CHAPTER EIGHT

REPRODUCTIVE RIGHTS OF INCARCERATED PERSONS

The Supreme Court in *Sunil Batra v. Delhi Administration* had noted that the Fundamental Rights of a prisoner "[do] not part company with the prisoner at the gates"[1] of the prison. The Court, in multiple judgments over the years, has reiterated this approach and safeguarded the Fundamental Rights of prisoners. Over the last decade, reproductive rights of incarcerated prisoners have also gained prominence. A number of issues have arisen before courts with respect to reproductive rights of incarcerated persons. In this section, we discuss cases pertaining to:

- Medical Termination of Pregnancy During Incarceration
- Special Provisions for Pregnant Women in Prisons
- Right to Procreation and Conjugal Visits

Medical Termination of Pregnancy During Incarceration

The Medical Termination of Pregnancy Act 1971 (MTP Act) applies to all women including women prisoners. However, in reality, incarcerated women have faced additional limits on access to abortion. In this context, cases have been filed by women prisoners (or people on their behalf) to safeguard reproductive rights during incarceration.

In ***Hallo Bi v. State of Madhya Pradesh***,[2] an undertrial woman prisoner filed a writ petition before the Madhya Pradesh High Court seeking directions to the State to permit her to terminate her pregnancy. She alleged that the pregnancy was due to forced prostitution. Although the MTP Act does not require judicial approval for MTP in any case, Hallo Bi's request for termination of pregnancy was forwarded by the jail authorities to the Chief Judicial Magistrate, who rejected it. The writ petition hence came to be filed. The High Court in permitting the woman to terminate her pregnancy relied on the Supreme Court's judgment in ***Suchita Srivastava v. Chandigarh Administration***,[3] which had held that a woman's right to make reproductive choices is a dimension of personal liberty guaranteed under Article 21 of the Indian Constitution. The Court held that "forced prostitution" amounted to rape, and hence was covered within one of the conditions stipulated by Section 3 of the MTP Act for termination of pregnancy.

The Bombay High Court recognized that it was unnecessary to seek permission from an external board, be it of jail authorities or prison officials, to adhere to the request of an incarcerated woman to terminate her pregnancy. In ***High Court on Its Own Motion v. State of Maharashtra***,[4] the Court noted that pregnant women form a common category which includes pregnant women prisoners. The Court found that all pregnant women have a fundamental right to reproductive choice under Article 21 of the Indian Constitution which includes the right to terminate pregnancy. The Court directed that every woman prisoner of reproductive age should be administered a urine pregnancy test on admission to the prison and if she is found to be pregnant, the medical officer should inform the woman of her option to terminate her pregnancy under the MTP Act. It held that once a pregnant woman prisoner indicates her wish to terminate pregnancy, she should be immediately referred to a hospital and all assistance should be provided to terminate her pregnancy. It recognized that a woman's decision to terminate her pregnancy is not a frivolous one but is a "carefully considered" decision. It also recognized the need to expand Explanation 2 to Section 3 of the MTP Act to cover not only married couples, but also any couple living together like a married couple. In its holding, the High Court held that the right of a woman to decide whether to be, or not to be a mother is derived from the human right to live with dignity, which is guaranteed under Article 21 of the Constitution. Further, relying on international human rights law, the Court noted that human rights are vested in a person only on birth, and an unborn foetus does not have human rights. It thus recognized the bodily autonomy of a woman, and that she is the person whose rights are paramount in the context of deciding on whether to procreate, and whether to continue or terminate a pregnancy.

Special Provisions for Pregnant Women in Prisons

In ***R. D. Upadhyay v. State of Andhra Pradesh***,[5] the Supreme Court issued guidelines with respect to the treatment of pregnant women incarcerated in prisons. The guidelines deal with medical facilities to be provided to pregnant women prisoners, dietary needs of pregnant women and their children, measures for childbirth (noting that as far as possible the woman should be released on bail so that she can deliver outside the prison) and keeping children in prison.

The Gujarat High Court in ***State of Gujarat v. Jadav @ Jatin Bhagvanbhai Prajapati & Ors.***,[6] implemented one of the guidelines in ***R.D. Upadhyay*** in relation to granting bail to pregnant women to deliver their children outside the prison. After convicting the woman accused, on being informed that she was pregnant, the Court suspended her sentence and granted her bail for eleven months. Thus, it provided her time not only to deliver her child outside the prison environment and while not in custody, but also to provide care to the child in the initial months. The Court also directed the jail authorities to permit the woman to keep her children with her in the prison until they reached the age stipulated by the relevant Jail Manual.

Right to Procreation and Conjugal Visits

Over the last few years, incarcerated persons have approached courts seeking recognition and enforcement of their conjugal rights. One such case is ***Jasvir Singh v. State of Punjab***.[7] In this case, the Punjab and Haryana High Court was petitioned by a couple seeking enforcement of their right to have a conjugal life. The husband had been sentenced to death, and the wife to imprisonment for life. Relying also on international human rights norms, the Court held that the right to procreation and to conjugal visits is a component of the right to live with dignity, which is engrained within the right to life guaranteed by Article 21 of the Indian Constitution. It held that the right to procreation survives incarceration. It however noted that reasonable restrictions apply to the right to conjugal visits or procreation, and as a corollary, to artificial insemination. Hence, limitations could be placed in accordance with "procedure established by law." The Court directed the State of Punjab to form a jail reforms committee with the mandate to formulate a scheme for conjugal visits for jail inmates.

A *habeas corpus* petition was filed before the Madras High Court by the wife of a life convict seeking leave for her husband for the purpose of fertility treatment. The High Court in ***Mrs. Meharaj vs. The State & Ors.***,[8] in allowing the application, held that the wife had the right to procreate, and that such right is not extinguished by her spouse being imprisoned for life. It ruled that the wife has a legitimate expectation to have a child that cannot be denied.

Related Human Rights Standards and Jurisprudence

Below is a selection of international and regional human rights standards and jurisprudence that explains states' obligations concerning the reproductive rights of incarcerated persons.

The Government of India has committed itself to comply with the obligations under various international human rights treaties to protect sexual and reproductive health and rights. These include the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC), the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW), and the International Covenant on Civil and Political Rights (ICCPR).[9] Under international law all government organs and authorities, including the judiciary, are obligated to uphold the laws and standards outlined in these treaties.[10] The U.N. has repeatedly reiterated that incarcerated individuals retain their human rights as set out in human rights treaties, except for those limitations that are demonstrably necessitated by the fact of incarceration.[11] The Supreme Court has held that in light of the obligation to "foster respect for international law" in Article 51 (c) of the Indian Constitution "[a]ny International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into [fundamental rights] to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee".[12]

INTERNATIONAL TREATY STANDARDS

TREATIES

- **ICCPR, Articles 2, 3, 6(5), 7, 10, 23(1)-(2), 26** (providing that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person," that the "essential aim" of the penitentiary system shall be prisoners' "reformation and social rehabilitation," and that the death penalty shall not be carried out on pregnant women; and protecting the right to life, to freedom from torture and ill treatment, to marry, to found a family, and to non-discrimination).
- **ICESCR, Articles 2, 3, 10, 12** (protecting the right to non-discrimination and equality, to a family and to "special protection" for women for a "reasonable period" before and after childbirth, and guaranteeing the right to the highest attainable standard of physical and mental health without discrimination).

- **CEDAW, Articles 10(h), 12(1), 14(2)-(b), 16(e)** (outlining women's right to family planning information, goods and services and to "decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights").

SELECTED GENERAL COMMENTS

- **Human Rights Committee, *General Comment No. 36 (2018) on article 6 of the ICCPR, on the right to life*,** U.N. Doc. CCPR/C/GC/36 (2018), paras. 8, 25, 48-49 (delineating women's right to abortion and pregnancy-related care while imprisoned or detained, outlining States' heightened duty of care to protect the right to health of persons who are deprived of liberty, and prohibiting the use of the death penalty on pregnant women and parents of very young or dependent children).
- **Human Rights Committee, *General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women),*** U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000), para. 15 (with respect to ICCPR articles 7 and 10, requiring States parties to ensure that women deprived of liberty enjoy equal rights to men, particularly including access to conjugal and family visits, medical and health care, and respect for their dignity, in particular during and following childbirth).
- **Human Rights Committee, *General Recommendation No. 21: Article 10 (Humane treatment of persons deprived of their liberty)*** (1992), para. 3 (highlighting States' positive obligation to persons deprived of liberty to guarantee their dignity "under the same conditions as for that of free persons" apart from "the restrictions that are unavoidable in a closed environment," and that such persons are not "subjected to any hardship or constraint other than that resulting from the deprivation of liberty").
- **CEDAW Committee, *General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19***, U.N. Doc. CEDAW/C/GC/35 (2017), para. 38 (requiring all relevant personnel, including legal, education, social welfare and health personnel for persons deprived of liberty to receive "mandatory, recurrent and effective" training in the area of sexual and reproductive health and the prevention of gender-based violence).
- **Committee for Economic Social and Cultural Rights (CESCR), *General Comment No. 22 (2016) on the right to sexual and reproductive health***, U.N. Doc. E/C.12/GC/22 (2016), paras. 31, 60 (highlighting State obligations to effectively monitor and regulate specific sexual and reproductive health-related sectors, and outlining that for "[p]risoners […] [and others with] additional vulnerability by condition of their detention or legal status […] the State [is required] to take particular steps to ensure their access to sexual and reproductive information, goods and health care.").
- **CESCR, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12)***, U.N. Doc. E/C.12/2000/4 (2000), para. 34 (establishing that States must not impose discriminatory practices relating to women's health status and needs, including for women prisoners and detainees, by, e.g., "refrain[ing] from limiting access to contraceptives and other means of maintaining sexual and reproductive health, [and] from censoring, withholding or intentionally misrepresenting health-related information, including sexual education and information").

UNITED NATIONS HUMAN RIGHTS EXPERT AND WORKING GROUP REPORTS

- **Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, *Report on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health***, U.N. Doc. A/HRC/38/36 (2018), paras. 28, 38, 71-72, 77-81, 98(c), 98(k) (underlining prisoners' and detainees' continued right to health care, including for women and adolescents; highlighting discrimination perpetuated in prison environments, including by denial of health care such as sexual health supplies or contraceptives; and outlining that for detained women, the lack of gender- and security-appropriate facilities, services and supplies, including pre-, peri-and post-natal care, violate women's rights to sexual and reproductive health and may amount to torture or ill-treatment).
- **Working Group on the Issue of Discrimination Against Women in Law and Practice (WGDAW), *Report of the Working Group on the issue of discrimination against women in law and in practice,*** U.N. Doc. A/HRC/32/44 (2016), paras. 17, 59-60 (highlighting that women deprived of liberty are particularly vulnerable to degrading treatment when seeking or receiving health care and frequently lack access to preventive services related to sexual and reproductive health).

- **Special Rapporteur on violence against women, its causes and consequences, *Pathways to, conditions and consequences of incarceration for women,*** U.N. Doc. A/68/340 (2013), paras. 33-65 (describing common violations of women's sexual and reproductive health rights while detained or imprisoned, including exposure to sexual and gender-based violence and harassment, lack of appropriate care for pregnant women and women with children, and deprivation of hygienic conditions, nutrition, and feminine-specific health care).
- **Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (SR Torture), *Second Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak*,** U.N. Doc. A/HRC/7/3 (2008), para. 41 (recommending that "measures of physical restraint should be avoided during delivery").
- **SR Torture, *Torture and other cruel, inhuman or degrading treatment or punishment: Report of the Special Rapporteur, Theo van Boven,*** U.N. Doc. E/CN.4/2004/56 (2003), paras. 42, 55-64 (pointing to basic standards of medical care and protections against torture and degrading and inhumane treatment for prisoners and detainees, including the right to information and medical care relating to sexual and reproductive health).

SELECTED REGIONAL CASE LAW

EUROPEAN COURT OF HUMAN RIGHTS

- ***Dickson v. The United Kingdom*, Application No. 44362/04 (2007)**, paras. 28-36, 67-85 (where an imprisoned man and his wife were denied access to artificial insemination necessary for conception, finding a violation of the right to private and family life).

INTER-AMERICAN COURT OF HUMAN RIGHTS

- ***Karina Montenegro et al. v. Ecuador*, Report No. 61/13, Petition 12.631, Friendly Settlement (2013)** (outlining the terms of a friendly settlement where, in express contravention of domestic law, four pregnant women in detention were obliged to give birth in prison and raise their babies there; requiring the State to provide compensation, training and resources to adapt the facilities for young children in conformity with the rights to personal integrity and to physical, moral, and psychological integrity, and with the obligation to eradicate violence against women).
- ***Miriam Beatriz Riquelme Ramírez v. Paraguay,* Report No. 25/13, Petition 1097-06, Friendly Settlement (2013)** (in a friendly settlement where a woman was held in preventive detention while she was breastfeeding, in violation of express provisions of domestic law, requiring the state to acknowledge responsibility and provide appropriate reparations for the "arbitrary denial of freedom" in violation of the rights to physical liberty and to judicial protection and of the child's right to protection).

RELEVANT EXCERPTS FROM SELECT CASE LAW

(Arranged chronologically)

IN THE SUPREME COURT OF INDIA

R. D. Upadhyay v. State of Andhra Pradesh
(2007) 15 SCC 337
Y.K. Sabharwal, C.J. and C.K. Thakker and P.K. Balasubramanyan, JJ.

A writ petition was filed by a non-governmental organization for issuance of guidelines with respect to developmental needs of children who were in jails, along with their mothers who were either undertrials or convicts. The writ petition also sought measures for improving conditions of children of women prisoners.

Sabharwal, C.J.: "Concerned by the plight of the undertrial prisoners languishing in various jails in the country, various directions were issued by this Court from time to time. Presently, we are considering mainly the issue of directions for the development of children who are in jail with their mothers or who are in jail either as undertrial prisoners or convicts.

…

45. In light of various reports referred to above, affidavits of various State Governments, Union Territories, the Union of India and submissions made, we issue the following guidelines:

…

2. Pregnancy:

(*a*) Before sending a woman who is pregnant to a jail, the authorities concerned must ensure that the jail in question has the basic minimum facilities for child delivery as well as for providing prenatal and post-natal care for both, the mother and the child.

(*b*) When a woman prisoner is found or suspected to be pregnant at the time of her admission or at any time thereafter, the lady Medical Officer shall report the fact to the Superintendent. As soon as possible, arrangement shall be made to get such prisoner medically examined at the female wing of the District Government Hospital for ascertaining the state of her health, pregnancy, duration of pregnancy, probable date of delivery and so on. After ascertaining the necessary particulars, a report shall be sent to the Inspector General of Prisons, stating the date of admission, term of sentence, date of release, duration of pregnancy, possible date of delivery and so on.

(*c*) Gynaecological examination of female prisoners shall be performed in the District Government Hospital. Proper prenatal and post-natal care shall be provided to the prisoner as per medical advice.

3. Childbirth in prison:

(*a*) As far as possible and provided she has a suitable option, arrangements for temporary release/parole (or suspended sentence in case of minor and casual offender) should be made to enable an expectant prisoner to have her delivery outside the prison. Only exceptional cases constituting high security risk or cases of equivalent grave descriptions can be denied this facility.

(*b*) Births in prison, when they occur, shall be registered in the local birth registration office. But the fact that the child has been born in the prison shall not be recorded in the certificate of birth that is issued. Only the address of the locality shall be mentioned.

(*c*) As far as circumstances permit, all facilities for the naming rites of children born in prison shall be extended.

4. Female prisoners and their children:

(*a*) Female prisoners shall be allowed to keep their children with them in jail till they attain the age of six years.

(*b*) No female prisoner shall be allowed to keep a child who has completed the age of six years. Upon reaching the age of six years, the child shall be handed over to a suitable surrogate as per the wishes of the female prisoner or shall be sent to a suitable institution run by the Social Welfare Department. As far as possible, the child shall not be transferred to an institution outside the town or city where the prison is located in order to minimise undue hardships on both mother and child due to physical distance.

(*c*) Such children shall be kept in protective custody until their mother is released or the child attains such age as to earn his/her own livelihood.

(*d*) Children kept under the protective custody in a home of the Department of Social Welfare shall be allowed to meet their mother at least once a week. The Director, Social Welfare Department, shall ensure that such children are brought to the prison for this purpose on the date fixed by the Superintendent of Prisons.

(*e*) When a female prisoner dies and leaves behind a child, the Superintendent shall inform the District Magistrate concerned and he shall arrange for the proper care of the child. Should the relative(s) concerned be unwilling to support the child, the District Magistrate shall either place the child in an approved institution/home run by the State Social Welfare Department or hand the child over to a responsible person for care and maintenance.

…

9. Diet:

Dietary scale for institutionalised infants/children prepared by Dr. A.M. Dwarkadas Motiwala, MD (Paediatrics) and Fellowship in Neonatology (USA) has been submitted by Mr Sanjay Parikh. The document submitted recommends exclusive breastfeeding on the demand of the baby day and night. If for some reason, the mother cannot feed the baby, undiluted fresh milk can be given to the baby.

The report also refers to the "Dietary Guidelines for Indians—A Manual", published in 1998 by the National Institute of Nutrition, Council of Medical Research, Hyderabad, for a balanced diet for infants and children ranging from 6 months to 6 years of age. It recommends the following portions for children in the ages of 6-12 months, 1-3 years and 4-6 years, respectively: cereals and millets—45, 60-120 and 150-210 gm respectively; pulses—15, 30 and 45 gm respectively; milk—500 ml (unless breastfed, in which case 200 ml); roots and tubers—50, 50 and 100 gm respectively; green leafy vegetables—25, 50 and 50 gm respectively; other vegetables—25, 50 and 50 gm respectively; fruits—100 gm; sugar—25, 25 and 30 gm respectively; and fats/oils (visible)—10, 20 and 25 gm respectively. One portion of pulses may be exchanged with one portion (50 gm) of egg/meat/chicken/fish. It is essential that the above food groups be provided in the portions mentioned in order to ensure that both macronutrients and micronutrients are available to the child in adequate quantities.

10. Jail Manual and/or other relevant rules, regulations, instructions, etc. shall be suitably amended within three months so as to comply with the above directions. If in some jails, better facilities are being provided, same shall continue.

…

12. The State Legal Services Authorities shall take necessary measures to periodically inspect jails to monitor that the directions regarding children and mothers are complied with in letter and spirit…"

IN THE HIGH COURT OF MADHYA PRADESH

Hallo Bi @ Halima v. State of Madhya Pradesh
2013 Cri LJ 2868 (MP)
S.C. Sharma, J.

An incarcerated woman filed an application with the jail authorities requesting termination of her pregnancy. The jail authorities forwarded her application to a chief judicial magistrate who rejected her application. The woman then filed a petition in the High Court of Madhya Pradesh for issuance of directions to the concerned State authorities to permit her to terminate her pregnancy as her pregnancy was a result of forced prostitution. The issue before the Court was whether forced prostitution amounted to rape and thus whether the woman could terminate her pregnancy under Section 3(2)(ii) Explanation 1 of the MTP Act.

Sharma, J.: "The petitioner before this Court, who is in Jail … for an offence punishable under section 302 of the Indian Penal Code, has filed this present petition for issuance of an appropriate writ, order or direction directing the respondents to permit the petitioner to terminate her pregnancy.

2. The contention of the petitioner is that she was forced into prostitution by one Usman and on account of forced prostitution, she became pregnant. Petitioner has further stated that an application was submitted to the Jail Authorities for termination of pregnancy and the matter was forwarded to the Indore (sic) for grant of necessary permission and the CJM in a mechanical manner, on 14-12-2012 has rejected the petitioner's application for grant of termination of pregnancy.

3. Section 3 of The Medical Termination of Pregnancy Act, 1971 provides a medical opinion by a registered medical practitioner and, therefore, the matter was immediately referred to obtain an opinion from the Head of the Department, Gynaecology and Obstetrics, M.G.M. Medical College/M. Y. Hospital, Indore…

…

5. The petitioner was present before this Court on 15-1-2013 and the petitioner in open Court categorically stated that she was forced into prostitution, she was sold in the State of Rajasthan and on account of the forced prostitution, she has become pregnant. The petitioner has categorically stated in the open Court that she wants to terminate pregnancy and at the relevant point of time the medical examination took place she was nervous and scared of the surrounding environment as well as she was very tense. The observation has been made by the Doctor that she does not want to terminate the pregnancy. This Court, by way of abundant caution has requested respected lady Lawyers of this Court to interact with the petitioner and Ms. Meena Chaphekar and Mrs. Vinita Phaye, Advocates have interacted with the petitioner and have informed this Court that the petitioner wants to terminate the pregnancy. The first medical examination of the petitioner took place on 10-1-2013 and the age of the foetus was assessed at 11 weeks and 4 days and therefore, keeping in view Rule 3, clause (2), subclause (b), a report of two registered medical practitioners/ Governent Doctors was required.

6. This Court has again referred the matter for medical opinion and now, today, a fresh report has been received. The report has been submitted on behalf of two Doctors posted at M.Y. Hospital, Indore and both are Gynaecologist. They have opined that the pregnancy can be terminated. The report has been received through Superintendent of Jail, District Jail, Indore and the same is taken on record.

7. Mrs. Vinita Phaye, learned counsel for the respondent-State has also argued before this Court that pregnancy can be terminated keeping in view section 3 of The Medical Termination of Pregnancy Act, 1971.

8. As statement was made by the petitioner in the open Court that she was subjected to forced sex/rape, she was also directed to submit an affidavit and she has submitted an affidavit dt. 15-1-2013. The affidavit reflects that she was subjected to forced sex. She has stated that she wants to terminate the pregnancy and does not want to give birth to the child. Thus, the petitioner has not only filed an affidavit, but had stated in open Court that she was subjected to forced sex and wants to terminate the pregnancy. The report as required under The Medical Termination of Pregnancy Act, 1971 is also in favour of the petitioner.

…

12. In the present case, the petitioner wants to abort the child and has challenged the order passed by the CJM, rejecting her prayer to abort the child. Section 3 provides for medical opinion of a registered medical practitioner and as the length of pregnancy is about 12 weeks, the matter was referred to M.Y. Hospital, Indore for obtaining medical opinion of two Doctors. Two lady Doctors including the Head of the Department, Gynaecology and Obstetrics, M.G.M. Medical College/M. Y. Hospital, Indore has categorically stated that pregnancy of the petitioner can be terminated vide report dt. 16-1-2013, meaning thereby the medical opinion to abort the child is in her favour.

13. …The Medical Termination of Pregnancy Act, 1971 was enacted in 1971. The Medical Termination of Pregnancy Act, 1971 provides for abortion, in case of woman whose physical/mental health are endangered by the pregnancy, woman facing birth of a potentially handicapped or malform (sic) child, rape, pregnancy in unmarried girls under the age of 18, with the consent of guardian, pregnancies in lunatics, with the consent of a guardian, pregnancies which are result of failure in sterilization. This Act provides for termination of pregnancy in case of rape which is in fact, forced sex with the victim who was led into prostitution by use of force and, therefore, in the peculiar facts and circumstances of the case, keeping in view, the statement of the petitioner, the Act of 1971 does permit abortion in the peculiar facts and circumstances of the present case also. The Act of 1971 provides for a legal method of abortion in respect of cases mentioned in the Act. It is really shocking that in our country every year almost 11 million abortions takes place and 20000 women die every year due to abortion related complications. Most abortion related maternal deaths are attributable to illegal abortions and, therefore, The Medical Termination of Pregnancy Act, 1971 has authorised a procedures for abortion in respect of cases mentioned in the Act. It certainly provides for a safeguard to women to abort a child keeping in view the statutory provisions as contained under the Act. Pre-natal Test for determining the sex of the foetus, is a crime under the Indian laws and a punishment is also provided under various statutory provisions for termination of pregnancy and for determining the sex of foetus. However, the present case is having a distinguishing feature, the sex of the child has not been determined, foetus is on account of the forced prostitution, as alleged by the petitioner, and, therefore, case of the petitioner in respect of the abortion, is squarely covered under the Explanations where permission can be granted for abortion as per the statutory provisions as contained under The Medical Termination of Pregnancy Act, 1971.

…

15. The Medical Termination of Pregnancy Act, 1971 provides for termination of pregnancy on health grounds and in those cases where there is a danger to life or risk to physical or mental health of a woman and also on humanitarian ground where the pregnancy arises from sex crimes like rape or intercourse with lunatic woman etc…

16. Section 3 provides for Opinion from a registered Medical Practitioner where the length of pregnancy does not exceed 12 weeks and where the length of pregnancy exceed 12 weeks, from two medical practitioners and permission can be granted where pregnancy is alleged by the pregnant woman to have been caused by rape and the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of a pregnant woman. The Statement of Objects & Reasons for enacting the Act of 1971 was to help a victim of a sex crime like rape or intercourse with a lunatic woman also.

17. In the present case, the petitioner who was present in the Court was brave enough to state before everyone that she was forcibly forced into prostitution. She was sold for prostitution and every day she was subjected to forced prostitution/ rape. Forced prostitution, in the considered opinion of this Court, virtually amounts to rape and, therefore, this Court is of the considered opinion, that the petitioner's case falls under Explanation 1 of section 3, clause (ii) of the Act of 1971.

18. We cannot force a victim of violent rape/forced sex to give birth to a child of a rapist. The anguish and the humiliation which the petitioner is suffering daily, will certainly cause a grave injury to her mental health. Not only this, the child will also suffer mental anguish in case the lady gives birth to a child.

19. The Apex Court in the case of *Suchita Srivastava v. Chandigarh Administration*, reported in (2009) 9 SCC 1, in paras, 20 to 27, 31 and 58 has held as under :—

> "…
>
> 22. There is no doubt that a woman's right to make reproductive choices is also a dimension of 'personal liberty' as understood under Article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of

reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. Furthermore, women are also free to choose birth-control methods such as undergoing sterilisation procedures. Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children. However, in the case of pregnant women there is also a 'compelling state interest' in protecting the life of the prospective child. Therefore, the termination of a pregnancy is only permitted when the conditions specified in the applicable statute have been fulfilled. Hence, the provisions of the MTP Act, 1971 can also be viewed as reasonable restrictions that have been placed on the exercise of reproductive choices.

23. A perusal of the abovementioned provision makes it clear that ordinarily a pregnancy can be terminated only when a medical practitioner is satisfied that a 'continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health' [as per section 3(2)(i)] or when 'there is a substantial risk that if the child were bom, it would suffer from such physical or mental abnormalities as to be seriously handicapped' [as per section 3(2)(ii)]. While the satisfaction of one medical practitioner is required for terminating a pregnancy within twelve weeks of the gestation period, two medical practitioners must be satisfied about either of these grounds in order to terminate a pregnancy between twelve to twenty weeks of the gestation period.

…

25. In all such circumstances, the consent of the pregnant woman is an essential requirement for proceeding with the termination of pregnancy. This position has been unambiguously stated in section 3(4)(b) of the MTP Act, 1971.

…"

20. In the present case, the petitioner understands what pregnancy is. She has consented for abortion. The medical opinion is in her favour. She does not want to raise the child of a rapist and, therefore, the relief prayed for in the relief clause is granted to the petitioner directing the respondents to carry out the process of abortion immediately.

…

23. In the result, the writ petition is allowed. The petitioner is granted permission to abort the child keeping in view the statutory provisions as contained under The Medical Termination of Pregnancy Act, 1971. The Superintendent of District Jail, Indore is directed to admit the petitioner in M.Y. Hospital, Indore for terminating the pregnancy. It is needless to mention that the petitioner shall be provided with all medical assistance and care after the pregnancy is terminated, she will again be provided with all medical assistance by the respondent State. It is needless to mention that the Superintendent of District Jail, Indore after the pregnancy is terminated shall file status report to the Principal Registrar of this Court and for a further period 6 months, he will file a monthly status report in respect of health of the petitioner.

…"

IN THE HIGH COURT OF PUNJAB AND HARYANA

Jasvir Singh v. State of Punjab
2015 Cri LJ 2282 (P&H)
Surya Kant, J.

An incarcerated couple petitioned the Punjab and Haryana High Court seeking enforcement of their right to have a conjugal life under Article 21 of the Indian Constitution. The Court was asked to address three issues. The first issue was whether the right to procreation survives incarceration, and if so, whether such a right is traceable within the Constitutional framework. The second issue was whether penological interest of the State permits or ought to permit creation of facilities for the exercise of right to procreation during incarceration. The third issue was whether the '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) and if so, whether all categories of convicts are entitled to such rights.

Kant, J.: "**(1)** The petitioners are husband and wife, respectively. They were tried for an offence under Section 302/364-A/201/120-B IPC for kidnapping and brutally murdering a 16 year old minor for ransom. The trial court awarded them death sentence which was confirmed by this Court. The Hon'ble Supreme Court dismissed their Criminal Appeal No. 1396 of 2007 vide order dated January 25, 2010 but commuted the death sentence awarded to petitioner No. 2 (wife) into life imprisonment.

(2) The petitioners now seek enforcement of their perceived right to have conjugal life and procreate within the jail premises. The issues raised by them are indeed of paramount public importance. Equally significant are the related issues hovering around the concept of 'reasonable restrictions' or 'the extent of suspension of some of the fundamental rights during incarceration', 'radical jail reforms', 'the status of prisoners as protected citizen' within the Constitutional framework as well as the 'international perspective on the right to conjugal life in the precincts of jail', which too call for discussion.

(3) The petitioners are currently lodged in the Central Jail at Patiala in separate cells. They seek a command to the Jail authorities to allow them to stay together and resume their conjugal life for the sake of progeny and make all arrangements needed in this regard. The first petitioner is statedly the only son of his parents and 8 months into their marriage they got caught in the criminal case. The petitioners claim that their demand is not for personal sexual gratification. The petitioners are also open to 'artificial insemination'.

(4) The petitioners' main plank is Article 21 of the Constitution. The 'right to life', they insist, has two essential ingredients, namely, (i) preservation of cell; and (ii) propagation of species of which sex life is a vital part. The decision in *State of Andhra Pradesh v. Chalaram Krishna Reddy* (2000) 5 SCC 712, is relied upon to urge that a prisoner whether convict, under-trial or a detenue, continues to enjoy the Fundamental Rights including 'right to life' which is one of the basic Human Rights. The petitioners also refer to the well regulated concept of 'conjugal visitations' successfully implemented in the advanced countries like the USA, Canada, Australia, UK, Brazil, Denmark and Russia etc.

(5) The State of Punjab has opposed the petitioners' prayer essentially on the plea that the Prisons Act, 1894 contains no provision to permit 'conjugal visitation'; its Section 27 rather mandates proper segregation of male and female prisoners. Para 498 of the Punjab Jail Manual lays down the method for separation of male and female prisoners.

(6) Even 'artificial insemination' as a viable and alternative solution suggested by the petitioners, is not acceptable to the State of Punjab as according to its affidavit dated 20th November, 2010 "there is no such provision in the Prisons Act, 1894 and Punjab Jail Manual to allow the husband and wife convicts to be in the same cell in the jail or to allow for artificial insemination of the convicts…".

…

(9) The following, amongst others, are the issues which have emerged for determination:-

i. Whether the right to procreation survives incarceration, and if so, whether such a right is traceable within our Constitutional framework?

ii. Whether penalogical (sic) interest of the State permits or ought to permit creation of facilities for the exercise of right to procreation during incarceration?

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)?

iv. If question No. (iii) is answered in the affirmative, whether all categories of convicts are entitled to such right(s)?

…

ROLE OF JUDICIARY

(18) A prison in civil society is the place for enforceability of law. All governmental systems provide incarceration through a judicial order only. The prison or the protectees living there are thus instruments and subjects of justice delivery system. The Judiciary as the principal executor and promoter of the rule of law has to have major stakes in respect of the conditions prevailing in the prisons. The duty of the Courts towards jail reforms has become heavier than before after the enforcement of our Constitution as Article 21 guarantees dignified life to one and all including the prison-inmates.

…

(21) In his one of the many salutary and historical decision [*Sunil Batra v. Delhi Administration*, (1978) 4 SCC 494 (popularly known as Sunil Batra-I)], Krishna Iyer, J considered the core issue, whether a prison ipso facto outlaw the rule of law, lock out the judicial process from the jail gates and declare a long holiday for human rights of convicts in confinement or the prison total eclipses judicial justice for those incarcerated under the orders of a judicial Court? The dictum very emphatically espoused the cause of jail-inmates holding that "Prisons are built with stones of Law' (sang William Blake) and so, when human rights are hashed behind bars, constitutional justice impeaches such law. In this sense, courts which sign citizens into prisons have an onerous duty to ensure that, during detention and subject to the Constitution, freedom from torture belongs to the detenu."

(22) Sunil Batra-I, amongst other things, ruled that the condemned prisoner (like Batra) shall be merely kept in custody and shall not be put to work like those sentenced to rigorous imprisonment. Such like convicts shall be entitled to amenities of ordinary inmates in the prison like games, books, newspapers, reasonably good food, the right to expression, artistic and other, and normal clothing and bedding. It was further held that condemned prisoners cannot be denied their right to eat, sleep, work or live together except on specific grounds warranting such a course etc. etc.

(23) Sunil Batra-I marched far ahead of its times in emphasising re-humanisation of the prisoners. It stated that "positive experiments in re-humanization-meditation, music, arts of self-expression, games, useful work with wages, prison festivals, sramdan and service-oriented activities, visits by and to families, even participative prison projects and controlled community life, are among the re-humanization strategies which need consideration. Social justice, in the prison context, has a functional versatility hardly explored."

(24) The reforms in prison administration also caught attention in **Sunil Batra-I** which not only emphasized the need of legislative intervention for replacement of obsolete prison laws but also for the re-orientation and re-visitation of prison house and practices, for "no longer can the Constitution be curtained off from the incarcerated community since pervasive social justice is a fighting faith with Indian humanity." Thus, in the context of Section 30(2) of the Prison Act it was held that such prisoner is not to be completely segregated except in extreme cases of necessity which must be specifically made out.

(25) *Sunil Batra v. Delhi Administration*, (1980) 3 SCC 488 (known as Sunil Batra-II), phenomenally liberated the jail inmates from the atrocities inflicted through mental torture, psychic or physical pressure and it brought a catenation of radical changes in prison conditions like (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) The duties and obligations of the Courts with respect to rights of prisoners; and (vii) Re-defining the duties of District Magistrate etc.

(26) Sunil Batra-II delved deeper into the petrifying effects of loneliness of jail-inmates as is evident from the following passage:-

"Visits to prisoners by family and friends are a solace in insulation; and only a dehumanised system can derive vicarious delight in depriving prison inmates of this humane amenity. Subject, of course, to search and discipline and other security criteria, the right to society of fellow-men, parents and other family members cannot be denied in the light of Art. 19 and its sweep."

(27) It further noticed that even as per the 1973 report of National Advisory Commission "prisoners should have a 'right' to visitation" and that "correctional officials should not merely tolerate visiting but should encourage it, particularly by families…' '…it also urged that corrections officials should not eavesdrop on conversations or otherwise interfere with the participants' privacy".

Sunil Batra-II very forcefully ruled that "we see no reason why the right to be visited under reasonable restrictions, should not claim current constitutional status. We hold, subject to considerations of security and discipline, that liberal visits by family members, close friends and legitimate callers, are part of the prisoners' kit of rights and shall be respected."

(28) Several maladies within the jail precincts including the victimization of young inmates at the hands of adults drew attention in **Sunil Batra-II**, prompting the Court to say that:-

"In the package of benign changes needed in our prisons with a view to reduce tensions and raise the pace of rehabilitation, we have referred to acclimatization of the community life and elimination of sex vice vis a vis prisoner we have also referred to the unscientific mixing up in practice of under-trials, young offenders and long-term convicts. This point deserves serious attention."

(29) The research conducted by a British author on the pitiable jail conditions in developed nations, depicting psycho stress and pressure on the prisoners sentenced for long terms, overcrowding in an area of limited size, unisexual agglomeration, the clash of personalities and the conflict of interests, physical violence for settlement of dispute in common and the impact of such conditions on the young inmates, was noticed with approval by the Hon'ble Supreme Court in *Mithu v. State of Punjab*, (1983) 2 SCC 277.

(30) It would be equally apt at this stage to reproduce Section 27(2) & (3) of the Prisons Act:-

> **"27. Separation of Prisoners**.- The requisitions of this Act with respect to the separation of prisoners are as follow:-
>
> (1) xxx xxx xxx
>
> (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) unconvicted criminal prisoners shall be kept apart from convicted criminal prisoners…"

(31) That the aforesaid provision was never put in practice and merely adorned the Statute Book was critically acknowledged by the Hon'ble Supreme Court in Sunil Batra-II when it said that "**the materials we have referred to earlier indicate slurring over this rule and its violation must be visited with judicial correction and punishment of the jail staff. Sex excesses and exploitative labour are the vices adolescents are subjected to by adults. The young inmates must be separated and freed from exploitation by adults. If Kuldip Nayar is right this rule is in cold storage. It is inhuman and unreasonable to throw young boys to the sex-starved adult prisoners or to run menial jobs for the affluent or tough prisoners. Article 19 then intervenes and shields**."

…

(34) Though these decisions are truly milestones in the recognition and enforcement of prisoner's rights and prison reforms yet they are peripheral to the core issues directly canvassed before me. **Sunil Batra-II** does notice the prevalence of homosexuality or sexual abuse of underage inmates by their adult counter-parts but the question of 'conjugal visits' or 'right to procreation' to be the 'right to life' or 'personal liberty' of a jail inmate was not raised there. Albeit, the book "Rape In Prison" by Anthony M. Scacco, Jr. referred to in that decision does acknowledge that "**sex is unquestionably the most pertinent issue to the inmate's life behind bar… There is a great need to utilize the furlough system in corrections. Men with record showing good behavior should be released for weekends at home with their families and relatives**".

(35) The Andhra Pradesh High Court in **PIL No. 251 of 2012** decided on 16th July, 2012 (Ms. G. Bhargava, President M/s Gareeb Guide (Voluntary Organisation) v. State of Andhra Pradesh) dealt with an identical issue as therein a direction was sought 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 observing that if conjugal visits are to be allowed keeping in view good behavior of the prisoners, "chances of the environment getting disturbed cannot be ruled out as it will have an adverse impact on the other inmates of the jail who have not been selected and extended such benefit…" and that "the issue raised in the writ petition being a policy decision is within the domain of the State…". The Court further viewed that Chapter-IV of Andhra Pradesh Prison Rules, 1979 provide for the release of prisoners on furlough/leave and parole/emergency leave therefore "it is not that there is no provision in the Rules to release the prisoners to enable them to lead family life with their spouses when they are granted furlough/leave of course for a limited period.".

…

(39) 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."

…

AMERICAN VIEWPOINT

(50) Close to the facts of the case in hand, the United States Court of Appeal, Ninth Circuit, in *William Gerber v. Rodney Hickmen*, 291 F.3d 617 (2002), considered the claim of an inmate in the California State prison alleging that Mule Creek State Prison is violating his Constitutional right by not allowing him to provide his wife with a sperm specimen that she may use to be artificially inseminated. The convict was 41-years old and was serving sentence to a hundred years to life plus 11 years. His wife was 44 years' old and they wanted to have a baby as no parole date was set for the convict due to the length of his sentence, he wished to inseminate his wife artificially. The question that arose for consideration was whether right to procreate is fundamentally inconsistent with incarceration? The Court of Appeals, with a majority of 6-5, relied upon two previous decisions to hold that (i) "**many aspects of marriage that make it a basic civil right, such as cohabitation, sexual intercourse, and the bearing and rearing of children, are superseded by the fact of confinement**"; (ii) "**prisoners have no Constitutional right while incarcerated to contact visits or conjugal visits**", and that keeping in view the nature and goals of a prison system, it would be a wholly unprecedented reading of the Constitution to "**command the warden to accommodate Gerber's request to artificially inseminate his wife as a matter of right**". The Court of Appeals did not accept the oral argument on the effect of technological advancement on the issue and said that "**Our conclusion that the right to procreate is inconsistent with incarceration is not dependent on the science of artificial insemination, or on how easy or difficult it is to accomplish**".

…

(52) Previously, in *Steven J. Goodwin v. CA Turner*, [908 F.2d 1395] (1990), the U.S. Court of Appeals, Eighth Circuit, considered the claim of a federal prisoner incarcerated in Missouri, to whom permission to give sperm to artificially inseminate his wife, was declined by the District Court. The Court of Appeals rejected Goodwin's argument that the prison regulation has a direct impact on his wife's right to procreate and viewed that "by its very nature, incarceration necessarily affects the prisoner's family". The other reasons assigned by the Court of Appeals while refusing Goodwin's prayer included that such a permission will have a significant impact on other inmates and the female inmates would have to be granted expanded medical services "thereby taking resources away from security and other legitimate penological interests".

EUROPEAN VIEWPOINT

(53) *Dickson v. The United Kingdom* (Application No. 44362/04) - a decision dated 4th December, 2007 rendered by the Grand Chamber of the European Court of Human Rights has been cited with great force. That was a case where two British nationals sought permission for access to artificial insemination facilities. The first applicant was a murder convict and sentenced to life imprisonment. He had no children. He met the second applicant while she was also imprisoned. She had since been released. The applicants got married in 2001. As they wished to have a child, the first applicant applied for facilities for artificial insemination to which the second applicant also joined. They relied on the length of their relationship; first applicant's earliest expected date of release and the age of second applicant to urge that it was unlikely for them to have a child together without the use of artificial insemination facilities. The Secretary of State refused their application. Their challenge to that decision was turned down by the High Court as well.

(54) Dickson(s) alleged violation of Articles 8 & 12 of the European Convention on Human Rights which, inter alia, provides that (i) everyone has a right to his private and family life and (ii) that men and women of marriageable age have the right to marry and to find a family, according to the national laws governing the exercise of that right.

(55) The Grand Chamber of ECHR held that Article 8 was applicable to the Applicants' complaint as the refusal of artificial insemination facilities concerned with private and family lives which notions incorporate the right to respect for their decision to become genetic parents. Before inferring the violation of Article 8 of the Convention, the fact "that more than half of the Contracting States allow for conjugal visits for prisoners (subject to a variety of different restrictions), a measure which could be seen as obviating the need for the authorities to provide additional facilities for artificial insemination", was duly noticed. The Court further expressed "…its approval for the evolution in several European countries towards conjugal visits, it has not yet interpreted the Convention as requiring Contracting States to make provision for such visits (see Aliev, cited above, § 188). Accordingly, this is an area in which the Contracting States could enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals."

(56) The Court then awarded monetary compensation to the applicants on the strength of Article 41 of the Convention which enables it to afford just satisfaction to the injured party.

SUBMISSIONS OF THE LD. AMICUS CURIAE

…

(58) It was urged that the State has denied the right to procreate to the petitioners only because such a right does not find any mention in the Rulebooks 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.

(59) Ld. Amicus Curiae further submitted that this Court in exercise of its discretionary writ jurisdiction possesses ample powers to enforce the subject fundamental right and direct the Prison Authorities to allow conjugal visits for the sole purpose of procreation, as best as the circumstances permit, and if they find any difficulty and explain it with reasons then the petitioners may be allowed, at their expense, the option of artificial insemination…

(60) Ld. Amicus Curiae canvassed that the right to life includes right to 'create life' and 'procreate' and this fundamental right does not get suspended when a person is sentenced and awarded punishment thereby limiting him to stay in the jail. The law under which petitioners are sentenced and tried does not extinguish their rights under Article 21, till in a legal manner and as far the procedure established by law, the life of 1st petitioner is extinguished. His right to procreate cannot be taken away only because he has been sentenced and punished for some offence. There is no provision, explicit or implied, in any penal law and/or the Constitution that takes away the petitioners' right to decent life under the set circumstances, which squarely falls within the expanded scope of Article 21. The petitioners seeking to exercise their fundamental right to 'life and procreate' thus ought not to be denied. Petitioner No. 1 has been awarded death sentence and is undergoing punishment but his 'right to life' cannot be taken away till his execution. Until then the right to life includes all rights except the freedom to move which has been taken away by way of punishment of law.

…

THE OTHER VIEWPOINT

(62) Learned counsel for the Complainant, contrarily, relied upon the dissenting opinion of Judges Wildhaber, Zupančič, Jungwiert, Gyulumyan and Myjer, in **Dickson** opining that no one can be heard to say "…that there is no right to conjugal visits in prisons, but that there is instead a right for the provision of artificial insemination facilities in prisons (this interpretation results implicitly from paragraphs 67-68, 74, 81 and 91). Not only is this contradictory…" The Minority further held that "the margin of appreciation of Member States is wider where there is no consensus within the States and where no core guarantees are restricted. States have direct knowledge of their society and its needs, which the Court does not have. Where they provide for an adequate legal basis, where the legal restrictions serve a legitimate aim and where there is room to balance different interests, the margin of appreciation of States should be recognized…" The learned Judges were also of the view that "…the Court might have wished to discuss the very low chances of a positive outcome of in vitro fertilization of women aged 45 (see Bradley J. Van Voorhis, "In Vitro Fertilization", New England Journal of Medicine 2007 (356): 4 pp. 379-386). The Court also fails to address the question whether all sorts of couples (for example, a man in prison and the woman outside, a woman in prison and the man outside, a homosexual couple with one of the partners in prison and the other outside) may request artificial insemination facilities for prisoners. We are of the opinion that in this respect too States should enjoy an important margin of appreciation…"

(63) In *R v. Secretary of State for Home Department*, [2001] EWCA Civ 472, the Supreme Court of Judicature (Civil Division), UK considered the claim of a convict-appellant who was serving life sentence for murder. He was aggrieved at the denial of access to facilities for artificial insemination of his wife. The Court considered the appellant's claim in the context of violation of Articles 8 & 12 of European Convention on Human Rights and after referring to the Strasbourg Jurisprudence and relevant decisions of the Commission, it summarized its conclusions as follows:-

"i) The qualifications on the right to respect for family life that are recognised by Article 8(2) apply equally to the Article 12 rights.

ii) Imprisonment is incompatible with the exercise of conjugal rights and consequently involves an interference with the right to respect for family life under Article 8 and with the right to found a family under Article 12.

iii) This restriction is ordinarily justifiable under the provisions of Article 8(2).

iv) In exceptional circumstances it may be necessary to relax the imposition of detention in order to avoid a disproportionate interference with a human right.

v) There is no case which indicates that a prisoner is entitled to assert the right to found a family by the provision of semen for the purpose of artificially inseminating his wife."

(64) The Court nonetheless put a cautious note that the above-reproduced conclusions need not be construed to justify preventing a prisoner from inseminating his wife artificially or naturally. The Court was of the view that interference with fundamental human rights must always involve an exercise in proportionality.

(65) The Court in the above-cited case thereafter referred to the policy of the Secretary of the State and culled out three reasons for sustenance of the policy that restricts the provision of facilities for artificial insemination, namely, (i) it is an explicit consequence of incarceration that prisoners should not have the opportunity to beget children whilst serving their sentences, save when they are allowed to take temporary leave; (ii) there is likelihood of a serious and justified public concern if prisoners continue to have the opportunity to conceive children while serving sentences; and (iii) there are disadvantages of single parent families. The Court thus held that the refusal to permit the appellant the facilities to provide semen for artificial insemination of his wife was neither in breach of the convention nor unlawful or irrational.

POLICIES FOR CONJUGAL/FAMILY VISITS ACROSS VARIOUS JURISDICTIONS

(66) Learned counsel for the complainant drew attention to policies for conjugal/family visits across various jurisdictions. In Canada, as per the Directive 770 dated 14/08/2008 issued by the Commissioner of the Correctional Service Canada, private family visit is allowed but these are subject to certain restrictions like:

PRIVATE FAMILY VISITING

> "22. Eligible inmates shall be offered the opportunity to participate in private family visiting. Private family visiting is intended to support the development and delivery of family programs in the institution and to provide inmates with the opportunity to use separate facilities where they may meet privately with their family to renew or continue personal relationships.

ELIGIBILITY – INMATES

> 23. All inmates are eligible for private family visiting except those who are:
>
> a. assessed as being currently at risk of becoming involved in family violence;
>
> b. in receipt of unescorted temporary absences for family contact purposes; or
>
> c. in a Special Handling Unit or are awaiting decision or have been approved for transfer to a Special Handling Unit.

ELIGIBILITY – VISITORS

> 24. Persons eligible to participate in private family visiting shall include spouse, common-law partner, children, parents, foster parents, siblings, grandparents, and persons with whom, in the opinion of the Institutional Head, the inmate has a close familial bond, provided they are not inmates. **Inmates are not eligible to participate in private family visits with other inmates."**

(67) The policy in Australia's Capital Territory, namely, "Corrections Management (Private Family Visits) Policy 2009" provides that "prisoners are not eligible to participate in private family visits with other prisoners."

ACADEMIC RESEARCH AND OPINION ON CONJUGAL VISITS

(68) Learned Amicus Curiae referred to various scholarly articles, books and research papers, throwing invaluable light on the issue of conjugal visits/marital relationship of prisoners/human rights of prisoners. The article Marital Relationships of Prisoners in Twenty - Eight Countries by Prof. Ruth Shonle Cavan and Prof. Eugene S. Zemans, gives insight of the policies and practices followed in as many as 28 countries in Europe, Asia, Africa and American continents. According to this article "…in only a few countries are provisions for marital contacts extended equally to all categories of prisoners. The limitation may be because of the unreliability or dangerousness of the criminal; or marital contacts may have some connotation of a privilege to be granted only to cooperative and conforming prisoners. In either case, the practice of home leaves or of family residence in a penal colony is not carried out haphazardly but tends to be integrated into the total prison regime.. ..it is worth noting that in general the countries from which we received responses do not favour private or conjugal visits within the prison, with the exception of Mexico."

(69) The other research paper authored way back in the year 1964 titled Conjugal Visitations In Prisons - A Sociological Perspective, is a study on the determination of changes of attitudes of prison administrators in USA towards the idea of conjugal visitations. The author concludes that "Conjugal visitations tend to magnify and accentuate problems relating to rehabilitation. It would appear that prison administrators are not in favour of conjugal visitations, foreign precedents to the contrary notwithstanding. This stand by prison administrators, however, is not without some foundation the attitude of the American public is characterised by apathy, un-familiarity, and disinterestedness in the problem as a whole…".

(70) Yet another article Attitudes toward Conjugal Visits for Prisoners is a research compilation on conjugal visiting practices including those prevailing in Latin American countries like Brazil, Bolivia, Colombia, Chile etc. The practices in Canada and the California (USA) where conjugal visits had been started also found a mention there. After interviewing the Prison Administrators in California, the author found "deep cleavages and almost irreparable estrangement of wives and children toward the husband and father who is away in prison… it is our contention that we do not protect society by contributing to the dissolution of the family unit. Family visiting is an attempt by California prison administrators to provide an opportunity for the inmate to visit his wife and children in a relaxed normal-like family setting".

(71) Learned Amicus Curiae referred to Nelson Mandela's autobiography Long Walk to Freedom wherein one of the tallest leaders of the world has described that Prison not only robs of one's freedom but it also attempts to take away one's identity as every inmate is asked to wear same uniform, eat the same food and follow the same schedule. The work of Sir Leon Radzinowicz and Joan King, titled **The Growth of Crime: The International Experience** especially the Chapter titled 'Prisons in the Pillory' has been usefully highlighted, where the authors while dealing with the issue of conjugal rights have strongly advocated the visits from wives and live-in relationship partners for long-term offenders as an effective solution to the problem of sexual tension and homosexual behavior amongst prisoners. The learned authors have backed with equal force that those prisoners who do not fall into the top security categories should be granted periodical home-leave as a better and more natural solution than conjugal visit in the unfamiliar and embarrassing atmosphere of a prison. In the case of maximum security prisoners, the authors have suggested a small scale experiment whereby selected prisoners with stable marriages could spend a day or weekend with their families in some kind of family hostel outside the prison walls as such a recourse will help maintain links and reduce tension.

(72) Learned Amicus Curiae also quoted an article by Professor Baroness Deech on **Human Rights and Welfare** (2009) which gives a meaningful insight of the case of Yigal Amir, who assassinated the Prime Minister of Israel in the year 1955. Under the Israeli law although the prisoners are allowed to marry and have children, the convict was denied such right due to the heinous nature of the crime. Having married by proxy, the couple petitioned for the right to consummate their marriage and the wife was allowed a conjugal visit in late 2006. The Courts held that the prisoners have these human rights. The said case underlines the severity of the crime to not be a disqualification in granting rights of procreation/ consummation as the same are "human rights".

(73) Learned Amicus Curiae lastly referred to an academic paper written by Brenda V. Smith, Analyzing Prison Sex: Reconciling Self-Expression with Safety, Humans Rights Brief (2006) as it gives an overview of the issue 'Human Rights Norms and Prison Sex' across various jurisdictions. The article is extremely informative and states - "Many other countries permit sexual expression in institutional settings, define these visit under the rubric of either intimate or conjugal visits, and permit prisoners to have intimate and other contact with spouses, partners and family. For example, **Brazil** has implemented a "conjugal visit," which allows prisoners to visit with family and friends without physical restriction, and an "intimate visit," which allows prisoners to receive visits from their partners or spouses in individual prison cells. In the **Czech Republic**, the Director of prison may allow married couples to visit in rooms specifically designated for intimate contact. It also allows prisoners to receive visits from four close relatives at a time. In **Spain**, inmates who cannot leave the institution may receive conjugal/intimate visits once a month for one to three hours. Finally, **Denmark** has implemented a "prison leave" system for prisoners with sentences greater than five months. The leave can last from one day to an entire weekend. Denmark "see[s] leave as a helpful tool in maintaining a stable atmosphere in the prisons and furthermore by keeping contact with relatives outside it is believed that fewer prisoners try to escape".

THE PUNJAB GOOD CONDUCT PRISONERS (TEMPORARY RELEASE) ACT, 1962 AND THE STATE POLICY, INSTRUCTIONS FOR THE RELEASE OF CONVICTS ON PAROLE, FURLOUGH ETC.

(74) Coming back to the Indian scenario, it is intriguing to note that it was as far back as in the year 1926 that the Punjab Good Conduct Prisoners' Probational Release Act, 1926 was enacted with the Object that those prisoners whose antecedents or conduct while under restraint give promise that they will justify privilege of conditional release, with opportunities of earning their own livelihood and "**of having their families with them**", could be released by the State Government, conditionally.

(75) The post-Independence era brought a new legislation known as the Punjab Good Conduct Prisoners (Temporary Release) Act, 1962. The Act was legislated keeping in view the recommendations of Jail Reforms Committee, for the grant of 'leave' on 'furlough' to certain categories of long-term prisoners and also to release them on 'parole'. Section 3(1) of the Act enables the State Government to release the prisoners temporarily for a specified period, 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;

(d) it is desirable to do so for any other sufficient cause."

…

(77) It may be seen from the words, expressions and phrases used by the Legislature in Section 3 of the 1962 Act that the necessity to keep a prisoner in contact with his/her family; societal expectations of his/her presence on certain occasions and the augmentation of sources of livelihood of the prisoner's family have been manifestly acknowledged. Further, sub-clause (d) of Section 3(1) is of such a wide amplitude that it can encompass any reasonable cause as a sufficient ground for the temporary release of a prisoner.

(78) From the conjoint reading of the 1962 Act, Rules and the Punjab Government policy, it is seen that these benefits are extendable to all the prisoners, subject to their good behavior while in jail, except those involved in heinous offences or whose temporary release is likely to endanger State security or public peace and order.

(79) Undeniably, the existing Statutes, Rules or Policy do not contain any express or implied provision to facilitate conjugal life or the opportunity for procreation to a prisoner even if he/she has neither committed 'heinous offence' nor such convict endangers 'State security or public peace and order'. Even the Jail Reforms Committees constituted from time to time have failed to delineate on the issue. The landmarks like **Sunil Batra-I & II** or the later decisions could not opine whether such right(s), to be or not to be read as a part of Article 21 of the Constitution, for no such issue was ever raised in those cases.

(80) The solitary purpose behind travelling into global case-law on the point in issue is to assimilate the broad consensus that has emerged on judicial platforms. It may be seen that from U.S. to Europe, the rights to conjugal visits, procreation or even artificial insemination facilities have been recognized only partially, being integrally embedded in Articles 8 & 12 of 'European Convention on Human Rights' or as the rights that are fundamental to the liberty and human dignity emanating from the Eighth Amendment, and further subject to the justifiable and proportionate restrictions.

(81) Reverting back to the question posed at the outset, there is no gainsaying that ordinarily the right to conjugal visits and procreation is a component of the right to live with dignity and is thus ingrained in the right to life and liberty guaranteed under Article 21 of our Constitution to which a very expansive, dynamic and vibrant meaning has been given by the Apex Court through several historical pronouncements.

(82) The right to conjugal visits or procreation or for that matter the right to secure artificial insemination as a supplement, are also, thus, subject to all those reasonable restrictions including public order, moral and ethical issues and budgetary constraints which ought to be read into the enjoyment of such like fundamental right within our Constitutional framework.

(83) Incarceration leads to suspension of some of the fundamental rights and is a legal impediment in giving effect to the right to conjugal visits or procreation. The said right inheres right to privacy, dignity, respect and free movements as well. Good behavior of the convict, unlikelihood of his/her endangering the State security, peace and harmony or the social and ethical order, financial and society security of the convict and his/her family etc. etc. are several other relevant factors to determine the extent and limitations for translating such a right into reality.

(84) An equally important and paramount issue is whether eligible convicts should have the facility of conjugal visits within the jail precincts or a provision like Section 3(1)(d) of the 1962 Act can be enlarged enough to serve as a regular measure for their temporary release on parole for such exclusive visits. The other question that needs simultaneous answer is as to whether these facilities be extended within or outside the precincts of jail to those hardened criminals also whose singular offence might have shaken the conscience of the society? The lack of unanimity in views even amongst the developed nations indeed keeps this riddle unsolved.

CONCLUSION

(85) India is a multi-linguistic, multi-cultural nation. Most importantly it has multitudinous religions, their sects and branches. India has its own traditions, customs, social values, inhibitions and taboos. Those who are well-equipped and abreast of the facts and figures on the social, economic, educational, self-sustenance, gender free growth of the society or other related complexities, are the most suited to re-visit the legislative or executive policy regime and recommend the need-based changes keeping in view the futuristic priorities towards national cohesion. A society which is currently involved in academic and intellectual debates on 'gay-rights' or the recognition of 'third-gender', cannot shy away nor can it keep concealed under the carpet the pragmatic concept of conjugal visits of the jail inmates. To say it differently, time has come and before it is too late, the stake-holders must sit together and deliberate upon this crucial subject and take a holistic view.

(86) The criminologists have delineated the aim behind 'punishment' and have enlisted several achievable objects like retribution, prevention, protection of the public, reformation and rehabilitation of convicts. The growing trend is for reformation and rehabilitation, prevent recidivism and to encourage re-socialisation through the fostering of personal responsibility. The sentence period is thus divided in such a manner that in the early days of sentence, there is emphasis on punishment or retribution but the net-end goal to be achieved is re-socialisation. The revised concept of punishment has found universal acceptability amongst all civic societies who believe in governance by rule of law. The significance of provisions like 'parole', 'furlough' or 'temporary release' should, therefore, be mirrored as the backbone of penal jurisprudence achievable through reformative concepts. If these age-old reprieving facilities are refurbished with the latest tools and designs, there can possibly be no reason as to why the authorities should shy away from releasing the convicts temporarily on 'parole', 'furlough' etc. for conjugal visitations/procreation.

(87) The legislative or executive, all policies, ought to remain vibrant and dynamic as the static or stale concepts cannot address all contemporary issues. Unfortunately, the in vogue executive policies on the rights of jail inmates are unevenly loaded with the pre-Independence mindset. The Punjab Jail Manual narrates the powers of jail staff and the obligations of convicts in such a tell-tale manner that the 'prisons' can be likened to the 'chambers of torture', as if Article 21 of the Constitution and dozens of human rights are still alien to prison-residents.

…

(89) There can be no quarrel and as rightly observed by AP High Court in Ms. G. Bhargava (supra) also that the issues like facilitation of conjugal visits of convicts for procreation essentially fall within the domain of policy makers and it has to be left to them to evolve an effective mechanism whether by way of legislation or through executive decision. However, what cannot be overlooked is that the convicts or other jail inmates are a class of persons who have been separated from society by the Courts in performance of their sovereign duties. Jails and other Correctional Centres are the extended limbs of justice delivery system as a measure for the enforcement of judicial verdicts. The management, conditions of living and future responsibilities of the inmates inside the jails etc., cannot be left to the sole desire or discretion of the executive. It is rather the responsibility of Courts to ensure that the rights of every resident of prison(s) or correctional home(s) are duly protected and irrespective of the financial constraints which is the oft-offered explanation by a State, the conditions of living, re-orientation or rehabilitation of the convicts is given effect under the direct supervision, command and control of the Courts.

(90) The directions for re-visiting the legislative or executive policy regime which are implicit in the observations made hereinabove are, however, subject to the caveat and conditions like

(i) the gravity of the offence committed by a convict and its likely effect on the society in the event of temporary release;

(i) likelihood of absconding in the case of offenders of heinous crimes;

(ii) good behavior while in jail;

(iii) duration of the actual sentence already undergone;

(iv) the expected date of release on completion of a tenure sentence;

(v) pre-conviction conduct of the convict; etc. etc.

(91) Owing to the neglected and limited infrastructure, causing overcrowding, lack of specialized services and above all the prevailing social norms and the societal expectations, it may not be conducive to create space for conjugal visits within the existing prisons. It can nevertheless be introduced on trial basis in Model Jails or Open Air-Free Jails in such

a manner that the independent family units of the 'convicts with good behavior' may live like in a small hamlet. For that purpose, as of now, a team comprising (i) District & Sessions Judge, (ii) Deputy Commissioner (iii) Superintendent of Jails can identify the places where such like practices can be introduced to begin with.

…

(93) It is directed that until the State of Punjab effectively addresses the issues either by way of appropriate legislation or through policy framework, the expression "any other sufficient cause" contained in Section 3(1)(d) of the 1962 Act shall treat the conjugal visits of a married and eligible convict as one of the valid and sufficient ground for the purpose of his/her temporary release on 'parole' or 'furlough' though subject to all those conditions as are prescribed under the Statute.

(94) Having held that, this Court cannot be oblivious of the fact that the cited decisions of various Courts across the globe voicing their opinion on the right of conjugal visits or artificial insemination of a convict may have some persuasive value in general but the jurisprudential principles expounded therein do not advance the petitioners' claim being vividly distinguishable, for the reasons that (i) the society, its fabric and pragmatic approach to allow or disallow certain events to happen in the case in hand are laid on entirely different foundations and thus no common pyramid can be structured; (ii) the circumstances which led to the petitioners' incarceration are far grave in nature and different from those where one of the spouse was totally innocent and possessory of all human rights without any curtailment unlike the instant case where both of them are convicts and undergoing death sentence and life conviction, respectively; (iii) even the most liberal view taken by some of the European or American Courts would not justify the claim put forth by the petitioners; and (iv) the existing infrastructure and overall environment do not support emergent measures; I, therefore, decline to issue any direction with reference to the claim put-forth by the petitioners.

(95) For the reasons assigned above, I sum up my conclusions and answer the questions as formulated in Para 9 of this order, in the following terms.-

i. Question - (i) Whether the right to procreation survives incarceration, and if so, whether such a right is traceable within our Constitutional framework?

Yes, the right to procreation survives incarceration. Such a right is traceable and squarely falls within the ambit of Article 21 of our Constitution read with the Universal Declaration of Human Rights.

ii. Whether penalogical (sic) interest of the State permits or ought to permit creation of facilities for the exercise of right to procreation during incarceration?

The penological interest of the State ought to permit the creation of facilities for the exercise of right to procreation during incarceration, may be in a phased manner, 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;

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)?

'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). However, the exercise of these rights are to be regulated by procedure established by law, and are the sole prerogative of the State.

iv. If question No. (iii) is answered in the affirmative, whether all categories of convicts are entitled to such right(s)?

Ordinarily, all convicts, unless reasonably classified, are entitled to the right to procreation while incarcerated. Such a right, however, is to be regulated as per the policy established by the State which may deny the same to a class or category of convicts as the aforesaid right is not an absolute right and is subject to the penological interests of the State.

(96) In the light of the above discussion, the instant writ petition is disposed of with the following directions:-

i. the State of Punjab is directed to constitute the Jail Reforms Committee to be headed by a former Judge of the High Court. The other Members shall include a Social Scientist, an Expert in Jail Reformation and Prison Management amongst others;

ii. the Jail Reforms Committee shall formulate a scheme for creation of an environment for conjugal and family visits for jail inmates and shall identify the categories of inmates entitled to such visits, keeping in mind the beneficial nature and reformatory goals of such facilities;

iii. the said Committee shall also evaluate options of expanding the scope and reach of 'open prisons', where certain categories of convicts and their families can stay together for long periods, and recommend necessary infrastructure for actualizing the same;

iv. the Jail Reforms Committee shall also consider making recommendations to facilitate the process of visitations, by considering best practices in the area of prison reforms from across jurisdictions, with special emphasis on the goals of reformation and rehabilitation of convicts and needs of the families of the convicts;

v. the Jail Reforms Committee shall suggest ways and means of enhancing the facilities for frequent linkage and connectivity between the convict and his/her family members;

vi. the Jail Reforms Committee shall prepare a long-term plan for modernization of the jail infrastructure consistent with the reforms to be carried out in terms of this order coupled with other necessary reforms;

vii. the Jail Reforms Committee shall also recommend the desired amendments in the rules/policies to ensure the grant of parole, furlough for conjugal visits and the eligibility conditions for the grant of such relief;

viii. the Jail Reforms Committee shall also classify the convicts who shall not be entitled to conjugal visits and determine whether the husband and wife who both stand convicted should, as a matter of policy be included in such a list, keeping in view the risk and danger of law and security, adverse social impact and multiple disadvantages to their child;

ix. the Jail Reforms Committee shall make its recommendations within one year after visiting the major jail premises and it shall continue to monitor the infrastructural and other changes to be carried out in the existing jails and in the Prison Administration System as per its recommendations.

x. the Jail Reforms Committee shall be allowed to make use of the services of the employees and officers of the State of Punjab, who is further directed to provide the requisite funds and infrastructure including proper office facilities, secretarial services, travel allowances and all necessary amenities and facilities, as required by the Jail Reforms Committee.

(97) Since the scope of this petition was enlarged in the larger public interest beyond the relief sought by the petitioners and the issues raised or answered are equally relevant keeping in view their pari materia Statute(s) or policies, it is directed that the directions issued hereinabove shall apply mutatis mutandis to the State of Haryana and Union Territory of Chandigarh as well.

(98) The petitioners - husband and wife, who are undergoing death sentence and life imprisonment, respectively, are not found entitled to any relief, as prayed for by them, for the reasons assigned in paras 91, 92 and especially in para 94 of this order. Their prayer is accordingly declined.

…"

IN THE HIGH COURT OF GUJARAT

State of Gujarat v. Jadav @ Jatin Bhagvanbhai Prajapati & Ors.
Criminal Appeal No. 652 of 2008, decided on February 01, 2016
M.R. Shah and Z.K. Saiyed, JJ.

A woman, her brother, and parents were acquitted in a criminal case by the trial court. On appeal, the High Court convicted the accused persons. Leniency in sentencing was sought with respect to one of the convicts who was pregnant at the time of delivering the judgment.

Shah, J.: "…

[3.0] Feeling aggrieved and dissatisfied with the impugned judgment and order of acquittal passed by the learned Additional City Sessions Judge (Fast Track Court No.2), Ahmedabad (hereinafter referred to as "learned trial Court") in Sessions Case No.16/2007 by which the learned trial Court has acquitted the respondents herein – original accused for the offences punishable under sections 498-A read with Section 114 of the Indian Penal Code, 1860 (hereinafter referred to as "IPC") and sections 306, 304(B) (sic) read with Section 114 of the IPC and sections 3 and 7 of the Dowry Prohibition Act, the State has preferred the present Criminal Appeal.

…

[8.0] On setting aside the acquittal and convicting the original accused for the aforesaid offences, we have heard all the accused and the learned advocate appearing on behalf of the original accused on sentence. Shri Dipen Dave, learned advocate appearing for Shri Zala, learned advocate appearing on behalf of the original accused has stated that by now 9 years have passed from the date of incident and that even the original accused No.5 – Bhavnaben Bhagvanbhai Prajapati has married and at present is pregnant having pregnancy of 5 months and therefore, it is requested to take lenient view …

…

[9.0] …All the sentences to run concurrently. All the accused, except original accused No.5, be taken into custody to undergo the sentences as observed hereinabove. Original accused No.5 is hereby granted time to surrender up to 31.12.2016. Till then, she is ordered to be released on bail on her furnishing the personal bond of Rs.10,000/- to the satisfaction of the concerned trial Court. It is also observed and directed that on completion of the aforesaid period when original accused No.5 surrenders she may be permitted to carry both her kids and the jail authority is directed to provide full facilities to her and the kids."

IN THE HIGH COURT OF BOMBAY

High Court on Its Own Motion v. State of Maharashtra
2017 Cri LJ 218 (Bom)
V.K. Tahilramani and Mridula Bhatkar, JJ.

A judge, during her visit to a women's prison, received a requisition from a woman inmate for termination of her 16 weeks pregnancy. The medical officer of the jail informed the judge that the jail authorities had sent a proposal for termination of the woman's pregnancy to a hospital committee and such proposal was still pending before the committee. The judge brought the woman inmate's requisition and pending proposal to the notice of the High Court of Bombay. She sought issuance of directions to the hospital and the jail authorities for urgent action to be taken on the woman's requisition for termination of the woman's pregnancy. Noting that other female inmates are also facing similar problems in accessing abortion services, the High Court took cognizance of the matter and treated it as a Public Interest Litigation. The Court examined the procedure followed in cases where medical termination of pregnancy is sought by a female prisoner.

Tahilramani, J.: "The background of this PIL, coming before us, is that Ms. A.S. Shende, Judge, City Civil & Sessions Court, Greater Bombay visited Byculla District Prison on 25.4.2016 in view of directions of this Court. Generally women prisoners in Mumbai are kept in District Women Prison, Byculla, Mumbai. During the visit, one inmate/under-trial prisoner namely Shahana gave a requisition for obtaining permission to terminate her pregnancy. The requisition given by Shahana is part of this PIL. In the requisition, she has stated that she already has a baby who is five months old. The baby was suffering from convulsion/epilepsy, hernia, loose motion as well as fever. Shahana's health was also not good and she was suffering from repeated bleeding. Shahana was four months pregnant. Shahana stated that in all these circumstances, it was very difficult for her to maintain and take care of her five months old baby and herself and in addition, the baby which she was expecting, hence, she requested that she be allowed to medically terminate her pregnancy.

2. Ms. Shende, the learned Judge made inquiry with the Jail Superintendent as well as the Medical Officer attached to the jail. She was informed by the Medical Officer about the health condition of five months old baby of Shahana and pregnancy of Shahana. The medical officer also supported the contention of Shahana in respect of termination of pregnancy. Learned Judge Ms. Shende was further informed by the Medical Officer attached to jail that for obtaining permission for termination of pregnancy, a proposal has to be sent to the Committee which will take time, therefore, considering the state of health of the baby and the mother and the application given by Shahana, the learned City Civil & Sessions Judge thought it fit to forward all the papers including the application/requisition given by Shahana to the High Court for information and urgent action, by her letter dated 26.4.2016. Along with the letter, Ms. Shende sent requisition of Shahana along with her medical papers along with copy of application dated 21.3.2016 sent by the Superintendent, Mumbai District Women Prison, Byculla, Mumbai addressed to Sir J.J. Group of Hospitals, Mumbai for grant of permission for surgery/medical termination of pregnancy. The concern of the learned Judge was that though the letter dated 21.3.2016 was addressed to the hospital, till 26.4.2016, no medical termination of pregnancy was carried out. In

view of that, the learned Judge Ms. Shende requested for urgent directions to be given to Jail Authorities as well as Dean of J.J. Hospital to take immediate necessary action according to law. In view of this report, the Registry of this Court then sought following directions:-

A. Registry be permitted to forward the report of City Civil Judge, Mumbai dated 26.4.2016 with annexures to the Dean of Sir JJ Hospital for taking immediate needful action as permissible under law.

AND

B. Registry be permitted to inform Jail Superintendent, Mumbai District Women Prison, Byculla, Mumbai to immediately co-ordinate with the authority of Sir J.J. Hospital and to produce the concerned Under Trial Prisoner at Sir J.J. Hospital for giving immediate medical treatment including MTP as per medical advice and permissible under law.

AND

C. Registry be also permitted to inform the concerned City Civil & Sessions Judge to monitor the action taken by the Jail Authorities and Sir J.J. Hospital for avoiding delay as there is requirement of urgent steps to be taken by the Authorities in respect of Under Trial Prisoners.

OR

D. Your Lordship may issue any other appropriate directions as may be deemed fit.

3. The directions at 'A' to 'C' were approved and the matter was placed before the Hon'ble the then Chief Justice who directed that this matter be treated as Suo Motu PIL and assigned the matter to this Bench. This is how this matter has come up before us as a number of female prisoners are faced with a similar situation.

4. Meanwhile as per the directions of the Jail Superintendent of Byculla Prison, Mumbai, under-trial prisoner Shahana was taken to the J.J. Hospital, Mumbai on 30.4.2016 for medical termination of her pregnancy. She was directed to be brought before the concerned unit of J.J. Hospital on 3.5.2016. Accordingly, she was brought to J.J. Hospital on 3.5.2016 and on that day itself, her pregnancy was medically terminated.

5. This Court appointed Advocate Ms. Manjiri Shah to assist this Court as amicus curiae in this matter. This Court also directed the learned APP to file an affidavit stating the procedure which is followed in case of Medical Termination of Pregnancy of a female prisoner. Pursuant to the said directions, learned APP tendered the affidavit of Dr. Khan Sayeed Ahmed, Medical Officer presently working at Byculla District Prison, Mumbai. In the affidavit, it is stated that Chapter XLI, at Page No. 607 of Maharashtra Prisons Manual deals with women prisoners. Rule 5 thereof deals with the facilities to women prisoners. Rule 6 deals with medical aid to women prisoners including cases of pregnancy. Rule 7 deals with pregnancy. Rule 8 deals with births in prison. In the said affidavit, it is further stated that records are being maintained by Prison Authorities and as soon as the prisoner viz. under-trial/onvicts (sic) are admitted to prisons/jails, entry is made in the register maintained by the Prison Authorities. The prisoners at the time of admission in the prison are medically examined. Female prisoners at the time of admission are examined and history about last menstrual period is taken down. Urine pregnancy test is also conducted. After conducting the test, if a woman prisoner is found to be pregnant, this fact is intimated to the Superintendent of the Jail and thereafter the woman prisoner is taken to the Government Hospital for further investigation, treatment and for registration of pregnancy in Government Hospital at the earliest.

6. On 29.8.2016, Advocate Ms. Manjiri Shah brought to our notice that an under-trial prisoner Anjali who was lodged at Thane Central Prison as under-trial prisoner F-346/16 was arrested on 25.6.2016 and she wanted to terminate her pregnancy, however, no steps were being taken in this regard. We then directed the Superintendent of Thane Central Prison to record the statement of under-trial prisoner F-346/16 (Anjali) and to produce it in the Court on the next date. Accordingly, the statement of under-trial prisoner F-346/16 was produced before us on the next date i.e on 30.8.2016. In her statement, she clearly stated that she wanted to terminate her pregnancy as it was not possible to continue the same for various reasons stated in her statement. We were also informed that the said prisoner had been referred to the Civil Hospital, Thane for medical tests including sonography and the report of the tests will be produced on the next date i.e 31.8.2016. On 31.8.2016, the medical reports of under-trial prisoner F-346/16 were produced before us. It showed that she was fifteen weeks pregnant as on 30.8.2016. The Medical Officer of Thane Central Prison who was present before the Court stated that in view of the statement of the said under-trial prisoner, the under-trial prisoner will be immediately referred to Thane Civil Hospital so that pregnancy can be terminated. As 3rd to 5th Sept. were holidays, we kept the matter on 6.9.2016 to find out the progress of the matter. On 6.9.2016, we were informed that prisoner was admitted in hospital on 3.9.2016 for medical termination of pregnancy and on 4.9.16, the pregnancy was medically terminated.

7. If a pregnancy is to be terminated, it is to be done strictly as per the norms provided in the Medical Termination of Pregnancy Act, 1971 (for short, 'The Act') especially Sections 3, 4 and 5…

8. Sections 3 and 5 of the Act are the only sections which allow termination of pregnancy. Section 5 can be invoked at any time if the registered medical practitioner is of the opinion in good faith that termination of pregnancy is immediately necessary to save the life of the pregnant woman irrespective of restriction of 12 or 20 weeks as mentioned in Section 3. Thus, Section 5 stands altogether on different footing. We are concerned with Section 3. Whether a woman can make her choice to continue with the pregnancy or to terminate it within a restricted period as contemplated in Section 3 of the Act.

9. In the affidavit of Dr. Khan Sayeed Ahmed, Medical Officer of Byculla District Prison, it is clearly stated that if a prisoner who is pregnant shows her willingness for termination of pregnancy, the norms set out in Section 3 of the Act are strictly followed and if the length of the pregnancy exceeds maximum of 20 weeks as stated in Section 3 of the Act, then Section 5 of the Act is followed.

10. It appears that earlier, there was some misconception that for obtaining permission for medical termination of pregnancy of a prisoner, the proposal has to be sent to a Committee. Referring the case to a Committee would entail delay in the termination of pregnancy. This delay in terminating the pregnancy could have some serious or unnecessary complications which may affect the pregnant lady adversely. However, on going through the Medical Termination of Pregnancy Act and the Rules, as well as the Prison Manual, we find that it is not necessary to refer the case of a pregnant prisoner who wants to terminate her pregnancy to a Committee. The Committee which is referred to under 2(e) of the Medication Termination of Pregnancy Rules 2003 and to which there is a reference in Section 4 of the Act is a Committee whose job is only to approve the place where a pregnancy can be terminated. A prisoner has to simply indicate that she wants to terminate her pregnancy as its continuance would cause grave injury to her physical and mental health. She would then be referred to the Government hospital and if her case was covered by Sections 3 or 5 of the Act, the pregnancy would be terminated.

11. Section 3(2) states that where the length of pregnancy does not exceed twelve weeks, it can be terminated by a registered medical practitioner if he is of the opinion that the case falls under Section 3(2)(a), (b)(i) or (ii). In case of termination of pregnancy exceeding twelve weeks and not exceeding 20 weeks, then same opinion but of not less than two registered medical practitioners is to be sought. The registered medical practitioners should opine that the continuance of pregnancy either would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health. Section 3(2)(b)(ii) pertains to the risk involved to the health of the child. The present case of medical termination of pregnancy is to be considered under Section 3(2)(b)(i) which allows the termination of pregnancy if there is risk to the life of the pregnant woman or of grave injury to her physical or mental health.

12. Besides physical injury, the legislature has widened the scope of the termination of pregnancy by including "a injury" to mental health of the pregnant woman. Thus, if continuance of pregnancy is harmful to the mental health of a pregnant woman, then that is a good and legal ground to allow termination if the pregnancy is not exceeding 20 weeks. Explanations 1 and 2 have stated the presumptions in respect of grave injury to mental health of the pregnant woman. The law-makers have considered and taken care of the mental condition of the pregnant woman. In the case of termination of pregnancy, the injury caused either to body or mind is considered. However, mental health can deteriorate if it is forced or unwanted pregnancy. Let us advert to Explanation 1. Under Explanation 1, if a woman is pregnant due to rape, then anguish caused by such pregnancy is to be presumed to constitute a grave injury to mental health of the pregnant woman. As per Explanation 2, if the pregnancy is accidental on account of failure of device or method used by married woman or her husband for the purpose of limiting the number of children, then the said pregnancy if unwanted, it may be presumed to constitute grave injury to mental health of the pregnant woman. These two explanations stating presumptions do not restrict the scope of the various other circumstances causing grave injury to mental health of woman who is pregnant. We do not want to deal with Explanation 1, as it is very specific about cases of rape and mental anguish to a woman in such cases is obvious. If pregnancy is due to rape, then there is bound to be complete mental break down of a victim. We need to interpret Explanation 2 which is restricted only to a married couple. However, today a man and a woman who are in live-in-relationship, cannot be covered under Explanation 2 whereas Explanation 2 should be read to mean any couple living together like a married couple.

13. A woman irrespective of her marital status can be pregnant either by choice or it can be an unwanted pregnancy. To be pregnant is a natural phenomenon for which woman and man both are responsible. Wanted pregnancy is shared equally, however, when it is an accident or unwanted, then the man may not be there to share the burden but it may only be the woman on whom the burden falls. Under such circumstances, a question arises why only a woman should suffer.

There are social, financial and other aspects immediately attached to the pregnancy of the woman and if pregnancy is unwanted, it can have serious repercussions. It undoubtedly affects her mental health. The law makers have taken care of helpless plight of a woman and have enacted Section 3(2)(b)(i) by incorporating the words "grave injury to her mental health". It is mandatory on the registered medical practitioner while forming opinion of necessity of termination of pregnancy to take into account whether it is injurious to her physical or mental health. While doing so, the woman's actual or reasonable foreseeable environment may be taken into account.

14. A woman's decision to terminate a pregnancy is not a frivolous one. Abortion is often the only way out of a very difficult situation for a woman. An abortion is a carefully considered decision taken by a woman who fears that the welfare of the child she already has, and of other members of the household that she is obliged to care for with limited financial and other resources, may be compromised by the birth of another child. These are decisions taken by responsible women who have few other options. They are women who would ideally have preferred to prevent an unwanted pregnancy, but were unable to do so. If a woman does not want to continue with the pregnancy, then forcing her to do so represents a violation of the woman's bodily integrity and aggravates her mental trauma which would be deleterious to her mental health.

15. According to international human rights law, a person is vested with human rights only at birth; an unborn foetus is not an entity with human rights. The pregnancy takes place within the body of a woman and has profound effects on her health, mental well-being and life. Thus, how she wants to deal with this pregnancy must be a decision she and she alone can make. The right to control their own body and fertility and motherhood choices should be left to the women alone. Let us not lose sight of the basic right of women: the right to autonomy and to decide what to do with their own bodies, including whether or not to get pregnant and stay pregnant.

16. Women in different situations have to go for termination of pregnancy. She may be a working woman or homemaker or she may be a prisoner, however, they all form one common category that they are pregnant women. They all have the same rights in relation to termination of pregnancy. As stated earlier, as per Prison Manual, for prisoners, there is provision for pregnant prisoners. Chapter XLI is on Women Prisoners. Rule 7 in said Chapter pertains to "Pregnancy of Women Prisoners, which is as follows:

> When a woman prisoner (convict or undertrial) is found or suspected to be pregnant at the time of her admission or at any time thereafter, the Medical Officer shall report the fact to the Superintendent. As soon as possible arrangements shall be made to get such prisoner medically examined at the hospital for ascertaining the state of her health, pregnancy, duration of pregnancy, probable date of delivery etc. After ascertaining necessary particulars, a report shall be sent to the Dy. Inspector of General of Prisons, stating the date of her admission, term of sentence, the date of release, duration of pregnancy, probable date of delivery etc.

17. Rule 8 states about Births in prison. Rule 9 is in respect of children of women prisoners. However there is no provision specifically relating to termination of pregnancy of women prisoners either convict or under-trial.

18. When a woman prisoner is admitted in prison, she is medically examined, history of her last menstrual period is taken and urine pregnancy test is carried out. One register is maintained in which noting on these aspects is made including if she is pregnant and if pregnant, procedure stated in paragraph 5 above is followed. However, we understand that sometimes a convict or under-trial women prisoner may not be aware of her pregnancy and she may be unable to disclose the fact of pregnancy at the time of admission in the prison. Hence, medical check up of all the women prisoners who are of reproductive age should be done at least once every month for two months from their admission in jail to ascertain whether the woman is pregnant. Moreover, a woman prisoner if found pregnant should be informed by the Medical Officer attached to the prison that she can get the pregnancy terminated if it is such that it falls under Section 3(2)(a), (b)(i) or (ii). This onus is cast on the medical officer. If she wants to terminate the pregnancy, she should be sent to the civil hospital on an urgent basis to help her to terminate the pregnancy.

…

21. If a pregnant prisoner wants to terminate her pregnancy, then provision of section 3(2)(b)(i) or (ii) are applicable. She being a prisoner should not be treated differently than any other pregnant women. We, with all responsibility state that Section 3 of Medical Termination of Pregnancy Act bestows a very precious right to a pregnant woman to say no to motherhood. It is the right of a woman to be a mother so also it is the right of a woman not be a mother and her

wish has to be respected. This right emerges from her human right to live with dignity as a human being in the society and protected as a fundamental right under Article 21 of the Constitution of India with reasonable restrictions as contemplated under the Act. Human rights are natural rights and thus a woman has a natural right in relation to her body which includes her willingness to be a mother or her unwillingness to be a mother.

22. Section 3(2)(b)(i) is an extension of the human right of a woman and this needs to be protected. Woman owns her body and has right over it. Abortion is always a difficult and careful decision and woman alone should be the choice maker. A child when born and takes first breath, is a human entity and thus, unborn foetus cannot be put on a higher pedestal than the right of a living woman. Thus, fundamental right under Article 21 of Constitution of India protects life and personal liberty which covers women. This right of exercise of reproductive choice though is restricted by Medical Termination of Pregnancy Act, 1971, it also recognizes and protects her right to say no to the pregnancy if her mental or physical health is at stake. Thus, it is a regulated procedure.

23. We would like to refer to the decision of the Supreme Court in the case of *Suchita Srivastava v. Chandigarh Administration* where it is observed that there is no doubt that a woman's right to make reproductive choices is also a dimension of "personal liberty" as understood under Article 21 of the Constitution of India. It is important to recognize that reproductive choice can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected."

24. Advocate Ms. Manjiri Shah stated that she had a discussion with the Head of the Department of Gynaecology in J.J. Hospital where women prisoners in Mumbai are referred in cases of pregnancy. The Out Patient Department (O.P.D.) timings are 8.00 a.m. to 12.00 p.m and it was found that generally women prisoners were brought to the hospital at about 11.30 a.m. to 12.00 p.m., hence, on that day, though the woman prisoner is examined, it is not possible to carry out all the tests which are necessary in relation to the pregnancy. Therefore, it was felt that it would be advisable that the woman prisoner who is pregnant reaches the hospital at about 8.00 or 8.30 a.m. and after examination, the tests can be prescribed and carried out on the same day by the afternoon and the tests results would be received by the evening, hence, by the time, the woman prisoner went back to the prison, the entire tests and reports are ready due to which the next step can be decided and the next date of operation/medical procedure can be decided on that day itself.

25. In Mumbai, when the prisoners are to be taken to the Court or hospital, it is the job of L.A. Squad to escort them, however, it is seen that except in cases of dire medical emergency, the L.A. Squad gives preference to prisoners who are to be produced in the Court and sometimes, sufficient staff is not available to take the prisoners to the hospital. In case where there is no emergency, then that prisoner is not taken to the hospital on that day and may be taken to hospital after a day or two. In case of pregnant prisoner, if the pregnancy has to be terminated, normally it has to be done in 12 weeks as set out in Section 3(2)(a) or 20 weeks as set out in 3(2)(b) of the Act provided it falls under Section 3(2)(b)(i) or (ii). In cases of pregnancy, every day is important on account of growth of foetus. Once a woman prisoner is found to be pregnant and she indicates that she wants to terminate the pregnancy, she should be immediately referred to the hospital and it should be ensured that her pregnancy is terminated. The Jail Administration and Escort Division to ensure that as far as possible such lady prisoner reaches the hospital by 8.30 a.m. A female prisoner cannot have access to facility of medical termination of pregnancy if her case falls under Section 3 or 5 of the Act, therefore not providing her with the facility amounts to forcing a woman to continue with a pregnancy she does not want which by itself constitutes a grave injury to her mental health and as such would fall under Section 3(2)(b)(i) of the Act. Hence, such a pregnancy can be lawfully terminated.

…

27. In view of the above, directions are given as under:-

1. (i). Upon admission into a jail/prison, every woman prisoner of child bearing age shall undergo a Urine Pregnancy Test (UPT) within 5 days of being admitted to jail.

(ii) Every woman prisoner of child bearing age shall undergo a second UPT approximately 30 days after admission into jail/prison in case the UPT under 1(i) is not positive.

2. In case, the urine pregnancy test is positive, the Medical Officer shall inform the prisoner that she can get the pregnancy terminated if her case falls under Section 3 or 5 of The Medical Termination of Pregnancy Act.

3. If the prisoner indicates she wants to terminate the pregnancy, her statement should be recorded by the Jail Authority or Medical Officer to that effect and the record of the statement be maintained. A copy of that statement be forwarded with the prisoner when she is referred to the hospital.

4. If the prisoner indicates that she wants to terminate the pregnancy, the Medical Officer and Jail Superintendent shall ensure that woman prisoner is sent on urgent basis to the nearest Government Hospital to help her terminate the pregnancy. It is made clear that they shall not wait for any order of the Court if the case falls under Sections 3 or 5 of the Act.

5. Every prison shall maintain "Prison OPD Register" where details of every prisoner examined either by the prison medical officer/doctor or visiting doctor are entered. Such register shall contain in brief (i) the name of the prisoner; (ii) convict or undertrial number, (iii) the medical complaint of the prisoner;

(iv) the advice of the doctor (including referral of the patient to the nearest government Hospital) and (v) the date for follow up when necessary. The Prison OPD Register be produced for inspection of the Sessions Judge/Magistrate deputed to visit the prison.

6. The Jail Superintendent and escort division to ensure that such prisoner as well as other prisoners needing medical treatment in a hospital are sent to the hospital as far as possible by 8:30 a.m. i.e when O.P.D opens.

7. After discharge from the said hospital, the prison authorities shall take due care of the woman prisoner until she fully recovers from the medical termination of her pregnancy.

…"

IN THE HIGH COURT OF MADRAS AT MADURAI

Mrs. Meharaj v. The State & Ors.
2018 SCC OnLine Mad 278
S. Vimala and T. Krishnavalli, JJ.

The wife of a detenu had filed an application with the State seeking leave for her husband for thirty days in order to undergo infertility treatment. The application had been rejected by the State. She then filed a habeas corpus petition in the High Court of Madras against this rejection order. The Court was called upon to adjudicate on whether prisoners are entitled to conjugal visits. It also ruled on the right to procreation of the spouse of an incarcerated prisoner.

Vimala, J. : "…

2. This application has been filed by the wife of the detenu, namely, Siddique Ali @ Sulthan, aged 40 years, seeking to quash the impugned order of the third respondent dated 20.09.2017, declining leave for her husband and seeking a direction to the respondents to produce her husband/detenu, who is a life convict detained at Central Prison, Palayamkottai, before this Court and to grant him leave for 30 days to assist her in the infertility treatment to be undergone by her.

3. It is stated that previously, a Habeas Corpus Petition was filed before this Court in HCP(MD) No.1121/2017 praying to grant leave for 60 days to the detenu. This Court, by order dated 31.08.2017, had directed the respondents to take a decision for consideration of leave within a period of one week from the date of receipt of the copy of the order. By the letter dated 20.09.2017, the leave was declined by giving two reasons, namely,

(i) neither the Inspector of Police nor the Probation Officer recommended the leave, and

(ii) The personal life of the detenu will be put to danger. This order is under challenge in this application.

…

5. The initial conviction and consequent imprisonment, though is in accordance with law, whether the denial of leave for 30 days, during the period of incarceration would amount to illegal custody and thus bring the case of the petitioner within the category of Habeas Corpus is the issue that arose for consideration in this petition, which is answered by the dictum laid down in the case of Sunil Batra.

6. Therefore, it is clear that when the rights of the prisoner is not protected, this Court can exercise the writ jurisdiction, if the humanistic approach obscure the sense of realities.

…

10. The 2nd objection is that there is no provision under the Jail Manual for the grant of leave on the ground stated by the petitioner herein. Rule 20 of the Tamil Nadu Suspension of Sentence Rules, 1982, prescribes eight grounds, under which, the 7th ground is 'any other extraordinary reason'. Therefore, whether the claim made by the petitioner is an extraordinary reason or not should be considered. In the absence of any other rule, providing for release of prisoner for the purpose of procreation of a child with the available law, it must be interpreted that the request is covered under extraordinary reasons. Even assuming that this reason is not extraordinary, Article 21 of the Constitution of India would very much available for this Court to consider the claim made by the wife.

11. The wife / petitioner is aged 32. The prisoner is undergoing imprisonment (life) and he is in custody for a period of 18 years. The fact remains that they are not blessed with a child, may be because the husband is not at all living with his wife. The Doctor has given assurance to the wife that with the help of infertility treatment, it is possible to beget a child.

12. Man is a social animal. He needs a family as well as a society to live in. The man needs both to share his emotions and feelings. Being human beings, prisoners also would like to share their problems with their life partner as well as with the society. Just because, they are termed as prisoners, their right to dignity cannot be deprived.

13. Out of four theories of punishment, India has accepted the theory of reformation also. The concept of reformative theory is best, as it says that the human being to be reformed would become the productive member of the society. If that is to be done, prisons have to be transformed as homes for the purpose of giving training morally as well as intellectually, so that the prisoners are denuded of the qualities of a criminal. The psychologists and psychiatrists believe that the frustration, tension, the ill feelings and the heart burnings can be reduced and a human being can be better constructed if they are allowed conjugal relationship even rarely. Therefore, while considering the merits and demerits of allowing conjugal visits or permitting leave for the purpose of artificial insemination, the advantages are more than the disadvantages.

14. Conjugal visit leads to strong family bonds and keep the family functional rather than the family becoming dysfuctional due to prolonged isolation and lack of sexual contact.

…

16. Conjugal visits of the spouse of the prisoners is also the right of the prisoner. This right is recognized at least in few countries of the world. When the prisons are overcrowded providing place for conjugal visits may be a problem, but the Government has to find out a solution. Today, conjugal visits are called extended family visits (or, alternately, family reunion visits). The official reason for these extended family visits is three-fold: to maintain the relationship between the prisoner and the members of his family, to reduce recidivism, and to motivate or to provide an incentive for the good behavior.

…

18. In 2015, Government of India passed legislation stating that conjugal visits are a right and therefore, it is not a privilege for married inmates. These inmates are also entitled, if they wish, to give their sperm to their spouse for artificial insemination.

19. Apart from that, even though the wife is not under incarceration, but a suffering person outside the prison on account of the marital relationship with the prisoner and her legitimate expectation to have a child cannot be declined.

…

21. Under the stated circumstances, this petition is disposed of and the convict prisoner, namely, Siddique Ali @ Sulthan, S/o.Deen (Convict No. 7368) is permitted to go on temporary leave initially for a period of two weeks, i.e. from 20.01.2018 to 03.02.2018…

…

22. It is made clear that if the preliminary investigation by the Doctors reveals that there is a possibility of getting a child and further treatment is necessary, then this Court will consider the extension of time by another two weeks. In case of further treatment, the petitioner shall make request to the jail authorities. The petitioner is also at liberty to move this Court as and when necessary. The expenses for escort shall be borne out by the State Government."

Endnotes

1 2013 Cri LJ 2868 (M.P.).

2 (2009) 9 SCC 1. For excerpts, see Chapter 7, "Disability and Reproductive Rights."

3 2017 Cri LJ 218 (Bom).

4 (2007) 15 SCC 337.

5 Criminal Appeal No. 652/2008, decided on Feb. 01, 2016 (High Court of Gujarat).

6 2015 Cri LJ 2282 (P&H).

7 2018 SCC OnLine Mad 278.

8 U.N. Office of the High Commissioner for Human Rights, "Status of Ratification Interactive Dashboard—India," http://indicators.ohchr.org/ [accessed Mar. 21, 2019].

9 D*raft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the Commission at its fifty-third session in 2001 (Final Outcome) (International Law Commission [ILC]), contained i*n U.N. Doc. A/56/49(Vol. I)/Corr.4 (2001)*, Arts. 3-4.*

10 United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, U.N. Doc. A/RES/43/173 (1988), Principles 1, 3, 5, 24-26 (outlining that prisoners retain all human rights, including protections for pregnant women and nursing mothers); United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), U.N. Doc. A/RES/65/229 (2011), Annex at § I, paras. 5-6, 7(c)-(d), 10, § 2, para. 3, and § III, para. 2 (outlining best practices for health care services, including pre-, peri- and post-natal care, for women and girl prisoners and detainees); United Nations Basic Principles for the Treatment of Prisoners, U.N. Doc. A/RES/45/111 (1990), paras. 2, 5, 9 ("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 other human rights treaties, including the rights to non-discrimination and to health); United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), U.N. Doc. A/RES/70/175 (2016), Rule 28 (updating the original rules from 1955 and outlining that "[i]n women's prisons, there shall be special accommodation for all necessary prenatal and postnatal care and treatment. Arrangements shall be made wherever practicable for children to be born in a hospital outside the prison. If a child is born in prison, this fact shall not be mentioned in the birth certificate.").

11 Vishaka v. State of Rajasthan, AIR 1997 SC 3011.