.com/stories/201210150018.html#:~:text=Swaziland%20will%20be%20the%20first,prison%20facilities%20in%20the%20country>. accessed 4 April 2023

⁵ Nguyo Waturi, 'Inmate's Wife Moves To Court To Demand Conjugal Visits' [2022] Parents Africa <https://parentsafrika.com/inmates-wife-moves-to-court-to-demand-conjugal-visits/#:~:text=In%20Kenya%2C%20conjugal%20rights%20are,their%20spouses%20over%20the%20years>. accessed 4 April 2023

⁶ Ugwu Romanus , 'Prison authority stops deployment, night duty for female staff ' [2022] Sun News Online <<https://sunnewsonline.com/raunchy-affairs-for-kuje-prison-inmates/#:~:text=%E2%80%9CThere%20is%20no%20rule%20permitting,cannot%20be%20practiced%20in%20Nigeria.>> accessed 4 April 2023

⁷ P v Minister of Justice and Correctional Services and Others (66090/18) [2021] ZAGPPHC 77 (4 March 2021)

privileges among prisoners in Zambia, the correctional facilities have become places for committing unnatural sexual acts and transmission of HIV and other STIs. Zambia has not significantly advanced the provision for conjugal visits as few other countries have.⁸

In 2019, a strong indication was made by the Zambia Correctional Service that steps were being undertaken to structure a law that would allow prisoners to visit their families and also enjoy their conjugal rights with spouses.⁹ The Human Rights Report of 2019 indicates that inmates in Zambia face serious sexual problems with limited access to sexual and reproductive health services. The report acknowledges the advocacy efforts undertaken by the Correctional authorities; PRISCCA and Zambia Medical Association for inmates to be granted conjugal rights in order to also reduce sexual misconduct and spread of sexually transmitted infections.¹⁰ The Human Rights Commission considered that conjugal rights for married inmates needed to be considered a priority as it was essential for strengthening families.¹¹

1.2. STATEMENT OF THE PROBLEM

International law recognises universal human rights for all as stated in the 1948 Universal Declaration of Human Rights adopted at the United Nations General Assembly. This does not exclude inmates whose rights are specifically provided for. The major international instruments that inform the rights of inmates include Article 12 of the **United Nations Universal Declaration of Human Rights of December 1984** which provides that:

*“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence.”*¹²

⁸ The Zambia Medical Association, Allow Conjugal Visits For Prisoners, Urges Zambia Medical Association (ZMA) (Zambia Medical Association 2020)

⁹ Zambia correctional services, 'Zambia Correctional Services' (Prisoners to be Granted Conjugal Rights, 27th June) <https://zambianeeye.com/prisoners-to-be-granted-conjugal-rights/> accessed 6 April 2023

¹⁰ United States Department of State Bureau of Democracy, Zambia 2019 Human Rights Report: Country Reports on Human Rights Practices for 2019 (Human Rights and Labor 2019)

¹¹ Mvula Steven, 'HRC advocates sex for married inmates' [2020] Human Rights Commission

¹² United Nations Universal Declaration of Human Rights, 2013 (2) SACR 350 (GNP)

Of significant reference is the **United Nations Standard Minimum Rules for the Treatment of Prisoners** (The Nelson Mandela Rules) of 17 December 2015, **Rule 58(2)**, which stipulates that:

“Where conjugal visits are allowed, this right shall be applied without discrimination, and women prisoners shall be able to exercise this right on an equal basis with men. Procedures shall be in place and premises shall be made available to ensure fair and equal access with due regard to safety and dignity.”¹³

In Zambia, the **Zambia Correctional Service Act** does not expressly provide for conjugal visits. However, **Section 114** of the **Act** provides that:

“The Commissioner may grant a prisoner permission in writing to be absent from prison for a specified period for personal, family or other reasons if, in the opinion of the Commissioner, the circumstances of the case warrant the granting of permission.”¹⁴

Consideration is only given of the reintegration of the prisoner on release from the correctional facility. Under **Section 85**, it is granted that the Director shall:

“Facilitate reintegration of inmates which involves connection with family, restorative justice, preparations for releases, job placement aftercare homes.”¹⁵

Considering the importance of human rights through the provision of conjugal rights to inmates and the significant steps made at international level, Zambia still lags behind. There has been a level of advocacy in recent years for incorporating conjugal visits in correctional facilities. However, there has not been substantial attention and action at government level to facilitate for this. There is therefore a need to examine conjugal visits as a concept in human rights, to study what other jurisdictions have done to advance the rights of inmates and to draw lessons which can be accordingly adapted to Zambia.

¹³ United Nations Standard Minimum Rules for the Treatment of Prisoners (The Nelson Mandela Rules) of 17 December 2015, Rule 58(2)

¹⁴ Zambia Correctional Service Act No. 37 of 2021 (ZCSA 2021) s114

¹⁵ ZCSA (2021) s85

1.3. OBJECTIVES OF THE STUDY

- i. To examine the rights of inmates with a focus on conjugal and other related rights.
- ii. To examine the international best practices governing human rights of inmates and conjugal visits for inmates.
- iii. To draw lessons from India and other jurisdictions on the best practices of providing conjugal rights for inmates in Zambia.

1.4. RESEARCH QUESTIONS

- i. What are the rights of inmates in relation to conjugal and other related rights?
- ii. What are the international best practices governing human rights of inmates and conjugal visits for inmates?
- iii. What lessons can be drawn from India and other jurisdictions on the best practices of providing conjugal rights for inmates in Zambia?

1.5. SIGNIFICANCE OF THE STUDY

The study is significant because it interrogates the need for inmates and their spouses to have their conjugal rights protected during incarceration. The study analyses international standards for conjugal visits to be granted as a matter of right as well as the criteria and legislative/policy framework required for them to be operationalised in Zambia. In addition, the study is significant in the advancement of human rights for inmates and creating an environment which is not based on retribution but correctional, promoting an easier reintegration process back into families and society at large.

1.6. THEORETICAL FRAMEWORK

i. The Human Rights-Based Approach (HRBA)

The human rights-based approach is based on the United Nation's pillars and has been in place since the **Universal Declaration of Human Rights**. Prior to this an important landmark statement was made at **The Virginia Declaration of Rights of 1776** that:

“All men are by nature equally free and independent and have certain inherent rights of which when they enter a state of society, they cannot by any compact deprive or divest posterity.”¹⁶

The HRBA recognises that human development is built on the promotion and protection of human rights. The concept recognises that there are serious inequalities which create development challenges and therefore aims at redressing any discriminatory practices impeding on development or lead to certain groups of people being vulnerable. The HRBA requires that the developmental processes, including associated plans, laws and policies be built on a system of human rights, requiring obligatory compliance by internationals, governmental, civic, cultural, political, economic and social institutions. The principles to guide the human rights approaches are universality, indivisibility, equality and non-discrimination, participation and accountability. The idea is to acquire the cooperation and development of capacities of the duty bearers meeting their obligations and rights-holders claiming their rights.¹⁷

The essential attributes of the HRBA are to advance the realisation of human rights as enshrined in the Universal Declaration of Human Rights and other international human rights instruments. Countries are mandated to facilitate the respect and protection of human rights.¹⁸ Basing on this, the Declaration of Sexual Rights was proclaimed in 1997 and revised/expanded in 2014. It provides for the right to the highest attainable standard of health, including sexual health; with the possibility of pleasurable, satisfying, and safe sexual experiences.¹⁹ The WAS Declaration of Sexual Rights is now the primary basis for further human rights declarations and policies. Sexual rights are based on the universal declaration of human rights which is the foundation of ensuing laws and policies among member countries.

ii. Marc Ancel: Social Defence: A Humanist Criminal Policy

¹⁶Universal Declaration of Human Rights [1776]

¹⁷ UN Sustainable Development Group. The Human Rights Based Approach to Development Cooperation Towards a Common Understanding Among UN Agencies [September 2003]

¹⁸ Ibid

¹⁹ Declaration of Sexual Rights, World Association for Sexual Health-WAS (2014)

Marc Ancel was an influential French scholar who advocated for more benevolent prisons, focusing on the rehabilitation of offenders. He argued that prisons had the capacity of rehabilitating and humanising prisoners. He is hailed for his pragmatic approach and developing a more progressive and liberal approach to contemporary criminal justice. Ancel's penal philosophy reflected a conception of individuality and liberal democracy rooted in the Enlightenment. Ancel advocated for humane prisons requiring experts to evaluate and treat offenders. The focus was on crime prevention. The need to assess the levels of criminal dangerousness was required of experts. In his 'New Social Defence' Ancel stressed rehabilitation in defending human rights; protecting human beings and therefore searched for a criminal justice policy of a humanistic kind.²⁰ The New Social Defence was appropriately referred to as 'Penal Humanism'. Ancel abhorred excess legalism since he perceived that they disregarded the human person whereby offenders were treated as objects, not subjects.²¹ Ancel considered that the individual needed to be at the center of criminal justice.²²

The theories aligned with conjugal visits for prisoners arise from the need to expand the application of human rights. They recognise that prisoners are humans who need to enjoy those rights not deprived by the condition of incarceration. Incarceration has deteriorating mental, physiological and physical effects. The major issues considered are whether prisoners forfeit all or some of their rights and whether the retained rights are difficult to enjoy due to prison conditions and isolation from society. Further considerations are given to the obligations of the state and responsible institutions to facilitate the enjoyment of prisoners' retained rights, and what specific rights prisoners retain or acquire in incarceration.²³

The two theories are consistent with the emerging need to incorporate conjugal visits within the Zambian legal system. By the HRBA, knowledge and understanding are drawn from the universally established and accepted Universal Declaration of Human Rights.

²⁰ Marc Ancel, *The New Social Defense: A Humanist Criminal Policy Movement* (3rd edn, Paris: Cujas 1981)

²¹ Sizaire V, *What remains of the new social defense?* *Journal of Criminal Science and Comparative Penal Law* 2(2): 261–272. [2017]

²² Marc Ancel (1981)

²³ Lippke, Richard, *Toward a Theory of Prisoners' Rights*. *Ratio Juris*. (2002).

This would be the basis for discussing the aspect of conjugal visits as a human right even as the WAS Declaration of Sexual Rights complements the declaration. From the New Social Defence by Marc Ancel, the study draws the appreciation of the rights of prisoners, rehabilitation and humanising them. Within this falls the conjugal visits programme since inmates are human beings undergoing a process of rehabilitation and having conjugal visits would make them better people.

1.7. REVIEW OF RELATED LITERATURE

The discourse of conjugal rights falls within the wider context of human rights. A human right is an entitlement that accrues to every person by virtue of being born human²⁴. However, the topic of conjugal rights is still in its infancy state with more and more literature being developed around the subject.

Hopper C. B., *The Evolution of Conjugal Visiting in Mississippi*,²⁵ is a prison journal that details the origins and development of conjugal programmes for inmates. It highlights the rationale behind conjugal programmes and how the concept has evolved over the years. It is a useful resource for understanding the history of conjugal visits for inmates.

Einat Tomer, *Conjugal Visits* in *The Encyclopedia on Corrections*²⁶ which is a comprehensive collection of scholarly entries focusing on corrections and criminal justice, highlights the definition of conjugal visits in prisons as meetings held privately between male and female inmates who are sexually engaged. It highlights how the visits are to be conducted in an ideal situation and advocated for the use of legislation as a means of protecting the right. These laws set the criteria for granting conjugal visits to inmates as a standard. This gives the basis of claiming conjugal visits as a right as they are viewed to be in the best interest of the prisoners and their families in order to keep the relationships intact for the prisoner to return to society.²⁷

Ssentongo Yakubu, *The Rights of Inmates to Conjugal Rights: Uganda in Perspective*,²⁸ stresses the need for giving conjugal visitations a legal backing if they are to be

²⁴ Anecdotal

²⁵ Hopper, C. B. (1989). The evolution of conjugal visiting in Mississippi. The Prison Journal

²⁶ Einat, Tomer. "Conjugal visits." The Encyclopedia of Corrections (2017)

²⁷ ibid

²⁸ Ssentongo Yakubu 'The Rights of Inmates to Conjugal Rights: Uganda in Perspective' (2018) Unilag Law Review

concretised to ensure that families of inmates are preserved and reintegration. It calls for legislation to stipulate the frequency of the visits, the location of the visits as well as the provision of supplies such as soap, condoms, lubricant, bed linens, and towels.

Vladu, Alexandra (et al), *Benefits and risks of conjugal visits in prison: A systematic Literature Review*,²⁹ provides a synopsis of the impacts of imprisonment beyond the prison walls. It brings out the aspect of family and how families of the incarcerated are affected as they lose the intimacy they enjoyed with the imprisoned. It highlights countries that have recognised the importance of family relationships and put in place measures to ensure visits to the prison. It is also a critical resource as it highlights the fact that the practice of conjugal visitation is both advocated for and against, considering the benefits, risks, safety, infrastructure and costs.

Heliany Ina and Muhenri Sihotang, *Application of Conjugal Visit in the Indonesian Statutory System for Correctional Assisted Persons*,³⁰ provides an insight into the biological needs of human beings in general and inmates in particular, and how failing to meet their biological sexual needs is considered a major challenge in Indonesia. It highlights the country's programme of Family Visitation Leave in accordance with a decree of 2001 Decree. It further highlights how the privilege has been misused and there is no legal basis for its regulation as it operates as the *Conjugal Visit Policy* or Romance Chamber. This has given the author some insights on the need to have legislative as opposed to merely administrative backing for conjugal visits for inmates.

Gates v. Collier³¹ gives one of the earliest orders of a court directing the rehabilitation of inmate housing including the renovation of housing units used for the conjugal programme known as 'Red Houses.'

There are arguments in favour of the practice of conjugal visits. Primarily, prisoners have rights as humans. Conjugal rights affect not only the prisoner but also the spouse who is

²⁹Vladu, Alexandra et al. "Benefits and risks of conjugal visits in prison: A systematic literature review." *Criminal behaviour and mental health: CBMH* 31,5 (2021): 343-361.

³⁰ Heliany, Ina, and Muhenri Sihotang. "Application of Conjugal Visit in the Indonesian Statutory System for Correctional Assisted Persons." *International Journal of Islamic Education, Research and Multiculturalism* (2022): 164-184.

³¹ 1971 501. 2d 1291

in society and still legally married to the imprisoned. This consideration has led more countries to increasingly adopt conjugal visits. The right to procreation cannot be denied just because one is in prison. While the courts can take away certain rights of a criminal, the rights of their spouse cannot suffer as a result since they can only have conjugal activities with their spouse. The courts would be acting unfairly if they indirectly punish the innocent spouse. Therefore, the provision of conjugal rights to prisoners is a practice of marital rights and also a way of allowing families to share their experiences of loneliness and grief while getting accustomed to the new life. This also has mental and physiological benefits.³²

Ceza Hukuku Dergisi, *Reconstruction of the Privilege of Conjugal Visitation in Turkey's Prisons*,³³ shows that at a global level, the benefits of conjugal visits outweigh the drawbacks. It however highlights a 2013 incident where a Turkish man murdered his wife during conjugal visitation bringing to light the security concerns that need to be considered.

Phakathi Mantoe, *Eswatini: Allowing Conjugal Visits - a Premature Adjudication*³⁴ illustrates that the issue of conjugal visits is taking shape in Africa, Eswatini has taken steps since 2012 to introduce conjugal visits for inmates. There have constructed comfortable two-bedroomed houses for two-hour private contacts between inmates and their marriage partners.³⁵ The author can draw some lessons learnt from the case of Swaziland.

Aduagna Alemu Balcha, *Prisoners Right to Conjugal Visits in Ethiopia: An Insight into Laws*,³⁶ highlights some of the challenges faced in African countries to introduce conjugal programmes to include, lack of political will; poor legal reforms and resource constraints. This is done by giving the situation in Ethiopia as an example where there is an emerging trend towards conjugal rights for prisoners. However, the constitution has neither stated

³² Rahman (n1)

³³ Ceza Hukuku Dergisi, 'Reconstruction of the Privilege of Conjugal Visitation in Turkey's Prisons'

³⁴ Phakathi Mantoe , 'Eswatini: Allowing Conjugal Visits - a Premature Adjudication [2012] Think Africa Press

³⁵ Phakathi

³⁶ Aduagna, Alemu Balcha. "Prisoners' Right to Conjugal Visits in Ethiopia: An Insight into Laws

in favour nor against the rights of conjugal visits. There is no subsidiary legislation conferring prisoners the right to conjugal visits.

The literature demonstrates that conjugal visits fall within the ambit of the rights of married inmates to enjoy sex and procreate. There is no conclusive agreement in favour and against conjugal visits. While literature upholds it for the benefits in inmate rehabilitation and spouse enjoyment, it has been frowned upon in developing countries as it may lead to single parents and is costly. Those in favour base their argument on the human rights approach while those against it refer to financial resources and administration challenges.

Literature suggests that most countries take a humanitarian approach towards inmates. The primary consideration is that punishment for crime be justified. The countries also recognise the inmates' marital and conjugal rights have now been closely linked to the right to life. Deprivation of marital contacts should not ordinarily be made a part of the punishment. The author agrees with the works that advocate and justify the need to allow conjugal visits as a matter of right for certain categories of inmates who meet a well laid down criteria.

1.8. RESEARCH METHODOLOGY

Noting that the subject matter of conjugal visits is in its primacy in Zambia, the study proposes a systematic review. The research will be conducted using international and local (Zambia) sources to reflect prevailing state practices (*usus*) and legal opinion (*opinion juris*). These will include legislation, case law and related policies and regulations in the first category. Further, data will be collected from previous research, journals, reports and publications. The data will be collected from online sources, libraries, institutions concerned with human rights, correctional facilities publications and other print media.

1.9. SCOPE OF THE STUDY

The project will focus on jurisdictions that permit conjugal visits and seek to draw lessons which can be implemented in Zambia. The specific areas of focus will be international best practices; legal and administrative impediments and implementation recommendations with regards to conjugal visits for inmates in Zambia. This will be

through critically reviewing laws, judicial precedence, policy documents, research articles, books and grey literature.

1.10. TIMETABLE

Activity	Timeline									
	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	
Preparation of full proposal										
Submission of Proposal										
Registration for Dissertation										
Submission of Chapter 1 to Supervisor										
Submission of Chapter 2 to Supervisor										
Data Collection										
Submission of Chapters 3 and 4 to Supervisor										
Submission of Chapter 5 to Supervisor										
Submission of 1 st and 2 nd Drafts Dissertation to supervisor										
Submission via Turnitin										
Submission of Final Spiral Bound Copies of Dissertation to Course Coordinator										

1.11. ETHICAL CONSIDERATIONS

As a matter of research ethics, all the literature to be used for the systematic review will be appropriately referenced using the OSCOLA style and listed accordingly in the bibliography. Participants in the study will be included solely with their consent and utmost confidentiality will be upheld at every level. Personal identities will not be divulged, and all material used in the study shall not fall under plagiarism or reflect personal biases of the researcher.

1.12. CONCLUSION

This chapter has introduced the research topic, its objectives, the problem that comes with denying inmates conjugal visits as well as highlighted the need for this problem to be addressed using a human rights-based approach.

1.13. OUTLINE OF CHAPTERS

Chapter 1: Introduction to the Study

Chapter 2: Rights of inmates with a focus on conjugal and other related rights

Chapter 3: The international best practices governing human rights of inmates and conjugal visits for inmates.

Chapter 4: Drawing lessons from India and other jurisdictions on the best practices of providing conjugal rights for inmates in Zambia.

Chapter 5: Conclusion and Recommendations

CHAPTER TWO

EXAMINATION OF THE RIGHTS OF INMATES WITH A FOCUS ON CONJUGAL AND OTHER RELATED RIGHTS.

2.0. INTRODUCTION

One of the main pillars of the criminal justice system is to ensure that a convicted person is taken through a process of accountability for their actions, by what has been widely accepted to be punishment, but also more importantly to ensure that should the convicted person desists from re-offending in future and therefore be a more productive member of society. Prisons and Correctional facilities play a critical role in this regard. The restorative components of Prisons if failing, render the whole criminal procedure futile.³⁷ The theories of punishment for a crime has evolved over the years and has been heavily influenced by human rights.³⁸ Striking a balance between protecting human rights and the deprivation of liberty of convicts remains a huge challenge. General objectives of detention are to diminish the ever-changing criminal mental forces and to render the detainees' life fit for useful social life.³⁹ This chapter seeks to examine the rights of inmates with a focus on conjugal and other related rights.

2.1. THE GENESIS OF CONJUGAL VISITATIONS

The origins of conjugal visits were focused mainly on rewarding work and safeguarding of marital relations was not a factor.⁴⁰ These origins can be traced back to 1918 when James Parchmann, the warden at Mississippi State Penitentiary, introduced conjugal visits as an incentive for inmates to work harder. Seen as a reward, sex was used to encourage hard work amongst inmates. Bringing a man to his own circle that is, his family was a step towards restoring him back to civilization.⁴¹

³⁷Bhopal Bhattacharya and Ms. Nidhi Arora prisoner's conjugal rights: a critical analysis through humanitarian approach in Indian perspectives. 2018

³⁸Ibid

³⁹Ibid

⁴⁰Prashanth S.J, —Hindu Women and Restitution of Conjugal Rights: Do We Need The Remedy (1967)

⁴¹Ibid

Conjugal visits were first introduced at Mississippi State Penitentiary. According to Hopper 1989, the conjugal visitation programme started as an initiative in an uncivilized and shameful way without proper planning. In the initial years, Parchman Penitentiary was a cotton plantation with the majority of prisoners being black and their main type of work was in the prison's cotton fields. Because of this, Conjugal visits were only accessed by black inmates in the beginning. It was widely believed by prison authorities that black inmates had superhuman strength and an insatiable sexual appetite that was likely to translate into violence even against prison officials if not sufficiently controlled, hence conjugal visits were used as an attempt of meeting their physical and emotional needs.⁴²

In addition, Hopper states that the program was also provided as an incentive to inmates and the payment for their labour was awarding them with unusual privileges such as conjugal visits as opposed to money.⁴³ However, at that time, prisons did not have facilities for conjugal visits. It has been reported that some prisoners modified their prison cells by using their blankets to conceal themselves and have some privacy, while others used storage rooms or toolsheds within prison vicinity to enjoy their conjugal visits.⁴⁴ These visits were allowed only once a week on Sundays, and they included services offered by sex workers. This went on until about 1940 when some progress towards respectability of the program was made. Inmates were allowed to build visiting quarters within the prison vicinity out of scrap lumber and gave them the name "red houses" because they were painted red, the readily available paint color. It was also around this time that the program was opened for access to all prisoners regardless of race.⁴⁵

In addition to conjugal visits, prisoners at Parchman's prisons also enjoyed ten-day furloughs as an additional privilege as compared to other prisons in America as motivation and incentives for their hard work.⁴⁶ These were temporary leaves allotted to some inmates during the months of December and January when there was less work on the farms. However, furloughs were most often granted to prisoners who had earned the

⁴²Prashanth S.J, —Hindu Women and Restitution of Conjugal Rights: Do We Need The Remedy (1967)

⁴³Ibid

⁴⁴Ibid

⁴⁵Ibid

⁴⁶Ibid

status of the trusty, loosely a synonym of the term “nyapala” in Malawian prisons or “capitols” in Zambian correctional centres. Trusties were important to the system since they guarded other inmates and did all of the specialized maintenance and skilled work which kept the facilities running, hence such functionally significant prisoners had to be given special consideration. Therefore, for the rest of the inmates, their only motivation ended at conjugal visits.⁴⁷

During the early years of the program, prison officers had a negative attitude towards the conjugal visiting program, it was considered to be a highly radical practice elsewhere. However, they gradually began to change their indifferent attitude toward the program after realizing that many people perceived the practice as progressive. This brought about plans of improving the facilities. In 1965 those plans came to fruition when the construction of the First Offender's Unit included “red houses” which signified official recognition of the conjugal visiting programs. Thereafter, all new units which were constructed routinely included conjugal visiting quarters. Following this official sanction, instead of just tolerating the conjugal visiting program, the prison staff began to support it. This was further buttressed by a federal court order in **Gates v. Collier**⁴⁸ in January of 1971 which ordered a lot of changes at Parchman prison facilities amongst them a general revamping of outdated inmate housing which also included the renovation of old “red houses.”

It is important to note that the conjugal program was only implemented in male prisons. This changed in 1972 when the program was also introduced in female facilities. By 1989, conjugal visitation became an official program administered by an officer titled “Director of Family Counseling” at Parchman prison facilities.⁴⁹ As opposed to being a reward for hard work, the program became an incentive for good conduct since to earn conjugal visits, all incoming inmates needed to work their way through the behavior modification programs. For an inmate to qualify, they needed to provide a legal certificate of marriage,

⁴⁷Hopper, C. B. (1989). The evolution of conjugal visiting in Mississippi. The Prison Journal

⁴⁸501 F.2d 1291

⁴⁹Hopper, C. B. (1989). The evolution of conjugal visiting in Mississippi. The Prison Journal

as well as a record that they have not violated the prison rules in a period of six months and do not have sexually transmitted infections.⁵⁰

These rules contributed to the decency of the program.⁵¹ The strict set criteria also resulted in the reduction of inmates taking part in the program consequently making the program manageable. By 2014, only 155 prisoners were allowed conjugal visits annually out of a prison population of more than 22,000 inmates confined in the Mississippi prisons and jails. Conjugal visitation progressed for nearly a century without obstructions at Mississippi. As of 2002, it was reported that conjugal visits still took place every fortnight and lasted up to 3 days in spacious, well-equipped cottages on prison premises. Currently, the United States Federal Bureau of Prisons does not have laws that either allow or prohibit prisoners' conjugal visits and this is left to the discretion of particular states. After Mississippi, the State of California followed in 1968 by introducing conjugal visits in 32 facilities.⁵²

Later, several other states also introduced conjugal visits, namely; New Mexico, Connecticut, Minnesota, New York, Washington, South Carolina and Alabama.⁵³ For example, offenders in Californian prisons were allowed to have these visits in prisons' modular homes. However, conjugal visits in New Mexico and Mississippi were discontinued in 2014 apparently for economic reasons, although the change of prison philosophy from rehabilitation to punishment has been cited to be the main reason and has been described as retrogressive in the state of Mississippi's efforts in reducing recidivism and physical and sexual violence in prisons.⁵⁴

2.2. UNDERSTANDING CONJUGAL VISITS.

A conjugal visit can be defined as time allotted to an inmate in which an inmate has a right to meet his or her spouse, during which the couple is allowed to engage in sexual relations. Mostly visits are meant to associate with sexual activity.⁵⁵ Physical intimacy in conjugal visits includes any personal activity which they desire such as holding hands,

⁵⁰Ibid

⁵¹Ibid

⁵²Hopper, C. B. (1989). The evolution of conjugal visiting in Mississippi. The Prison Journal

⁵³Ibid

⁵⁴Ibid

⁵⁵Ibid

hugging, kissing, touching and sexual activity.⁵⁶ The idea behind allowing conjugal visits were to bind the family ties from being broken. It was thought that if inmates are allowed to meet their family once in a while, then there will be moral reform in the prisoner and social adjustment will be easier at the point of reintegration.

They help to deepen the couple and to build a strong bonding and to also help to drive the stress away.⁵⁷ Physical intimacy when welcomed by our bodies by hug or a touch or other experiences, then it releases various chemicals among them oxytocin, dopamine and serotonin. Oxytocin increases our desire to bond while dopamine improves our mood and serotonin helps us to fight against depression and left with a very pleasurable feeling on the couples.⁵⁸

Conjugal rights fall under the broader protection of marital rights of prisoners.⁵⁹ They are recognized as an inherent right of a married couple and include the right of a couple to associate with one another, build a home together and enjoy all the privileges of an interpersonal relationship together including the right to have sex and procreate.

There is agreed disagreement about the value and desirability of allowing conjugal rights to prisoners.⁶⁰ Those who advocate for this practice argue that it would help in solving the problem of unconsented homosexuality and would also help in moulding the behaviour of the inmate. Those who do not agree with it point out that factors like security risks, single parenting, smuggling in of contraband goods among others nullify the positive effects of allowing conjugal visits.⁶¹ Noteworthy is the fact that jurisprudence on the concept of conjugal rights of inmates is still in its infancy.⁶²

⁵⁶Ibid

⁵⁷Ibid

⁵⁸Ibid

⁵⁹Dr. Shruti Goyal, conjugal rights of prisoners. June 2018

⁶⁰Ibid

⁶¹Ibid

⁶²Ibid

2.3. PHILOSOPHY FOR ESTABLISHMENT OF PRISONS AND CONJUGAL VISITATION.

A prison is a place used as a correction center where human beings are physically detained by suspending their personal freedoms.⁶³ It is normally enclosed by walls or other barriers to prevent escape of inmates. It is inflicted by way of legal punishment by a state authority for committing a crime or violation of its prescribed law. Different nations follow different views while dealing with convicts and inflicting punishment, methods of which include punitive, deterrence, reformative and retributive as ways to protect society. Punishment means suffering inflicted on someone for committing wrongs; for that reason, he may be confined into a jail.⁶⁴

According to Collins Dictionary, jail means a place where people are kept locked up, either because they have been found guilty of committing a crime or because they are waiting to be tried for a crime.⁶⁵ The reason for reformative form of punishment is for the moral development of the criminal who has been awarded a sentence of imprisonment so as to prevent further offending and to reform that offender. The more heinous the crime committed, the more grievous the punishment inflicted.⁶⁶

Amongst all the theories of punishments, the theory of reformative punishment intends to reform the offender from further committing that offence.⁶⁷ This theory is of the view that an offender commits a crime when there arises dispute between his character and the intention. This theory would also consider medicine in reformation of the offender as it treats crime as a disease.⁶⁸ For this reason this theory suggests that punishment in the form of imprisonment is effective for an offender's transformation by providing physical, moral and intellectual support to improve the character of a criminal.⁶⁹

⁶³Bhopal Bhattacharya and Ms. Nidhi Arora prisoner's conjugal rights: a critical analysis through humanitarian approach in Indian perspectives. 2018

⁶⁴Ibid

⁶⁵Ibid

⁶⁶Ibid

⁶⁷Ibid

⁶⁸Bhopal Bhattacharya and Ms. Nidhi Arora prisoner's conjugal rights: a critical analysis through humanitarian approach in Indian perspectives. 2018

⁶⁹Ibid

2.4. JUSTIFICATIONS OF CONJUGAL VISITS

In order to have a full understanding of why conjugal visits are important, it is prudent to take a holistic approach to the subject. There are many benefits that come with conjugal acts, the most basic of which is that it is a human need, and this has been held true from ancient times, and they include:

(a) Conjugal acts serve as a great form of exercise through physical activity.⁷⁰ Physical intercourse helps to change the physiology of a human being increasing the respiratory rates and consequently helps in burning calories. It helps to send more oxygen into the body cells, and the testosterone produced during sex makes bones and muscles strong.⁷¹

(b) Sexual acts are associated with natural pain relief through the production of endorphins, hormones that act as a painkiller.⁷² Regular sexual activity also aids in keeping the reproductive system and organs in shape. Sex helps women to increase fertility, postpone menopause and relieve pre-menstrual stress symptoms.⁷³

(c) Regular ejaculation has also been associated with the protection of the prostate gland.⁷⁴ Reduced ejaculation may cause the prostate glands to swell, and this may lead to many health complications. Regular ejaculation may thus prevent prostate diseases until old age.⁷⁵

(d) Regular sexual activity helps prevent erectile dysfunction because an erection keeps blood flowing through penile arteries, thereby promoting tissue health. Doctors believe that regular sexual activity is very important in averting erectile dysfunction.⁷⁶

(e) Science considers sex as a very effective way of reducing stress. Sex produces dopamine, a substance that fights stress hormones, endorphins, also known as the

⁷⁰Ibid

⁷¹Ibid

⁷²Ibid

⁷³Rachel Wyatt, "Male Rape in U.S. Prisons: Are Conjugal Visits the Answer", *Case Western Reserve Journal of International Law*, Vol. 37, Issue 2, 2006.

⁷⁴Ibid

⁷⁵Ibid

⁷⁶Ibid

"happiness hormones" and oxytocin, a desire-enhancing hormone secreted by the pituitary gland.⁷⁷

2.5. ARGUMENTS IN FAVOUR AND AGAINST CONJUGAL ASSOCIATION OF PRISONERS.

Having discussed the origins and development of conjugal programs it is important to now understand the debate on the value of allowing conjugal visits for inmates as well as to point out some of the weaknesses that are associated with conjugal programs. The points for agreement disagreement are discussed herewith.

One of the most basic principles of human rights is that imprisonment serves to curtail the freedom of liberty and all other rights that are reasonably associated with it.⁷⁸ Imprisonment in no way serves to take away all the human rights of inmates. Therefore, all other rights must be protected, and the inmate must be allowed to enjoy the said rights as persons who are not in incarceration. The same goes for conjugal acts for married inmates. This is closely linked with the right to found a family and procreate. When allowed, it must be done in a dignified manner affording the inmate and his other partner privacy. This is a matter of human rights that are inherent regardless of status.

Unconsented homosexuality remains one of the biggest problems faced by the prison system.⁷⁹ Some authors hold the view that if inmates are allowed to have intimate relations, the issue of unconsented homosexuality can be diminished to a large extent.⁸⁰

Permitting prisoners to spend some time with their families can also reduce the negative effect and tension brought about by being in a confined unisex environment.⁸¹ Particularly in the case of male inmates, conjugal visits help to reaffirm their sexuality without the urge to establish a manly self-image by victimizing other inmates. However, two main arguments that are advanced in opposition to this viewpoint are firstly that it has been

⁷⁷Ibid

⁷⁸ Anecdotal

⁷⁹Ibid

⁸⁰Rachel Wyatt, "Male Rape in U.S. Prisons: Are Conjugal Visits the Answer", Case Western Reserve Journal of International Law, Vol. 37, Issue 2, 2006.

⁸¹Ibid

suggested that prison homosexuality is not related to heterosexual deprivation but rather is an expression of the urge for mastery by people who have been placed in a position of powerlessness and secondly, the frequency of heterosexual activity is so limited that it will have only minimal or negligible effect.⁸²

It has also been argued that conjugal associations for inmates help to change and mould the behaviour of inmates.⁸³ Continuing family ties is argued to have a normalizing effect on their behaviour.⁸⁴ This behavioural change will reduce the incidence of violence in prisons and will also prepare the inmate for re-entering society successfully once he or she is released. However, to counter this, it is argued that there is paucity of research to support this view and that this position is mere speculation. Another point of disagreement is moral grounds. Those who advocate for conjugal association argue that humanism requires that prisoners should be allowed to spend some time with their families in privacy.⁸⁵

Additionally, the issue of the “innocent” spouse and his or her emotional and sexual frustration associated with severance of marital ties by incarceration ought to be taken into consideration.⁸⁶ The main rebuttal to this argument is that society holds no moral obligation to grant inmates the privilege of sexual license and that the denial of conjugal and other associated rights is an explicit consequence of incarceration. Further, allowing conjugal visitations would mean a one-parent family for years before the incarcerated parent is released. This question is further aggravated when both the spouses are in prison and conjugal association is allowed. In such cases, the vital issue that arises is the ‘best interest of the unborn child’.⁸⁷

As can be seen above, there is a huge debate regarding conjugal rights for inmates and there is no clear agreement on the subject. However, with the development of human

⁸²Ibid

⁸³Ibid

⁸⁴Ann Goetting, “Conjugal Association in Prison: The Debate and Its Resolutions”, *New England Journal on Prison Law*, Vol. 8, 1982

⁸⁵Ibid

⁸⁶Ibid

⁸⁷Ann Goetting, “Conjugal Association in Prison: The Debate and Its Resolutions”, *New England Journal on Prison Law*, Vol. 8, 1982

rights for all, there is need to adopt a human rights based approach when it comes to inmates, bearing in mind their vulnerability and the fact that incarceration does not make one cease to be human.

2.6. MODES OF CONJUGAL ASSOCIATION.

Conjugal association refers to the time when a prisoner is allowed to spend some time with his or her spouse or family in privacy.⁸⁸ The state facilitates this association by providing infrastructure such as rooms or cottages in a designated area within the premises of the prison where the prisoner and his or her family is allowed some private time. The duration of the visits may vary depending on the governing policy. The State also provides facilities like separate washrooms, linen etc. for the prisoner and his family.⁸⁹

Another mode for enjoying conjugal rights by prisoners is 'parole' or 'furlough'.⁹⁰ This is, when an inmate is released for a temporary period from the prison and allowed to spend time with his or her family. Most states have rules providing for some form of furlough.⁹¹ The difference between conjugal visits and 'furlough' or 'parole' is that the latter involves unsupervised trips away from the prison for a spectrum of undefined purposes, one of which may be conjugal visitation. Both systems have their own merits and demerits. One of the cons of allowing conjugal visits is inequitable treatment to prisoners.⁹²

This is because in main instances, conjugal visits are only allowed for prisoners who are married, and their marriages are intact.⁹³ Such visits cannot be allowed for unmarried prisoners or prisoners with broken marriages. That is, such visits cannot be made available on the basis resembling "equal opportunity" for all prisoners. On the other hand, parole or furlough does not require this as a pre-condition for release.⁹⁴ Another argument supporting furlough over conjugal visitation is that conjugal visitations are expensive, they

⁸⁸Norman Elliot Ken, "The Legal and Sociological Dimensions of Conjugal Visitation in Prisons", New England Journal on Prison Law, Vol. 2, 1975

⁸⁹Ibid

⁹⁰Norman Elliot Ken, "The Legal and Sociological Dimensions of Conjugal Visitation in Prisons", New England Journal on Prison Law, Vol. 2, 1975

⁹¹Ibid

⁹²Ibid

⁹³Ibid

⁹⁴Ibid

create an extra burden on the state as it must provide facilities and supplies using a usually overstretched budget, whereas parole or furlough does not require additional infrastructural facilities. This is compounded by other competing interests like dealing with overpopulated prisons, poor sanitation and other related problems. It is therefore highly unlikely that the state would choose to spend on the construction and development of facilities required for conjugal visits.⁹⁵

In parole or furlough the prisoner visits his or her home and this environment is more conducive, warm and friendly for establishing family ties as opposed to the prison setting.⁹⁶ This home environment cannot be recreated in a prison setting. On the other hand however, there is always an inherent risk of the prisoner absconding during parole or furlough and not returning as required. Moreover, many of the prisoners who do not satisfy the conditions for parole or furlough (because of length of sentence or non-fulfilment of other conditions) may lose this right of conjugal enjoyment also. One of the essential facets of conjugal rights is 'procreation'.⁹⁷ With advancement of science, it has become possible that procreation is done by the way of artificial insemination.⁹⁸

Artificial Inseminations happens when a male and female do not come into physical contact with each other, but rather the male gives his sperm to be inseminated into a female for the purpose of conception.⁹⁹ In the recent times, prisoners have knocked on the doors of courts to have access to the facilities of artificial insemination for the purposes of procreation especially when the state does not have programs for conjugal visitation or the prisoner does not qualify for claiming such right or for temporary release on parole or furlough.¹⁰⁰

⁹⁵Norman Elliot Ken, "The Legal and Sociological Dimensions of Conjugal Visitation in Prisons", New England Journal on Prison Law, Vol. 2, 1975

⁹⁶Ibid

⁹⁷Ibid

⁹⁸Ibid

⁹⁹Ibid

¹⁰⁰Ibid

2.7. MODERN CONJUGAL VISITS.

Although conjugal programs are still used as an incentive for good behaviour, they are no longer applied as a means to increase work productivity.¹⁰¹ In the early 1900s Mississippi's prisons allowed private female visitors but only for African-American convicts. This was in the racist belief that it would calm their supposedly fiery passions.¹⁰² The world has since moved on from this approach with some researchers arguing that they help rehabilitation. But in America and Britain policymakers look at them with distaste. In September, Qatar's Central Prison unveiled villas for spouses and children to visit married inmates.¹⁰³ Turkish prisons introduced them for the first time earlier this year. Authorities in Costa Rica, Israel and Mexico have in recent years allowed them for homosexual inmates. Even Saudi Arabia and Iran have long allowed them for married prisoners. And many Latin American countries allow private visits for unmarried inmates as well. But only five American states allow them, and in Britain they are banned. State officials in Ohio feared that they would lead to more disease and pregnancies (which touches on another delicate issue: condoms in prisons).¹⁰⁴

Dr Chris Hensley, a criminologist who has advised American prisons, says the phrase conjugal visit has a deviant connotation.¹⁰⁵ Cindy Struck Man-Johnson, of America's National Prison Rape Elimination Commission, says it shunned the issue in its research for fear of stirring up controversy. Paul Nuttall, a British member of the European Parliament, decried a study of the issue as wasteful, complaining that prisoners were already like holiday campers when they should be a punishment.¹⁰⁶ Yet evidence does suggest that conjugal visits not only reduce prison violence but also reduce recidivism by preserving family ties. In Canada, inmates are allowed every two months to spend up to 72 hours in a flat with their spouses, partners, children, parents or in-laws.¹⁰⁷

¹⁰¹Oshinsky, David M.: *Worse Than Slavery: Parchman Farm and the Ordeal of Jim Crow Justice*, Free Press, 1997

¹⁰²Ibid

¹⁰³Bhavana c.m Dhoundiyal and C. Suganya Jeba Sarojini, "conjugal rights of prisoners: imprisonment does not mean farewell to fundamental rights." 2016.

¹⁰⁴Ibid

¹⁰⁵Ibid

¹⁰⁶Ibid

¹⁰⁷Ibid

“We get to cook together, play cards and bingo, and be a family, the children get to know their father”, remarks a female relative of an offender in Ontario.¹⁰⁸ Canada’s Correctional Service has advised the Trinidadian government on creating a similar program.¹⁰⁹ Hence it can be hoped that, as a part of reformation in systems and as per the trends of the changing needs and aspirations of society, this may be considered as part of reformation and process giving a cleaner re-entry slate for an inmate to settle back in his or her life, and not deploying oneself again in the same criminal activity instances.¹¹⁰

In analysing the conjugal visitation in a male prison, it has been affirmed that the intimate moment considers the desire of the one who is visited, but that is conditioned to the desire of the other that is outside; the desire of the inmate is “in the hands” of those who are free, a desire that, in order to materialize, depends much more on the other (the partner on the outside) than on the subject’s own will.¹¹¹ The author considers that in the case of conjugal visitations to men, the “power” is in the hands of the woman, who may not want to be subject to practicing sex in the possible conditions that the prisons offer. But this equation becomes even more complex when the subject deprived of liberty is a woman, since women are much less visited than men, regardless of the manifestation of the desire to receive conjugal visits.¹¹²

In the case of conjugal visits in the prison where the study was carried out, the nuances of what is power, desire, right and freedom assume different and complex connotations that begin with the adherence of a specific nomenclature: “conjugal encounter”.¹¹³ The formal terminology and the one that is used widely is “conjugal visit”, but in study above, another term was discovered, that is “conjugal encounter”.¹¹⁴ Although it was reported that there is no difference between the two terms, in empirical reality “conjugal visit” and “conjugal encounter” differ not by the purpose in itself, since both allow sexual activity,

¹⁰⁸Ibid

¹⁰⁹Ibid

¹¹⁰Bhavana c.m Dhoundiyal and C. Suganya Jeba Sarojini, “conjugal rights of prisoners: imprisonment does not mean farewell to fundamental rights.” 2016.

¹¹¹Natasha Maria Wangen Krahn, Jalusa Silva De Arruda and Jussara Carneiro costa, “Conjugal Visits in the Context of Incarceration of Women and Girls in the State of Bahia, Brazil: Permissions, Prohibitions and (In) Visibilities.” 2019

¹¹²Ibid

¹¹³Ibid

¹¹⁴Ibid

but due to the condition of the visitor. “Conjugal visit” is commonly adopted when the visitor is a partner who is not in prison, whose situation is quite rare.

As indicated, women are far less visited than men and it is not uncommon for their husbands and mates not to continue their relationships when women are arrested.¹¹⁵ The abandonment by husbands and companions is a statement widely found in studies that deal with incarcerated women, since it is rare for men to accompany their intimate partners/wives during the period of deprivation of liberty. Thus, having a companion who visits her in prison and who is willing to engage in conjugal-sexual activity in the prison is seen as a “privilege” among women prisoners.¹¹⁶

On the other hand, “conjugal encounter” is used for encounters provided between prison establishments (male and female) so that prisoners who have relationships can have a moment of intimacy together.¹¹⁷ In this case, both are deprived of their liberty and the possibility of sexual intimacy is given by the intermediation and permission of the male and female prison establishments. The “conjugal encounter” does not enhance the symbolic sense of the visit because both the woman and the man are incarcerated and deprived of the possibility of having (heterosexual) sexual intercourse. There is no need to talk about visitation when both are imprisoned, and in the investigated prison it is the conjugal encounter that happens more frequently, because it is not the freedom that is at stake, but only the desire.¹¹⁸

2.8. CONCLUSION.

This chapter looked at the rights of inmates with a focus on conjugal and other related rights and it has found that, the origins of conjugal visits had more to do with encouraging work than preserving marital relationships. The earliest program dates back to 1918 when James Parchmann, the warden at Mississippi State Penitentiary, introduced conjugal visits as an incentive for inmates to work harder. Sex was used as the proverbial

¹¹⁵Natasha Maria Wangen Krahn, Jalusa Silva De Arruda and Jussara Carneiro costa, “Conjugal Visits in the Context of Incarceration of Women and Girls in the State of Bahia, Brazil: Permissions, Prohibitions and (In) Visibilities.”

2019

¹¹⁶Ibid

¹¹⁷Ibid

¹¹⁸Ibid

dangling carrot for increasing inmate productivity. Bringing a man to his own circle, a family in fact, was a step towards restoring him in the civilization.

Finally, this chapter looked at modes of conjugal association and it highlighted that conjugal association can be established when a prisoner is allowed to spend some time with his spouse or family in privacy. During incarceration, conjugal rights can be enjoyed by the prisoner if the state has provisions for allowing 'conjugal visits' in jails. The state provides infrastructure such as separate rooms or cottages in a separate designated area within the premises of the facility where the inmate and his or her family is allowed private time. This visit may continue for hours or days depending upon the policy of concerned the state. The state also provides facilities like separate washrooms, linen etc. for the prisoner and his family. Thus, an inmate and his or her family can continue to enjoy private family during the period of incarceration.

CHAPTER THREE

EXAMINATION OF THE INTERNATIONAL BEST PRACTICES GOVERNING HUMAN RIGHTS AND CONJUGAL VISITS FOR INMATES.

3.0. INTRODUCTION

Deprivation of liberty to a large extent complicates, restricts or even removes the possibility that individuals can assert their human rights.¹¹⁹ This certainly does not mean that a person in detention legally forfeits all his rights merely because of his status as a prisoner.¹²⁰ In this respect human rights law is even more complicated in respect of inmates than it already is in relation to free individuals. Perhaps the real difficulty concerns not so much which human rights prisoners have, but rather on the obligations that rest on the state to protect those rights. Where the assurance of a human right to a free individual often only demands that the state does not breach the right, in case of a prisoner this will usually also require that the authorities actively shape the preconditions under which the prisoner can actually enjoy the right.¹²¹

3.1. PRESERVATION OF HUMAN RIGHTS IN PRISONS: A MINIMUM BASIC PRINCIPLE

An intrinsic and therefore inevitable consequence of imprisonment is the loss of the right to liberty.¹²² Although deprivation of liberty often to a certain degree forms an obstacle to the enjoyment of other rights too, this does not as such mean that authorities are permitted also to deny those rights to prisoners. Several international soft law instruments confirm this. **Principle 5** of the **United Nations Basic Principles for the Treatment of Prisoners**¹²³ (1990) states that, 'except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and

¹¹⁹Van Kempen, "Positive Obligations to Ensure the Human Rights of Prisoners." 2008

¹²⁰Ibid

¹²¹Ibid

¹²²Ibid

¹²³United Nations Basic Principles for the Treatment of Prisoners of 1990

fundamental freedoms set out in the **Universal Declaration of Human Rights**¹²⁴ and other core human rights treaties.

Moreover, the **United Nations Standard Minimum Rules for the Treatment of Prisoners (2015)**¹²⁵ affirms in **Rule 3** that, ‘the prison system shall not, except as incidental to justifiable segregation or the maintenance of discipline, aggravate the suffering inherent in such a situation’. The principle that prisoners retain all rights apart from the right to liberty can also be found in several regional soft law instruments. For example, **Rule 2** of the **European Prison Rules (2020)**¹²⁶ states that, ‘Persons deprived of their liberty retain all rights that are not lawfully taken away by the decision sentencing them or remanding them in custody’. More specific is **Principle VIII** of the recently approved **Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (2008)**,¹²⁷ which provides that, ‘Persons deprived of liberty shall enjoy the same rights recognized to every other person by domestic law and international human rights law, except for those rights which exercise is temporarily limited or restricted by law and for reasons inherent to their condition as persons deprived of liberty’.

And in the **Kampala Declaration on Prison Conditions in Africa of 1996**¹²⁸ the second recommendation on prison conditions provides that, ‘prisoners should retain all rights which are not expressly taken away by the fact of their detention’. Furthermore, that the suffering inherent in imprisonment shall not be aggravated by the regime in prison. **Rule 5** of the **European Prison Rules 2006**¹²⁹ specifies: ‘Life in prison shall approximate as closely as possible the positive aspects of life in the community’.

These soft law principles have largely been affirmed in the international and regional case law on the main human rights conventions. This is of major importance, for those conventions are legally binding upon the states which are a party to them.

¹²⁴Universal Declaration of Human Rights (adopted 10 December 1948)217 A(III) (UNGA)

¹²⁵United Nations Standard Minimum Rules for the Treatment of Prisoners 1957

¹²⁶ European Prison Rules 2020

¹²⁷Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas of 2008

¹²⁸Kampala Declaration on Prison Conditions in Africa of 1996

¹²⁹Ibid

International and regional opinions and decisions on these conventions must in the least be considered as authoritative interpretations which cannot be set aside by any of the state parties without good reason.¹³⁰ And as far as the European, African and Inter-American Courts of human rights are concerned, their decisions are unconditionally legally binding on the parties to the case in which they are rendered.¹³¹ With this in mind it is important to note that the Human Rights Council (HRC) holds that ‘Persons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment’. No less significantly, the Council goes on to state that ‘no penitentiary system should be only retributory; it should essentially seek the reformation and social rehabilitation of the prisoner’.¹³²

The Grand Chamber (GC) of the European Court of Human Rights (ECtHR) repeatedly emphasized ‘that prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty’.¹³³ The Court has confirmed that a difference in treatment between prisoners and free individuals is discriminatory if it has no objective and reasonable justification.¹³⁴ Restrictions of human rights with regard to prisoners may be justified for reasons of security, in particular the prevention of crime and disorder. The Inter-American Court of Human Rights (I-ACtHR) stresses that ‘impairment of rights arising from the deprivation of liberty or as its collateral effect, must be strictly minimized’ and that deprivation of liberty may not result in suffering exceeding the unavoidable level of suffering inherent in detention.¹³⁵

In its ‘Resolution on Prisons in Africa,’ the African Commission on Human and Peoples’ Rights (AfCHPR) considers ‘that the rights established and guaranteed under the African Charter on Human and Peoples’ Rights extend to all categories of persons including prisoners, detainees and other persons deprived of their liberty’.¹³⁶ It is thus an accepted principle of international human rights law that prisoners enjoy the same human rights as

¹³⁰Van Kempen, “Positive Obligations to Ensure the Human Rights of Prisoners.”2008

¹³¹Ibid

¹³²Ibid

¹³³Ibid

¹³⁴Ibid

¹³⁵Ibid

¹³⁶Van Kempen, “Positive Obligations to Ensure the Human Rights of Prisoners.”2008

free individuals except for the right to liberty, and that it is the duty of the state to ensure that those rights are protected.

In addition to the state's obligation to protect prisoners' human rights with the specific intention of reformation and social rehabilitation, there appears to be an added layer of duty due to the fact that prisoners are in a vulnerable position of major helplessness due to their incarceration. This includes the obligation to prevent prisoners suffering that goes beyond the unavoidable level of suffering inherent to detention. At the same time, however, the basic principle is subject to several limitations.¹³⁷

All acceptable limitations to the basic principle lower the standard the principle initially sets, and they therefore must be taken into consideration when establishing what human rights standard is minimally required in prison.¹³⁸ Firstly, restrictions that are unavoidable in a closed environment are permitted. Although at first glance this appears to be a logical inevitability. However, an in depth reflection reveals that it is actually not very clear what parameters ought to be used to determine whether a restriction is unavoidable or inherent to imprisonment. The question therefore remains whether this exception to the basic principle is of an objective and purely factual nature or partly subjective and normative in substance.

A second limitation to the basic principle is that the state may limit the rights of inmates in the interest of security and the maintenance of order.¹³⁹ This exception appears to be purely subjective and consequently its scope is vague. What constitutes "interest of security" and "maintenance of order" is not defined and is subject to interpretation. Additionally, it does not expressly include conditions of proportionality and necessity. Although this does not indicate that the state is totally unbound in this way, it gives the state a lot of latitude when applying this exception.¹⁴⁰

Notwithstanding the exceptions highlighted above, the significance of the established principle cannot be overemphasised and ought to be protected, respected and fulfilled by

¹³⁷Ibid

¹³⁸Ibid

¹³⁹Ibid

¹⁴⁰Van Kempen, "Positive Obligations to Ensure the Human Rights of Prisoners."2008

the state. And limitations only applied when it is absolutely justifiable under the law weighed with reasonableness and necessity.

3.2. OBLIGATIONS TO SECURE THE SAFETY OF PRISONERS.

Of paramount importance for the wellbeing of prisoners is the obligation on states to protect them against all forms of violence and ill-treatment by other detainees.¹⁴¹ Although this positive obligation is not expressly provided for in any of the general human rights instruments, all of them are being interpreted and applied in such a way that they require the state to afford such protection.¹⁴² The **International Covenant on Civil and Political Rights (ICCPR)**¹⁴³ contains several provisions that have been used by the Human Rights Council to formulate state obligations to protect prisoners against each other as well as against themselves. Especially relevant is **article 6 (1)**, which demands that the right to life 'shall be protected by law', and **article 10(1)**, which stipulates that 'All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person'. In the case of **Barbato v Uruguay**,¹⁴⁴ it was stated that protection of the right to life places an obligation on the state to take adequate measures to protect the life of a prisoner against suicide, forced suicide and killing by others while in custody.¹⁴⁵

In the case of **Daley v Jamaica**,¹⁴⁶ the state neglected to take measures to protect the complainant, who was assaulted regularly by other inmates. It was held that this neglect constituted a breach of article 10 (1) of the ICCPR. The rationale of this duty to protect prisoners is that they are particularly vulnerable because of their status as persons deprived of liberty¹⁴⁷ and that the state party, by arresting and detaining individuals, takes on the responsibility to care for their life wellbeing and the dignity of the person.¹⁴⁸ In this

¹⁴¹Ibid

¹⁴²Ibid

¹⁴³International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)

¹⁴⁴HRC, View of 21 October 1982, Comm. 84/1981, para 9.2 and 10(a)

¹⁴⁵HRC, View of 21 October 1982, Comm. 84/1981, para 9.2 and 10(a)

¹⁴⁶HRC, View of 31 July 1998, Comm. 750/1997, para 7.6

¹⁴⁷HRC, General Comment No. 21 'Humane treatment of persons deprived of liberty (art. 10)', 10 April 1992, para 3

¹⁴⁸(Fabrikant v. Canada). HRC, View of 6 November 2003, Comm. 970/2001, para 9.3

regard, it is incumbent on the state to resolve issues that may exacerbate the wellbeing of prisoners such as overcrowding and to segregate different categories of detainees.

Similar positive state obligations can be found in the decisions on the regional human rights bodies of Europe, the Americas and Africa. These decisions usually explain the obligations of the state in a more detailed and precise manner.¹⁴⁹ For example, in the case of **Paul & Audrey Edwards v the United Kingdom**,¹⁵⁰ the European Court held that in appropriate circumstances the state authorities have a positive obligation ‘to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual’. The protection of prisoners is part of this obligation. In the same way States have a duty to protect detainees against suicide and self-harm. Both duties are based on the provision: ‘Everyone’s right to life shall be protected by law’ as provided under **article 2 (1) of the European Convention on Human Rights**. However, on the basis of, inter alia, the prohibition that ‘no one shall be subjected to torture or to inhuman or degrading treatment or punishment’ **article 3 of the European Convention on Human Rights**, states are also required to protect all individuals including prisoners against non-lethal violence by private parties.

This includes the obligation to prevent prison rape, since rape constitutes inhuman treatment according to **article 3 of the European Convention on Human Rights**.¹⁵¹ The obligations apply when the authorities ‘knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party’.¹⁵² Although the obligation to protect individuals against violence by others applies with regard to all individuals alike, these conditions are more likely to be encountered in the context of prisoners. This is because state officials have more control over both the victim and the perpetrator of violence in a prison setting than they do in free society, and are therefore better placed to learn about tensions between individuals.

¹⁴⁹Van Kempen, “Positive Obligations to Ensure the Human Rights of Prisoners.”2008

¹⁵⁰ECtHR, Judgment of 14 March 2002, Appl. 46477/99, para 54-56

¹⁵¹Ibid

¹⁵²(Paul & Audrey Edwards v. the United Kingdom), ECtHR, Judgment of 14 March 2002, Appl. 46477/99, para 55

Furthermore, the rationale of the duty of the authorities to protect prisoners differs slightly from that of the duty to protect individuals within society.¹⁵³

It is this authority over inmates that places the responsibility of their safety upon the state.¹⁵⁴ Thus if a risk of violence occurs, the state has ‘to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk’. Such measures have been held to include the screening of prisoners, segregation of dangerous detainees, and supervising detainees.¹⁵⁵ In case of a risk of suicide or self-harm, adequate measures include: monitoring of the prisoner, regular doctor’s visits, assessment and treatment by a psychiatrist, administration of medication, availability to the prisoner of an alarm mechanism, withholding alcohol and drugs, and restraint in disciplinary punishments.¹⁵⁶

Under **article 4** of the **American Convention on Human Rights**,¹⁵⁷ the right to life encompasses the effective protection of personal safety of all inmates and shall be protected by law and includes the right to humane treatment, i.e., ‘the right to have his physical, mental, and moral integrity respected’ as provided under **article 5(1)**¹⁵⁸ **American Convention on Human Rights**. The state has an obligation to guarantee security and maintain public order, especially within the prisons.¹⁵⁹ According to the Inter-American Court, the basis of this duty is that the state is presumably responsible for what happens to those who are in its custody.¹⁶⁰

In order to execute the duty to protect detainees and fulfil its role as ‘guarantor’ of rights the state should utilize all possible means to reduce the level of violence and adopt all appropriate measures to guarantee the rights to life and humane treatment.¹⁶¹ Those measures and their implementation must be effective. More specifically, measures the

¹⁵³Van Kempen, “Positive Obligations to Ensure the Human Rights of Prisoners.”2008

¹⁵⁴Ibid

¹⁵⁵Ibid

¹⁵⁶Keenan v. the United Kingdom, ECtHR, Judgment of 3 April 2001, Appl. 27229/95, para 97-99 and 114-116

¹⁵⁷Ibid

¹⁵⁸Ibid

¹⁵⁹Miguel Castro-Castro Prison v. Peru, I-ACtHR, Judgment of 25 November 2006, para 240

¹⁶⁰Urso Branco Prison v. Brazil, I-ACtHR, Order of 7 July 2004 (Provisional Measures), ‘Considering’ para 6

¹⁶¹Van Kempen, “Positive Obligations to Ensure the Human Rights of Prisoners.”2008

state can be obligated to undertake are confiscation of weapons possessed by inmates, prevention of riots which can be triggered by unsatisfactory security, infrastructure, conditions of incarceration, and health and hygiene, acceptable space for each inmate, changes in surveillance patterns, physical segregation of different categories of inmates, and the devising and application of a prison policy that prevents crises.¹⁶² Preventive measures have priority over repressive ones.

Finally, in cases of mass killings the African Commission has recognized the state duty under the **African Charter on Human and Peoples' Rights** to protect the life and safety of all citizens against violence and damaging acts by non-state actors. Since the duty applies to all citizens, it includes the obligation to protect detainees against violence by other prisoners.¹⁶³ Furthermore, this would be in keeping with the principle that the State's responsibility for someone's integrity and wellbeing 'is heightened in cases where an individual is in its custody'. This principle is explained by the complete dependence of prisoners on the actions of the authorities.¹⁶⁴ The right to 'life and the integrity of the person' in **article 4**, the prohibition of 'torture, cruel, inhuman or degrading punishment and treatment' in **article 5**, and 'the right to liberty and to the security of his person' in **article 6** of the **African Charter on Human and Peoples Rights** can in particular serve as a basis for the obligation.

Each with a slightly different argument, the regional human rights bodies make it clear why the duty to protect individuals is in general more urgent in the case of prisoners than in that of free persons.¹⁶⁵ The state's obligation to protect detainees against lethal violence and inhuman treatment by other prisoners as well as against suicide and self-harm has thus been broadly acknowledged in the jurisprudence on the main international and regional human rights conventions. All the rights involved, the right to life, the prohibition of torture and inhuman treatment, and the right to humane treatment of prisoners are absolute and in addition, save for **article 10¹⁶⁶ of the ICCPR** are non-derogable. This means that there is no margin to depart from the basic principle that

¹⁶²Ibid

¹⁶³Van Kempen, "Positive Obligations to Ensure the Human Rights of Prisoners."2008

¹⁶⁴Ibid

¹⁶⁵Van Kempen, "Positive Obligations to Ensure the Human Rights of Prisoners."2008

¹⁶⁶International Covenant on Civil and Political Rights

prisoners enjoy all the same human rights as free individuals, except for the right to liberty, and that the authorities thus have an obligation to protect, respect and fulfil those human rights in prison.

Hence, the limitation to the principle that those rights are subject to the restrictions that are unavoidable in a closed environment or necessary in view of security and the maintenance of order cannot apply, given the absolute character of the rights involved.¹⁶⁷ What is more: States cannot invoke lack of material resources to justify a defective performance of this duty. Although the collected jurisprudence of the aforementioned human rights bodies on the duty to protect prisoners is not identical in every case, it is clear that they are very closely attuned. Where differences occur, they are primarily about the way in which the duty is elaborated.¹⁶⁸

Thus, the conditions under which the duty applies are fairly precisely expounded in the jurisprudence of the European Court, while the Inter-American Court is more specific about the measures that states have to take in order to comply with the duty.¹⁶⁹ But in essence the different jurisprudence collections do not reveal a different approach to the substance of the conditions under which the duty applies, the measures required to fulfill it, and the scope of the duty.¹⁷⁰ As a consequence, the acknowledgement of the duty to protect prisoners on the basis of the **ICCPR**, the **ECHR**, the **ACHR** and the **AfChHPR** confirm and strengthen each other. This makes it possible to adopt a unified view of the jurisprudence of the distinct human rights bodies on this duty. Together, the jurisprudence collections offer a more or less full picture of what the duty entails. As a result, the jurisprudence on this duty of all these bodies is ultimately relevant to each and every state.¹⁷¹

3.3. OBLIGATIONS TO PROVIDE PRISONERS WITH HEALTHCARE.

The right to healthcare is of critical importance given the often congested conditions in prisons and the inability of prisoners to be able to access healthcare of their choice. The

¹⁶⁷Van Kempen, "Positive Obligations to Ensure the Human Rights of Prisoners."2008

¹⁶⁸Ibid

¹⁶⁹Ibid

¹⁷⁰Ibid

¹⁷¹Van Kempen, "Positive Obligations to Ensure the Human Rights of Prisoners."2008

duty to protect detainees against suicide and self-harm illustrates that safety and healthcare can be closely related.¹⁷² Furthermore, the Human Rights Council has held that a failure to separate detainees with communicable diseases from other detainees could raise issues primarily under the right to life and the right to humane treatment of prisoners.¹⁷³ Proper healthcare can help to prevent violence against prisoners, by systematically keeping track of injuries and by communicating information to the prison authorities.

However, even in situations where such a relation between safety and health-care does not clearly exist, the authorities can be required to offer medical and psychiatric assistance and remedies.¹⁷⁴ Insofar as withholding such care might cause the prisoner death or inhuman suffering, a duty to offer health-care is in conformity with the duty to ensure the safety of prisoners. In both cases the positive obligation rests primarily on the fact that the State has brought someone into a situation in which he cannot provide for his own health or safety as well as he generally would be able to in free society.¹⁷⁵

It is therefore perfectly in line with the minimum basic principle that authorities are obligated actively to provide measures of healthcare as a compensation for the unintended consequences of imprisonment.¹⁷⁶ So, for example, the Human Rights Committee found a violation of the right to life **article 6 (1)** of the **ICCPR** in the case of **Lantsova v Russia**,¹⁷⁷ in which the son of the applicant died in prison because the authorities had not taken appropriate medical measures when his health deteriorated dangerously. The European Court has it made clear that denying psychiatric care may contravene the prohibition of torture and inhuman treatment as provided under **article 37** of the **European Convention on Human Rights**, if this causes the detainee suffering that could be classified as inhuman or degrading. In conformity with the basic principle, moreover, is that the duty to provide healthcare to prisoners is not limited to situations in

¹⁷²(Cabal & Pasini v. Australia), HRC, View of 7 August 2003, Comm. 763/1997, para 7.7

¹⁷³(Lantsova v. Russia), HRC, View of 26 March 2002, Comm. 763/1997, para 9.2

¹⁷⁴Van Kempen, "Positive Obligations to Ensure the Human Rights of Prisoners."2008

¹⁷⁵Ibid

¹⁷⁶Van Kempen, "Positive Obligations to Ensure the Human Rights of Prisoners."2008

¹⁷⁷HRC, View of 26 March 2002, Comm. 763/1997, para 9.2

which the detainees' condition that needs treatment is caused in or is due to his stay in prison.¹⁷⁸

The obligation, for example, also applies to prisoners who were already ill before their liberty was taken away. The **ICCPR** does not expressly provide for a right to health care. Still, proceeding from the **article 6** of the **ICCPR** on the right to life, **article 7** of the **ICCPR** on the prohibition of torture or to cruel, inhuman or degrading treatment or punishment', and the **article 10 (1)** of the **ICCPR** on the right to humane treatment of prisoners, the Human Rights Committee took the stance that 'adequate' or 'appropriate' and timely medical care must be available to all detainees. The Committee held that 'free access to doctors' should be guaranteed in practice, immediately after arrest and during all stages of detention.¹⁷⁹ That, however, does not necessarily mean that prisoners are free to choose a particular medical treatment. Ultimately, the authorities are only compelled to provide for the most appropriate treatment 'in accordance with professional medical standards.'¹⁸⁰

At the same time, appropriate and timely medical care must be offered even if it is not requested by the prisoner.¹⁸¹ What is more, at least under the right to life, the states are required 'to know about the state of health of the detainees as far as may be reasonably expected'. Lack of financial means does not reduce this responsibility. Those duties reach beyond the situation in which the life of the prisoner is in danger or in which he will suffer inhumanely without health care.¹⁸² The **article 10 (1) ICCPR** right to be treated with humanity and with respect for the inherent dignity of the human person, has a broader meaning than the right to life and the right not to be tortured or ill-treated, while it still includes the right to adequate medical care during detention.

So, for example, denying healthcare to a prisoner who suffers from skin disease and from recurrent stomach pains constitutes a violation of **article 10 (1)** of the **ICCPR**. By contrast, the **ECHR** which contains no explicit right to healthcare either, nor an equivalent to **article**

¹⁷⁸Aerts v. Belgium, ECtHR, Judgment of 30 July 1998, Appl. 25357/94, para 64-66.

¹⁷⁹Fabrikant v. Canada, HRC, View of 6 November 2003, Comm. 970/2001, para 9.3.

¹⁸⁰Fabrikant v. Canada, HRC, View of 6 November 2003, Comm. 970/2001, para 9.3.

¹⁸¹Ibid

¹⁸²Ibid

10 (1)¹⁸³ **ICCPR** does not generally demand health-care for detainees when there is no life threatening situation or suffering which is at least inhuman. Only within the boundaries of the right to life in **article 2**¹⁸⁴ **ECHR**, and the prohibition of inhuman treatment in **article 3**¹⁸⁵ **ECHR**, are States duty-bound, given the practical demands of imprisonment, to secure the health of prisoners in an adequate and timely fashion by, among other things, providing them with requisite medical assistance.

The Court does not seem to be willing to stretch the right to life and the prohibition of inhuman treatment in order to broaden the right to healthcare. So, in the case of **Rehbock v Slovenia**¹⁸⁶ the applicant, a German body-building champion, suffered from headaches. Prison staff refused to provide him with painkilling medication on several occasions, but since this did not amount to treatment contrary to **article 3**¹⁸⁷ **ECHR**, there was no obligation under the European Convention to supply painkillers. In the more serious case of **Melnik v Ukraine**,¹⁸⁸ **article 3** was breached, however, because the complainant did not receive the necessary medical treatment and assistance for tuberculosis in timely and adequate fashion while serving his sentence.

Besides that, the authorities might have a positive obligation under **article 2**¹⁸⁹ **ECHR** or **article 3**¹⁹⁰ **ECHR** to eradicate or prevent the spread of a particular disease or infection. However, in principle they have a substantial margin of appreciation in this regard. And insofar as a health threat falls outside the scope of these provisions, the right to respect for private life in **article 8**¹⁹¹ **ECHR** does not demand that general preventive healthcare measures be taken, either. Consequently, in the recently decided case of *Shelley versus the United Kingdom* the authorities were not required to replace the supply to inmates of agents to disinfect needles for the use of drugs with more effective needle exchange schemes. Furthermore, the European Convention does not lay down a general obligation

¹⁸³International Covenant on Civil and Political Rights

¹⁸⁴European Convention on Human Rights

¹⁸⁵*Ibid*

¹⁸⁶*Rehbock v. Slovenia*, ECtHR, Judgment of 28 November 2000, Appl. 29462/95, para 80

¹⁸⁷European Convention on Human Rights

¹⁸⁸*Melnik v. Ukraine*, ECtHR, Judgment of 28 March 2006, Appl. 72286/01, para 104-106

¹⁸⁹European Convention on Human Rights

¹⁹⁰*Ibid*

¹⁹¹*Ibid*

to release a detainee on health grounds or to place him in a civil hospital to enable him to obtain a particular kind of medical treatment.¹⁹²

Prisoners do not appear to have a real right to choose a particular medical treatment under the **ECHR**, which the **ICCPR** does not afford them either, although the prisoner's choice of physician should as a rule be respected.¹⁹³ Support for the conclusion that prisoners lack a right to choose a particular medical treatment can be found in the fact that States are allowed to transfer a prisoner to another facility in order to provide for the necessary medical treatment. In the case of **Matencio v France**,¹⁹⁴ the applicant did not want to be transferred because the facility to which he was going to be transferred for an indeterminate period of time was a long way from where his family lived. The European Court held that the state did not contravene the rights of the applicant by not offering him the necessary healthcare in the prison in which he was staying at that time. The approach by the European Court is quite understandable. Since the right to healthcare is not explicitly part of the **ECHR**, the question for the Court to answer is not whether this right is complied with but whether denial of healthcare constitutes a violation of the right to life or the prohibition of inhumane treatment.¹⁹⁵

3.4. OBLIGATIONS TO MAKE PROVISION FOR CONJUGAL VISITS AND BEGETTING CHILDREN.

Deprivation of liberty greatly influences the opportunity for prisoners as well as their relatives to enjoy their rights to private life, family life, and the possibility to found a family. All of these rights are covered by the **ICCPR**, the **ECHR** and the **ACHR**.¹⁹⁶ The African Charter, by contrast, at most only indirectly provides for some aspects of them.¹⁹⁷ The several UN, European and American provisions in which the rights are contained are mostly derogable and none of them are absolute. Their character differs in that respect quite fundamentally from most human rights provisions discussed above. This nonetheless does not mean that the rights to private life, family life and founding a family

¹⁹²Shelley v. the United Kingdom, ECtHR, Decision of 4 January 2008, Appl. 23800/06, para 1.

¹⁹³Mathew v. the Netherlands, ECtHR, Judgment of 29 September 2005, Appl. 24919/03, para 186 and 187 (

¹⁹⁴ ECtHR, Judgment of 15 January 2004, Appl. 58749/00, para 82-90

¹⁹⁵ECtHR, Judgment of 15 January 2004, Appl. 58749/00, para 82-90

¹⁹⁶Van Kempen, "Positive Obligations to Ensure the Human Rights of Prisoners."2008

¹⁹⁷Ibid

can simply be ignored by the prison authorities. Generally, restrictions to these rights must be provided by law, serve a legitimate aim and meet a high standard of necessity.¹⁹⁸

This applies equally within and outside prison.¹⁹⁹ Furthermore, the minimum basic principle that persons continue to enjoy all human rights following conviction save the right to liberty only allows for limitations that are unavoidable in a closed environment or necessary in view of security and the maintenance of order. To consider the meaning and scope of this principle it is worth exploring whether prisoners under the aforementioned rights should be offered a possibility to engage in intimate conjugal contacts with non-detained partners and to beget children.²⁰⁰ None of the human rights treaties discussed here contain any formulations concerning consummation of marriage or conjugal visits. Nevertheless, sexual relations between consenting adult partners fall indisputably within the boundaries of the right to private life.²⁰¹

State-caused limitations on the possibility for adult prisoners to have a consenting sexual relationship with other adults therefore imply a restriction of the right to a private life.²⁰² Furthermore, in case the limitation concerns a relationship within the concept of the family, it may also restrict the right to family life, and possibly also the right to found a family. However, none of this actually means that States have a general obligation under international human rights law to provide prisoners with the opportunity to have intimate contacts with other adults. The juris- prudence is developing, however. In State Reports to the Human Rights Council, the allowance of and pro- vision for conjugal visits has been presented as a fulfilment of the obligation to secure humane living conditions and treatment of prisoners.²⁰³

More importantly, considering **article 7** and **article 10** of the **ICCPR**, the Council holds that States parties must ensure that the rights of persons deprived of their liberty are protected on equal terms for men and women. Differences between male and female prisoners regarding access to conjugal and family visits do not seem to be acceptable in

¹⁹⁸Ibid

¹⁹⁹Ibid

²⁰⁰Ibid

²⁰¹Toonen v. Australia, HRC, View of 31 March 1994, Comm. 488/1992, para 8.2

²⁰²Dudgeon v. the United Kingdom, ECtHR, Judgment of 22 October 1981, Appl. 7525/76, para 41

²⁰³Ibid

this regard.²⁰⁴ The right to conjugal visits does not seem to have been addressed as such by the Committee. By contrast, the European Court was forced to take a general stance on conjugal visits. In the case of **Aliev v Ukraine**,²⁰⁵ the applicant submitted that his right to respect for his private and family life had been violated for he had been deprived of any intimate contact with his wife.²⁰⁶ The Court considered ‘that while detention is by its very nature a limitation on private and family life, it is an essential part of a prisoners right to respect for family life that prison authorities assist in maintaining effective contact with his or her close family members’.

Denying prisoners intimate visits may anyhow ‘for the present time be regarded as justified for the prevention of disorder and crime’ within the meaning of **article 8 (2) ECHR**. This judgment implies that a right to intimate visits is part of the right to private and family life under **article 8 (1) ECHR**, but that a blanket ban on such visits is unconditionally accepted by the Court under this provision. At the time of writing, therefore, the Court appears unwilling to demand from states that the denial of the right is in accordance with the law, serves a legitimate aim and is necessary in every separate case.²⁰⁷ Hence, the right does not in fact exist under the European Convention. Consequently, States have no obligation whatsoever to make provision for such visits. Yet at the same time the Court makes it clear that a right to intimate visits and a positive obligation to provide facilities for them might in the future be recognized under the right to private and family life.²⁰⁸

Meanwhile, the Court lauds the reform movements in several European countries to improve prison conditions by facilitating conjugal visits.²⁰⁹ An approving attitude to offering prisoners facilities for intimate visits can also be detected in the case law on the Inter-American Convention on Human Rights. Indeed, at present a right to such visits is not acknowledged under this human rights instrument either.²¹⁰ Nevertheless, the Inter-American Commission has consistently held that the state is obligated to facilitate contact

²⁰⁴HRC, General Comment No. 28 ‘Equality of rights between men and women (art. 3)’, 29 March 2000, para 15.

²⁰⁵Aliev v. Ukraine, ECtHR, Judgment of 29 April 2003, Appl. 41220/98, para 187

²⁰⁶Ibid

²⁰⁷Van Kempen, “Positive Obligations to Ensure the Human Rights of Prisoners.”2008

²⁰⁸Ibid

²⁰⁹Raxcacó-Reyes v. Guatemala, Judgment of 15 September 2005, para 125, 135

²¹⁰Ibid

between the prisoner and his or her family. When a State voluntarily fulfils this obligation by allowing intimate visits it may not restrict this possibility, impose conditions or conduct procedures that constitute an infringement of any of the other rights protected by the American Convention.²¹¹ First of all this means that the authorities may not discriminate between inmates in different facilities or between male and female inmates in their policy on intimate visits.²¹²

It might also imply that authorities are forbidden to deny homosexuals conjugal visits where they are allowed for unmarried hetero- sexual couples.²¹³ Furthermore, if conjugal visits are allowed the authorities are obligated to take the measures necessary to allow such visits to take place in conditions which are reasonable.²¹⁴ Non-fulfilment of these obligations can amount to an undue interference with the **American Convention on Human Rights**. So, requiring a vaginal search or inspection of a visitor each time the prisoner wished to have a personal contact visit with that person can constitute a violation of the right 'to protection by society and the state' of the family in **article 17** of the **American Convention on Human Rights**.²¹⁵ A violation of the may also occur when a prisoner is on an unlawful basis denied family and conjugal visits as a form of punishment.

Article VI of the **American Declaration of the Rights** states that '[e]very person has the right to establish a family, the basic element of society, and to receive protection there-fore'. On the basis of this provision, the Inter-American Commission appears to acknowledge that prisoners have a right to conjugal visits as such, which right can only be limited if there are sufficient reasons to do so. In the case of **Oscar Elías Biscet et al. v Cuba**,²¹⁶ the authorities had restricted family and conjugal visits for no apparent reason. The consequence of the denial of a right to intimate visits was that prisoners could not enjoy the human right to found a family either. Certainly, this was undeniable so for long time, but modern techniques like artificial insemination imply that prisoners who wish to beget a family can do so without having physical contact. In the case of **Dickson v the**

²¹¹Ibid

²¹²Ibid

²¹³Van Kempen, "Positive Obligations to Ensure the Human Rights of Prisoners."2008

²¹⁴Ibid

²¹⁵Ibid

²¹⁶I-ACionHR, Report of 21 October 2006, No. 67/06, CASE 12.476, para 235-240

United Kingdom,²¹⁷ a prisoner and his wife complained to the European Court of Human Rights about the refusal to afford access to artificial insemination facilities which they argued breached their right to private and family life under **article 8 ECHR** and/or their right to found a family under **article 12 ECHR**. The refusal must indeed be considered a restriction of those rights.²¹⁸

Respect for the decisions to become a parent belongs to the core of the **article 12**, and according to the European Court it also falls within this ambit. The remaining question therefore was whether such restriction is justified. The authorities asserted that it was. They offered three principles as an explanation. First, losing the opportunity to beget children is part and parcel of the deprivation of liberty and an ordinary consequence of imprisonment. With this the government implicitly refers to the restriction clause on inherent limitations.²¹⁹ Secondly, public confidence in the prison system will be undermined if the punitive and deterrent elements of a sentence were to be circumvented by allowing prisoners to conceive children. Thirdly, the inevitable absence of one parent, including that parent's financial and other support, for a long period has adverse consequences for the child and for society as a whole.²²⁰

The European Court, on the other hand, found that the restriction was not justified and that the authorities therefore had violated the right to private and family life.²²¹ The main argument for the violation was that the policy on which the refusal was based effectively excluded any real weighing of the competing individual and public interests, and prevented the required assessment of the proportionality of a restriction, in any individual case.²²² This means that States have a positive obligation to provide prisoners with access to artificial insemination facilities, unless fairly balancing the concrete circumstances in the case at hand indicates that a restriction is called for. It also implies that a restriction of the possibility to beget children may not be regarded as a limitation

²¹⁷ECtHR (GC), Judgment of 4 December 2007, Appl. 44362/04, para 65-66.

²¹⁸ECtHR (GC), Judgment of 4 December 2007, Appl. 44362/04, para 65-66

²¹⁹Ibid

²²⁰Ibid

²²¹Evans v. the United Kingdom, ECtHR, Judgment of 4 December 2007, Appl. 44362/04, para 71-72

²²²Ibid

inherent to imprisonment.²²³ To be sure, this judgment is only about granting access; it does not imply that authorities should at their own expense have to make provision for artificial insemination facilities as such.

In the Dickson case, on artificial insemination facilities, the European Court takes a very different approach from that in the aforementioned Aliev case on conjugal visits. Where conjugal visits may be completely denied, it ought not to be done in a manner that gives a blanket ban on conjugal visits. What is more, the right to intimate visits has to be applied equally to male and female inmates as is confirmed by the Human Rights Committee and Inter-American Commission. In addition, the right to respect for private life, and possibly also the right to family life, appears to require that unmarried couples and same sex couples should also be able to enjoy intimate visits. So, a broad acknowledgement of positive obligations to shape the conditions that allow for intimate visits is called for. Ultimately, there seems to be yet another reason for that: allowing intimate visits might even aid the fulfilment of the duty to protect the safety of prisoners, for such visits can help to prevent prison rape.²²⁴

3.5. CONCLUSION.

This chapter has detailed the international best practices governing human rights of inmates and it can be seen that prisoners enjoy all the same human rights as individuals in the community save the right to liberty, and the authorities have an obligation to actually protect those human rights in prison. This is a basic principle that has been widely recognized in many international and regional instruments and in the jurisprudence of the UN Human Rights Council and the regional human rights bodies within the European, Inter-American, and African human rights systems. Not only is the principle generally accepted in that jurisprudence, but it is also reflected in the interpretation and application by these human rights. Of course, the basic principle may be restricted. The basic principle and the accepted limitations together produce a ‘minimum basic principle’: the human rights standard that is minimally required in prison.

²²³Ibid

²²⁴Van Kempen, “Positive Obligations to Ensure the Human Rights of Prisoners.”2008

Furthermore, this chapter shown that nevertheless, the aforementioned human rights bodies have formulated a large variety of positive obligations with which the State has to comply in order to ensure human rights in prison. As a result, prison authorities have a duty actively to take measures to ensure the safety and health of detainees as a means of compensating the state-caused inability of the individual to take care of himself. Moreover, in order to repair the infringement on the right to family life and the right to found a family as unintentional consequences of the deprivation of liberty, authorities have to cooperate with prisoners who want access to artificial insemination facilities. Hardly any of those obligations are expressly provided for in the International Covenant on Civil and Political Rights, European Convention on Human Rights, American Convention on Human Rights and African Charter on Human and Peoples Rights.

Lastly, this chapter looked at the conjugal visits for inmates and it has found that several European countries have been encouraged to improve prison conditions by facilitating conjugal visits. A budding positive attitude to offering prisoners facilities for intimate visits can also be found in the case law on the Inter-American Convention on Human Rights. Indeed, at present a right to such visits is not acknowledged under this human rights instrument either. Nevertheless, the Inter-American Commission has consistently held that the state is obligated to facilitate contact between the prisoner and his or her family. When a State voluntarily fulfils this obligation by allowing intimate visits it may not restrict this possibility, impose conditions or procedures that constitute an infringement of any of the other protected rights.

CHAPTER 4

DRAWING LESSONS FROM INDIA AND OTHER JURISDICTIONS ON THE PROVISION OF CONJUGAL VISITS FOR INMATES IN ZAMBIA

4.0. INTRODUCTION

The Zambian legal framework is silent on conjugal visits for inmates. This, as a matter of human rights, calls for a serious legal consideration. Such consideration in the legal framework should seek to protect the rights for inmates. This Chapter will draw lessons from various jurisdictions on how conjugal visits for inmates have been implemented. In particular, jurisdictions of focus are India, some countries in Europe and some states the United States of America (USA).

4.1. LEGAL DIMENSIONS OF CONJUGAL RIGHTS OF PRISONERS IN INDIA

4.1.1. CONSTITUTIONAL FRAMEWORK

The United Nations Basic Principles for the Treatment of Prisoners, 1990 states that except for those limitations that are demonstrably 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** and where the State concerned is a party, the **International Covenant on Economic, Social and Cultural Rights**, and the **International Covenant on Civil and Political Rights and the Optional Protocol** thereto, as well as such other rights as are set out in other United Nations covenants.²²⁵ India is a signatory to the **Universal Declaration of Human Rights and the Covenants**. These rights are enshrined in the Constitution in the form of fundamental rights and directive principles of state policy of India.

Article 21 of the Constitution of India guarantees that no person shall be deprived of his life and personal liberty except according to procedure established by law. It includes within its ambit the prisoners also. The Supreme Court of India in the case of **D. Bhuvan Mohan Patnaik and Others v. State of Andhra Pradesh and Others**²²⁶ declared that convicts cannot be denied the protection of fundamental rights which they otherwise possess, merely because of their conviction. It said that a convict whom the law bids to

²²⁵ Principle 5 of the Basic Principles for the Treatment of Prisoners (1990).

²²⁶ AIR 1974 SC 2092.

live in confinement stands denuded of some of the fundamental rights like the right to move freely or the right to practice a profession, but such convict shall continue to enjoy other constitutional guarantees including the precious right guaranteed by **Article 21 of the Constitution**.

Similarly, **Articles 11, 12 and 13 of the Constitution of Zambia**²²⁷ declares that every person in Zambia shall continue to be entitled to the fundamental rights and freedoms of the individual which include life and liberty inter alia, except as may be authorized by established law. This is inclusive of inmates.

The Supreme Court in the case of **Sunil Batra v. Delhi Administration**²²⁸ (popularly known as **Sunil Batra I**) emphatically espoused that it is an onerous duty of the Court to ensure that during detention and subject to Constitution, the detinue does not suffer from any torture. The Supreme Court in this case emphasized the need of social justice by re-orienting, re-visiting and re-humanizing the existing strategies in the context of prisoners. The Court in this case ruled that the condemned prisoners shall be kept in custody and shall not be put to work like those sentenced to rigorous imprisonment. The Court held that convicts shall be entitled to amenities of ordinary inmates in the prison like games; books; newspapers; reasonably good food; right to expression, artistic and other; and normal clothing and bedding.

Two years later, the Supreme Court in the case of **Sunil Batra v. Delhi Administration**²²⁹ (popularly known as **Sunil Batra II**) in its holding, liberated inmates from the atrocities inflicted through mental torture, psychic or physical pressure and brought about radical changes in prison conditions like (i) separation of under-trials from convicts in jails; (ii) their right to invoke **Article 21 of the Constitution**; (iii) separation of young inmates from adults; (iv) liberal visits by family and friends of prisoners; (v) ban on confinement in irons; (vi) duties and obligations of the Courts with respect to rights of prisoners; and (vii) re-defining the duties of District Magistrate etc. The Supreme Court in this case pointed out

²²⁷ The Constitution of Zambia, Chapter 1 of the laws of Zambia

²²⁸ AIR 1978 SC 1675.

²²⁹ (1980) 3 SCC 488.

various maladies in the jail precincts including the victimization of young inmates at the hands of adults.

In the case of *Francis Coralie Mulin v. The Administrator, Union Territory of Delhi*,²³⁰ the Supreme Court expanded the expression “personal liberty” embedded in **Article 21 of the Constitution** in the context of the rights of a detainee and it held that the prisoner or detainee has all the fundamental rights and other legal rights available to a free person, save those which are incapable of enjoyment by reason of incarceration. The Court held that no law which authorizes and no procedure which leads to cruel, inhuman or degrading treatment can ever stand the test of reasonableness and non-arbitrariness and thus would plainly be void and violative of **Articles 14 and 21**.

Additionally, there are various other landmark judgments wherein wide connotation is given to the prisoner’s rights within the walls of a prison. For example, in the case of *State of Maharashtra v. Prabhakar Pandurang Sangzgiri and Another*²³¹, the Supreme Court held that the detainee has a right of publication of his books; in *Sheela Barse v. State of Maharashtra*,²³² the Court reiterated the right to legal aid to under trial and convicted persons and issued directions for providing fast and efficient legal assistance to prisoners in jail and to provide protection to women prisoners in lock-ups to name a few.

The above judicial precedents are true milestones in recognizing the constitutional rights of prisoners that have been incidental to the recognition of conjugal rights in India. This is a lesson that can be drawn in Zambia to show how other constitutional rights can be enjoyed by people in incarceration without the need to break the confinement.

4.1.2. STATUTORY FRAMEWORK

In India, there is no statute which discusses or confers conjugal rights to prisoners. There is no mechanism or scheme for allowing conjugal visits in jails. As far as provisions of parole or furlough are concerned, these powers are exercised by the concerned state government and there is no central legislation to regulate it. For example, in the state of

²³⁰ AIR 1981 SC 746.

²³¹ AIR 1966 SC 424.

²³² (1983) 2 SCC 96

Punjab the release of prisoners on parole and furlough are regulated by the **Punjab Good Conduct Prisoners (Temporary Release) Act, 1962** read with its rules and the State Policy and Instructions issued by the state government for the release of convicts on parole, furlough etc. **Section 3(1) of the Act** enables the State Government to release the prisoners temporarily for a specified period on parole, if it is satisfied that:

- a. a member of the prisoner's family had died or is seriously ill; or
- b. the marriage of the prisoner's son or daughter is to be celebrated; or
- c. the temporary release of the prisoner is necessary for ploughing, sowing or harvesting or carrying on any other agricultural operation on his land and no friend of the prisoner or a member of the prisoner's family is prepared to help him in this behalf in his absence; or
- d. it is desirable to do so for any other sufficient cause.

It is pertinent to note that conjugal rights or visitations are not a ground for release of the person on parole and furlough. The Supreme Court in its various decisions has stated that parole is a penological innovation to check recidivism and has recommended the liberal use of the same.²³³ However, the decisions have been emphatic on promoting and upholding constitutional rights and freedoms that apply to every individual without the exclusion of prisoners, save for rights and freedoms that are related to movement and to practice a profession, etcetera.

4.1.3 JUDICIAL DECISIONS

In the absence of any specific law on conjugal rights of prisoners, some inmates have resorted to public interest litigation. An example is in the Andhra Pradesh High Court case of **Ms. G. Bhargava, President M/s. Gareeb Guide (Voluntary Organization) v State of Andhra Pradesh**²³⁴ where the applicant sought an order to take immediate steps and allow conjugal visits to spouses of prisoners in jails across the State of Andhra Pradesh. The Court rejected the claim of the petitioner and observed the following: firstly, if conjugal visits are allowed keeping in view good behavior of the prisoners, then chances of the environment getting disturbed cannot be ruled out as it will have an adverse impact on

²³³ See the case of *Suresh Chandra vs. State of Gujarat*, 1976 Cri LJ 1890. Also see *Krishan Lal vs. State of Bihar* 1976 Cri LJ 854.

²³⁴ PIL No. 251 of 2012 decided on 16th July, 2012.

the other inmates of the jail who have not been selected and extended such benefit. Secondly, **Chapter-IV of Andhra Pradesh Prison Rules, 1979** provides for the release of prisoners on furlough/ parole and during this temporary release the prisoners can lead family life with their spouses. Thus, High Court denied the application to put up any facilities to be used for conjugal visits. It also pointed out that such an issue was a policy matter which fell within the exclusive domain of the state.

A similar petition two years later was filed before the Punjab and Haryana High court in the case of **Jasvir Singh and Another v. State of Punjab**.²³⁵ The facts of the case were that the petitioners were husband and wife. They were prosecuted and convicted for kidnapping and murdering a 16-year-old minor for ransom. The trial court awarded death sentence which was confirmed by the High Court. The Supreme Court also upheld the conviction. However, the death sentence of the wife was commuted to life imprisonment. Both were held in the same jail in separate cells.

The couple was prosecuted within eight months of their marriage. In the instance case, they requested for an order compelling the prison authorities to allow them to stay together and resume their conjugal right for the sake of progeny. The petitioners claimed that their demand was not for personal sexual gratification and thus they were open for artificial insemination also.

The case involved important questions of law regarding conjugal rights of the prisoners. Therefore, the court also appointed an *amicus curia* in the matter. The core issues in the case were;

- i. Whether the right to procreation survives incarceration, and if so, whether such a right is traceable within the Constitutional framework?
- ii. Whether penological interest of the State permits or ought to permit creation of facilities for the exercise of right to procreation during incarceration?

²³⁵ 2015 Cri LJ 2282.

- iii. Whether 'right to life' and 'personal liberty' guaranteed under **Article 21 of the Constitution** include the right of convicts or jail inmates to have conjugal visits or artificial insemination (in alternate)? And
- iv. If question no. (iii) is answered in the affirmative, whether all categories of convicts are entitled to such rights?

The application of the petitioners was opposed by the state of Punjab and the father of the minor victim who was kidnapped and murdered for ransom. The main point advanced by the state for opposing the petition was that *the right to procreation does not find any mention in the Rulebook or Statutes*. They contended that there was *no provision for 'conjugal visitation' under the Prisons Act, 1894 and the Punjab Jail Manual*. There was *no provision in the said Acts for artificial insemination also*.

Moreover, **Section 27 of the Prisons Act, 1894** mandates proper segregation of male and female prisoners.²³⁶

Here are the main arguments put forth by the *amicus curia*:

- i. The principles enshrined in the Constitution are of widest amplitude and have been intentionally left open ended so that the courts are not shackled by the limited interpretation.
- ii. The right to procreation cannot be denied merely because such a right does not find any mention in the Rule Books or Statutes. In the absence of such a right having been spelt out in a codified law, it cannot be assumed that the petitioners' prayer contravenes any law. The denial of the right to procreate thus is alleged to be unreasonable, arbitrary as such a right not being violative of any rule or law, its denial amounts to be a monstrous violation of **Article 21 of the Constitution**.

²³⁶ Section 27(2) of the *Prisons Act, 1894* states 'separation of prisoners': The requisitions of this Act with respect to the separation of prisoners are as follow:

(1)

(2) in a prison where male prisoners under the age of twenty-one are confined, means shall be provided for separating them altogether from the other prisoners and for separating those of them who have arrived at the age of puberty from those who have not;

(3) un-convicted criminal prisoners shall be kept apart from convicted criminal prisoners.

- iii. The 'right to life' includes right to 'create life' and 'procreate' and this fundamental right does not get suspended when a person is put in jail. There is no provision, explicit or implied, in any penal law or constitution that takes away the prisoners right to decent life which squarely falls within **Article 21 of the Constitution**. He argued that although the husband had been sentenced to death, his 'right to life' cannot be taken away until his execution.
- iv. The court has ample powers under its jurisdiction to enforce fundamental rights and therefore, it could direct the prison authorities to allow conjugal visits for the sole purpose of procreation in the instant case.

The Court held that the right to procreation survives incarceration. And such a right is traceable and squarely falls within the ambit of **Article 21 of the Constitution** read with the **Universal Declaration of Human Rights**.

Regarding the second question, the court held that the penological interest of the State ought to permit *the creation of facilities for the exercise of right to procreation during incarceration 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. The court held that the facilities may be made available in a phased manner.

The court further held that 'right to life' and 'personal liberty' guaranteed under **Article 21 of the Constitution** include *the right of convicts or jail inmates to have conjugal visits or artificial insemination (in the alternate)*. However, the court was conscious of the intricacies involved and held that exercise of such rights is to be regulated by procedure established by law and is the sole prerogative of the State.

As regards, availability of right to all prisoners the court held that *ordinarily all convicts are entitled to the right to procreation while incarcerated, unless reasonably classified*. The Court left it to the state to frame policy for reasonable classification as the right is not an absolute right and is subject to the penological interests of the State.

The Court in this case *issued directions* to the State of Punjab to constitute a Jail Reforms Committee to formulate a scheme for creation of an environment for conjugal visits in jail.

The court also ordered that until the issue is addressed effectively by the state, the provisions relating to parole or furlough should be used and shall treat the conjugal visits of a married and eligible convict as one of the valid and sufficient grounds for the purpose of his/her temporary release on parole or furlough subject to all those conditions as are prescribed under the Statute.

Similar to the Zambian situation, there is no direct legislative provision for allowing conjugal visits for inmates, however, the courts have the power to interpret the rights and freedoms enshrined in the Bill of Rights to protect the right to life to include the right to procreate and found a family.

4.2. LESSONS FROM OTHER JURISDICTIONS

4.2.1. UNITED STATES OF AMERICA

In USA, many states allow conjugal visitation programs. These visitations are subject to a variety of restrictions which are provided by state laws and regulations. The oldest conjugal visiting program for inmates is at the Mississippi State Penitentiary in Parchman. Conjugal visitation privileges in this institution date back to 1918, although many penitentiary employees believe the program has been in existence since the institution was first opened in 1900.²³⁷ Earlier, the program was open only for black inmates only but later on it was extended to all prisoners. The conjugal visitation program in the Mississippi evolved with time and was never formally established by law. The visits take place every two weeks and can last for up to three days. Prisoners and their families are taken to cottages located on the prison grounds, which are equipped with beds and tables.²³⁸ In addition to conjugal visitation, the prison authorities also use the program of home furloughs.

²³⁷ Michael Braswell and Donald A. Cabana, "Conjugal Visitation and Furlough Programs for Offenders in Mississippi", *New England Journal of Prison Law*, Vol. 67, No. 2, 1975, pp. 67-72, at p. 67.

²³⁸ Christopher Hensley et al, *Conjugal Visitation Programs: The Logical Conclusion: From Prison Sex: Practice and Policy*, 2002, pp. 143- 156, at p.144.

Various other states in USA also have programs for conjugal visitations.²³⁹ For example, in the state of California the first conjugal visit program was instituted in 1968 and has been expanded since then. The inmates in California are allowed to have visits with their children, spouses, siblings and parents in modular homes located on the prison grounds.²⁴⁰ Similarly, conjugal visitation programs are also available in New York,²⁴¹ New Mexico, Washington and Connecticut.

4.2.2. EUROPE

In Europe, conjugal rights of visitation and are claimed on the basis of the **European Convention on Human Rights**²⁴². The Convention guarantees right to respect for privacy or family life as well as the right to marriage. **Article 8 of the Convention** provides that everyone has a right to respect for his private life, his family life and his home and that there shall be no interference by a public authority with the exercise of that right, save in accordance with law or as necessary in a democracy for certain named purposes (which include public safety, health or morals). **Article 12 of the Convention** provides that a prisoner of marriageable age has a right to marry and to found a family according to national laws governing the exercise of the right.

All members of the Council of Europe are party to this Convention and are under an obligation fulfil its provisions. In this regard, many states in Europe allow conjugal visits of prisoners. For example, conjugal visits are allowed in Spain, France, Sweden and Denmark.²⁴³ The Spanish prison system prisoners allows conjugal visits on a monthly basis and prisoners can invite members of their families as well as close friends.²⁴⁴

²³⁹ Carolyn Simpson, "Conjugal Visiting in United States Prisons", *Columbia Human Rights Law Review*, Vol. 10, 978-79, pp. 643-671, at p. 662.

²⁴⁰ Rachel 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.

²⁴¹ Bonnie E. Carlson, "Inmates and their Families: Conjugal Visits, Family Contact and Family Functioning", *Criminal Justice and Behavior*, Vol. 18, No. 3, 1991, pp. 318-331, at p. 319.

²⁴²Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR)

²⁴³ Rachel 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.602.

²⁴⁴ Dirk Van Zyl Smit, Frieder Dunker (eds.), *Imprisonment Today and Tomorrow: International Perspective on Prison Rights and Prison Conditions*, Kluwer Law International, Hague, 2001, at p. 612.

Swedish prisons allow inmates to have visits with family members that can last for up to nine hours.²⁴⁵

European countries have implemented conjugal visitation programs for inmates in various ways, with each country tailoring its approach based on its legal system, cultural norms, and specific goals. Here are some key aspects of European conjugal visitation programs from which Zambia could draw lessons:

1. **Clear Eligibility Criteria:** European countries often have clear eligibility criteria for inmates to qualify for conjugal visits. Factors such as behavior, sentence length, and risk assessment play a role in determining eligibility. Zambia can establish similar criteria based on its own prison population and rehabilitation goals.
2. **Behavior and Rehabilitation:** Inmates typically need to demonstrate good behavior and progress in rehabilitation programs to be considered for conjugal visits. Zambia can establish programs that encourage positive behavior and rehabilitation efforts among inmates.
3. **Application and Approval Process:** European countries have well-defined application and approval processes that allow inmates to apply for conjugal visits. These processes involve reviewing an inmate's behavior, security status, and overall progress. Zambia can adopt a transparent and standardized process to ensure fairness.
4. **Facility Design and Privacy:** European prisons often have designated areas for conjugal visits, providing privacy while maintaining security. Zambia can design or modify prison facilities to accommodate such visits safely.
5. **Security Measures:** European countries implement stringent security measures during conjugal visits to prevent escapes, violence, or contraband smuggling. Zambia can learn from these security protocols to ensure the safety of all parties involved.

²⁴⁵ Ibid, at p. 635.

6. **Duration and Frequency:** European countries define the duration and frequency of conjugal visits based on factors such as sentence length, behavior, and logistical considerations. Zambia can adopt a balanced approach that allows meaningful interaction while also managing prison resources effectively.
7. **Family Support Programs:** Some European countries offer support programs for families of inmates, providing them with resources, counseling, and information to cope with the challenges of incarceration. Zambia can establish similar programs to help families maintain connections with incarcerated loved ones.
8. **Monitoring and Evaluation:** European countries continuously monitor the impact of conjugal visitation programs on inmate rehabilitation, family relationships, and recidivism rates. Zambia can implement a robust monitoring and evaluation system to assess the effectiveness of its program and make improvements as needed.
9. **Legal Framework:** European countries ensure that their conjugal visitation programs are supported by a solid legal framework that protects the rights of inmates, visitors, and prison staff. Zambia can review and adapt its laws, such as the **Zambia Correctional Service Act**, to accommodate conjugal visitation while upholding legal standards or in the alternative (which appears to be more practicable, Zambia can utilize the existing provisions of the Act to provide for such conjugal relations).
10. **Cultural Sensitivity:** Each European country considers its cultural norms and values when implementing conjugal visitation programs. Zambia should tailor its program to align with its cultural context, considering public opinions and concerns.
11. **Training for Staff:** European prisons provide training to staff members involved in overseeing conjugal visits. Zambia can offer specialized training to prison staff to ensure professionalism, sensitivity, and the smooth execution of these visits.
12. **International Collaboration:** European countries often collaborate with international organizations and treaties, such as the UNODC and ECHR

respectively, to exchange best practices and expertise. Zambia can engage in similar collaborations to benefit from global insights.

Zambia should approach the implementation of conjugal visitation programs with a comprehensive strategy that considers both international best practices and its unique circumstances. Adapting these lessons from European countries will require careful planning, stakeholder engagement, and a commitment to inmate rehabilitation and family reintegration. A starting point can be the invocation of section 114 of the Zambia Correctional Service Act which provides that the Commissioner-General may grant an inmate permission, in writing, to be absent from a prison or correctional centre for a period that the Commissioner-General may determine, for personal, family or other reasons if, in the opinion of the Commissioner-General, the circumstances of the case warrant the granting of the permission²⁴⁶.

4.3. CONCLUSION

In conclusion, the exploration of conjugal visitation programs for inmates as a human rights consideration has led to a comprehensive understanding of various approaches and experiences from India, Europe, and the USA. The global landscape reveals that while the implementation of such programs varies significantly among these regions, the underlying principles of preserving human rights, maintaining family bonds, and fostering rehabilitation remain constant.

²⁴⁶ Zambia Correctional Service Act, no. 37 of the Laws of Zambia s. 114

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

5.0. CONCLUSIONS

The paper has discussed imprisonment, deprivation of liberty and the impact of such deprivation on conjugal and other related rights of inmates. It has gone further to discuss the history, rationale and justifications associated with conjugal rights for inmates as well as the lessons that can be drawn from other jurisdictions. It has found that conjugal association can be established when a prisoner is allowed to spend some time with his spouse or family in privacy.

It has been established that imprisonment ought only to limit the rights that are directly associated with liberty and that extending such limitation to other rights can amount to a violation of an array of human rights. When viewed with a human rights lens, it is clear that the protection of the right to conjugal visits for inmates has a direct impact on the right to life, health as well as the right to family. This not only impacts the inmates, but also the spouse who may not be in incarceration.

In terms of modes of allowing conjugal visits, it has been established that it can take various forms ranging from the type of accommodation provided (or in some cases, permission to be absent from the facility), the duration of the visits as well as the criteria for eligibility to be part of the program. At the core of this is that privacy and dignity ought to be a recurring theme in considerations of the mode. The program should allow for health screening, reproductive health and sanitary supplies as well as security and privacy.

The study has established that currently, Zambia does not have a program for conjugal visitations nor does the law provide for it expressly. However, as has been seen in the Zambia Correctional Service Act, that the Commissioner General has the discretionary powers to grant an inmate time away from the correctional facility to attend to family issues as the Commissioner General deems fit. This can be a starting point and as a window of opportunity to allow for spousal time for inmates.

Learning from other jurisdictions has shown that the benefits of having a program for conjugal visitations outweighs the related security risks. It has been established that having such programs reduces violence in places of detention, it improves the overall health and well-being of inmates, it promotes continued bond with family and thereby making re-integration easier as the inmate does not lose close family ties with his or her immediate family members.

Zambia, being a signatory to major international human rights instruments has committed to upholding the rights of inmates as a basic standard of human rights. In addition to protecting the rights related to the conditions in correctional facilities, the state has duty to ensure the health and well-being of inmates is upheld and protected. The move from a prison service focused on retribution to a correctional service with a focus on rehabilitation, is an opportunity to incorporate measures to provide for a conjugal program for inmates in Zambia. It is a way of giving a human face to inmates.

Even though Zambia lags behind in terms of conjugal programs, it has been established that this is a relatively novel area of human rights with a growing jurisprudence. However as stated above, the legislative framework does not appear to be a huge technical challenge as there is discretionary room which can be used a legal basis for allowing conjugal visits.

As Zambia moves forward, it can harness the lessons learned from diverse global experiences to craft a program that not only respects the human rights of inmates but also contributes to their successful rehabilitation and eventual reintegration into society. In doing so, Zambia has the opportunity to showcase its dedication to the principles of human rights while fostering a criminal justice system that aligns with international standards and best practices.

5.1. RECOMMENDATIONS

From the foregoing, it is clear that there is a lot that Zambia can do in a bid to establish a conjugal program for inmates. These recommendations seek to incorporate international

best practice, lessons learnt, as well to address the weaknesses and lacunas in the Zambian context. The following are the recommendations:

5.1.1. ESTABLISH AN INMATES AND FAMILIES' WELFARE COMMITTEE.

This committee should be established to firstly conduct an intensive review of all the policies and laws that could potentially have a bearing on the establishment of a conjugal program in Zambia. The study proposes the use of Inmates and Family Welfare as opposed to Conjugal program to maintain the dignity of the parties involved. This Committee should be established under the office of the Commissioner General of the Correctional Service with a membership of both state and non-state actors.

5.1.2. DEVELOP GUIDELINES FOR THE INMATES AND FAMILIES' WELFARE PROGRAM.

These guidelines would address how the implementation of the program would be done. They would address the functioning of the Committee, the eligibility criteria for being benefiting from the program among other things. The guidelines would also provide for select Zambia Correctional Service officers to be responsible for the day to day running of the program and ensuring that the security of the facilities, the inmates or their families is not compromised.

5.1.3. CLARITY ON THE PROVISIONS OF THE SECTION 114 OF THE ZAMBIA CORRECTIONAL SERVICE ACT.

The law ought to be interpreted so as to provide clarity on permission to be absent from a prison or correctional Centre. If this provision includes allowing inmates to have private time with their families and spouses, it should then follow that it should be a guided provision and not one based on discretion. There should be laid down procedures and guidelines as stated above.

5.1.4. ADEQUATE FINANCIAL RESOURCES FOR THE PROGRAM.

In order for this program to achieve its objective it is imperative that adequate funds are appropriated. These will include funds for building some basic family meeting rooms, provision of reproductive health and other supplies, beds, beddings and other related costs. This also means that the health centres in the correctional facilities ought to be adequately stocked with medicines, test kits and other supplies for the regular screening of inmates in the program over and above the routine services offered.

5.1.5. AWARENESS RAISING FOR COMMUNITY MEMBERS AND CORRECTIONAL OFFICERS.

Due to the perception that inmates relinquish their rights as part of their punishment, there will be a need for robust nationwide awareness raising activities at all levels. This is particularly important to prevent a perception that inmates are being rewarded whilst being in incarceration and that there is no punishment for committing an offence. A human rights-based approach ought to be used to raise awareness on the rights of inmates. In like manner, officers of the Zambia Correctional Service as the custodians of inmates should be well versed with information on protecting the rights, dignity and privacy of inmates.

5.1.6. STRENGTHENING OF OVERSIGHT INSTITUTIONS.

There is need to strengthen oversight institutions such as the Human Rights Commission to be able to monitor the implementation of the program allowing for conjugal visits. Inmates should have the opportunity to lodge complaints about their general rights and welfare within the correctional facilities without any fear of victimization. This can be by actualizing the Constitutional provision of having the Human Rights Commission in all provinces and districts so that complaints are dealt with expeditiously and monitoring places of detention is done frequently and thoroughly.

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