

## Examining Conjugal Rights of Inmates under Pakistan's Legal and Shari'ah Framework

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### Abstract

*The main aim of the study is to evaluate the Islamic and legal aspects of conjugal right of prisoners in the Pakistani system of penitentiaries. Despite the fact that imprisonment implies the limitation of individual freedom, inmates still have the right to a system of human entitlement in the form of international, regional and domestic legal policies. This paper examines the basic Sharia principles and underlying constitutional, statutory and judicial perspectives in a bid to find out the degree to which the Islamic law recognizes marital intimacy among the incarcerated. The study employs a qualitative research design through the assessment of constitutional requirements, prison policies, international standards, and human rights reports. The results suggest that the formalization of conjugal rights is important not only in saving human dignity and effectiveness of rehabilitative interventions but also in ensuring family cohesion. Additionally, the use of marital visitations is an effective intervention in reducing institutionalization of homosexuality and the spread of sexually oriented diseases among the prisoners.*

**Keywords:** *Conjugal Rights, Shari, Law, Prison Reform, Human rights, Pakistan Penal System, Rehabilitation*

### Introduction

The right to individual freedom is one of the keystones of human life. However, the judicial system might require imposing a temporary limitation on this right on the individuals whose actions lead to criminal convictions and place them under the direct supervision of the correctional authorities<sup>1</sup>. One of the common punitive actions the judiciary applies to punish the offender is imprisonment where the offender is kept in a controlled setting. Nevertheless, imprisoned is not a state in which a prisoner

abandons his/her status of a human being. Although the law requires the loss of certain liberties, there is a group of inalienable fundamental rights

enjoyed by the inmates. These are right to life and the standard minimum of living, humane treatment, inadmissibility to torture, and the absence of discrimination due to the caste or ethnicity. Moreover, the right to education, rehabilitation, due process and the rights to protect parental and cultural relationships are key rights to be observed even in confined conditions<sup>2</sup>.

The conjugal rights are among these basic rights. The very notion of the conjugal refers to the lawful and social acceptance of the rights which is inherent to married couples, namely, the privilege of having intimate relations and bringing up an extended family. A conjugal visit is considered as an approved time during which a convict is allowed to have a personal moment with his or her legal spouse in the prison compound. This permits the practice of sexual privilege and preservation of marriage relationship. These provisions should help create a stable psychological state during the imprisonment period and ease the social integration process after being free, in particular, by reducing the rate of sexual and non-sexual violence among the prisoners<sup>3</sup>.

The main aim of this right is to maintain the integrity of the domestic stability and the upholding of the family set up. The worldwide debate on the right of prisoners to marital intimacy reached a large momentum circa 1904 in the Parchman Penitentiary<sup>4</sup>. Although to the common population conjugal visits refer to the sexual activity only, the legal definition is inclusive of a secret meeting in a special area where an inmate can enjoy the physiological and emotional right of a spouse<sup>5</sup>.

The development of these visits is rather complicated historically. The example of Parchman Farm in Mississippi is an early though controversial one. It was originally known as a labor camp where African American prisoners were treated in a way that reminded me of slavery, but later it was used as the location of early marital visitation<sup>6</sup>. During the early 20 th century, these relations were than a system of informal, patriarchal compensation. The prisoners were provided with sexual partners as a form of reward to high productivity of labor in the cotton fields but this was not a policy and usually involved sex workers<sup>7</sup>.

Only after 1955 was the penal system officially formalized to have programs of marital visits. It was during this change that private cabins that were meant to hold meetings among the inmates, their wives and their children were constructed and sex workers were no longer used. Gradually, these visits were developed as formal furloughs, a sort of partial solution to the psychological fears and behavioral changes of long-term isolation<sup>8</sup>. These rights, though initially looked at with distrust within the Western penal cultures, were more efficient at controlling the tensions in the prisons, than the purely disciplinary action<sup>9</sup>.

The discussion of conjugal rights is a debatable and under-studied aspect of prison reform in the modern Pakistani setting. Although the world standards of human rights encourage human beings to preserve family relationships, the country faces immense cultural, infrastructural, and legal challenges in Pakistan. This study is important because it aims at aligning the

conjugal rights with the international standards and constitutional guarantees, legally. The study highlights the social importance of these rights in maintaining the mental health of the inmates as well as avoiding recidivism. Combining the global comparative analysis with the specifics of socio-cultural and Islamic situation in Pakistan, this research offers a helpful framework of the substantive criminal justice reform.

## 2. Conceptual Framework of Conjugal Rights

In essence, conjugal rights are the mutual rights that are created by the marriage institution whose main entitlements are the rights of one partner to the other in the form of society and companionship. In the contextual setting of the penal system, such a notion is translated into the concept of conjugal visits, where imprisoned people have an opportunity to spend personal, special time with their legal partners within the restrictions of the correctional facility<sup>10</sup>. Proponents of this practice argue that such visitations are instrumental in bolstering the psychological health of detainees, fortifying marital bonds, and curbing the prevalence of sexual aggression and institutionalized homosexuality<sup>11</sup>. Moreover, the denying of these rights is observed in the law-making discourse to be an implied punishment of the innocent spouse, who have a fundamental entitlement of continuing their marital relationship<sup>12</sup>.

The dignity and life of the incarcerated is safeguarded by a protective umbrella of the global human rights instruments, such as the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the United Nations Standard Minimum Rules on the Treatment of Prisoners (The Nelson Mandela Rules). These theories promote the maintenance of family wholeness, by which also, in the implication, marital intimacy<sup>13</sup>. On the national level, although the need to ensure social order is the major aim of most penal codes, there is a growing understanding that there is a need to support the social and family network of a prisoner<sup>14</sup>.

The acknowledgement of these rights is based on the philosophies of human dignity, social rehabilitation and successful reintegration. The state recognizes the humanity of the inmate by giving him or her the freedom to engage in physical intimacy and privacy, and tries to reduce the emotional trauma of the protracted separation<sup>15</sup>. Although the practice may differ across the world, whereas in certain jurisdictions there may be liberalization of the visitation policies and in some cases having a complete ban, the argument usually revolves around the conflict between the welfare of the inmates and the safety of the institutions<sup>16</sup>. This discussion has in recent times extended to the analysis of gender parity and wholesale criminal justice reform<sup>17</sup>.

## The Pakistani Legal and Socio-Cultural Landscape

Marital rights of the detainees are a burning but still under-explored field of the action in Pakistan, where the tension between conservative social practices and the development of the law is evident. The Prisons Act of 1894 that is still considered to be the basic legislative framework of the jail management is particularly silent on the question of the marital rights of

the inmates<sup>18</sup>. However, the higher court in Pakistan has sometimes construed a right to life and liberty under Article 9 of the 1973 Constitution to mean protection of human dignity that may include the right to marry and engage in marital relationship<sup>19</sup>.

Being the signatory to the ICCPR, as a global citizen, Pakistan must align its national penal practice to the international standards, including the right to family life, which is outlined in the article 8 of the European Convention on Human Rights<sup>20</sup>. Additionally, the sociological understanding of these rights in Pakistan is riddled with the Islamic values. Islam emphasizes the holiness of the marriage agreement and performance of spousal duty, which is a religious belief that underpins the argument of conjugal access in the imprisonment period<sup>21</sup>. Nevertheless, the tension between traditionalist cultural disposition and more liberal interpretation of the law tends to derail the process.

There are important lessons of Pakistani reform as presented in comparative research. In India, the courts have at intervals acknowledged that conjugal access will decrease recidivism and promote moral reformation among the convicts<sup>22</sup>. On the same note, some jurisdictions of the United States have incorporated marital visits in their reform agenda in order to stabilize the family unit<sup>23</sup>. Although there are these possible advantages, there are dire structural challenges to implementing the approach in Pakistan such as acute overcrowding in the prison, poor infrastructure, and high levels of public opposition<sup>24</sup>. Critics frequently argue that paying attention to marital access can come at the cost of more pressing crises, which include prisoner safety and basic healthcare<sup>25</sup>. Also, it is feared that unless there is strict monitoring, then such programs may be easily abused by the administration and add to the already crippled criminal justice system<sup>26</sup>.

### **Rationalizing the Protection of Conjugal Rights**

The rationale in defending the conjugal rights of the detainees lies in the overlap of the human dignity, the social rehabilitation and the maintenance of the domestic unit<sup>27</sup>. Marital visitations reiterate the fact that even though physical freedom is limited, convicts still enjoy basic freedoms i.e. the right to privacy and a family of their own<sup>28</sup>. These interactions as a psychological phenomenon are a crucial way of mitigating the chronic stress and high levels of isolation of the carceral experience, which otherwise leads to emotional stability.

Moreover, the preservation of close family relationships is an important antecedent to a successful socialization, which successfully reduces recidivism by keeping the inmate in a well-grounded support network<sup>29</sup>. In a more general social sense, these rights allow the preservation of the marital duties and relationships between parents and children that should not be broken forever by the state authority. The latter is also a response to the current gender equality issues as it acknowledges that both men and women prisoners have an equal right to their marital status and biological legacies<sup>30</sup>. After all, these rights are a shift toward the restorative and human-focused philosophy of justice, instead of the retributive one<sup>31</sup>.

### Islamic Jurisprudential Approaches to Inmate Conjugal

Rights Islamic jurisprudence (Fiqh) offers a deeper theoretical framework of explaining the marital rights of the incarcerated based on the principle of human dignity protection (Karama) and the holiness of family. With Islam, marriage is considered to be a religious agreement (Mithaq-e-Ghaliz) that contains mutual responsibilities such as the right to sexual intimacy, which is also understood as a right and necessity to both the partners. The philosophy of Islamic law is that, except where a particular right is specially restricted in the name of the common good or the administration of justice, the basic human situation of an individual is not lost when in prison<sup>32</sup>.

Even the Divine direction of the Holy Quran emphasizes the significance of the couple bond and the family unit. O people! beware of ( your duty to) your Lord who made of a single being and of its mate of the same kind, your counselor, your helper, your comforter, your sibling, your companion!...<sup>33</sup>. This is further supported in Surah Al-Zariyat which observes: And of all these We have brought pairs that thou should be mindful”<sup>34</sup>. Moreover, Surah Al-Hujurat points out that the institution of tribes and families was meant to be recognized and to socialize with one another and that honorable are the most conscious to their obligations<sup>35</sup>.

The family roles are also spelt out by the Islamic law; men are known as family protectors and providers; the same role is compensated by the corresponding rights of the wife and her responsibilities to the house. The rights of a spouse are not affected by the legal status of the partner in the conditions of imprisonment in spite of the fact that the inherent rights of a spouse are not influenced by the legal status of the person in prison<sup>36</sup>. Therefore, the Shari-compliant concept of parole or temporary release is an appropriate system through which the inmates can meet their family and marital responsibilities. The treatment of detainees has compassionate precedents in the Islamic history and the Sunnah. Historical documents show that there is a principle according to which no one should be deprived of his/her spouse or children during more than six months<sup>37</sup>.

This was the human norm that was maintained in the age of the Rightly Guided Caliphs. In particular, it is recorded that Imam Ali (R.A) responded to the grievances on the denial of marital support and established universal guidelines on welfare of prisoners. Imam Ali (R.A) gave permission in a landmark precedent that the spouse of a detainee could accompany and live with the prisoner saying that the family of an inmate always has the right of visitation and companionship at any moment<sup>38</sup>. These precedents establish that the Islamic law is not aimed at penalizing the innocent relatives of the convicted family nor does it favor the demolition of the marital relationship during the detention duration<sup>39</sup>.

### The Legal Framework: Constitutional and International Perspectives

Being an Islamic Republic, Pakistan is constitutionally bound to respect the equality, social justice, and liberty. Although Article 25(3) of the Constitution of Pakistan (1973) is

concentrated in protecting women and children, Article 35 specifically commits the State to protect the marriage, the family, and the entitlement of the mothers<sup>40</sup>. The courts should be urged to think past the confines of legalism in areas of marital matters, in which the human heart and the delicate or societal social fabric are involved. Though Articles 9 and 14 provide the right to life, liberty, and dignity, their direct use in conjugal visitation has traditionally not been expressed in judicial activism.

Nevertheless, international standards can help to establish a solid base of such reforms. Pakistan being a signatory to the International Covenant on civil and political rights (ICCPR, 1966) has an obligation to acknowledge the family as the basic unit of the society, which should be accorded protection by the State in accordance with Article 23 of the document<sup>41</sup>. Likewise, the 16 th article of the Universal Declaration of human rights (UDHR, 1949) says that men and women of full age are entitled to marry and create a family and have the rights and freedoms equal before, during and after the dissolution of marriage without discrimination on the basis of race or religion<sup>42</sup>.

### **Legislative Needs and the Evolution of Prison Rules**

The controversy over the lack of sex laws in Pakistani prisons was greatly instigated by the Petition No. 21-I of 1995 that pinpointed the lack of conjugal right as a factor that breeds sexual exploitation, health hazards and mental instabilities<sup>43</sup>. In 2010, there was a historic change as the Federal Shariat Court (FSC) confirmed the rights of prisoners to have special marital meetings, which is based on preservation of family, which was an Islamic focus.

After the FSC landmark decision in Dr. Muhammad Aslam Khaki and others vs. the State and others (2010), the provinces made changes in legislation. The Punjab government under Section 59 of Prisons Act of 1894 made amendment in Punjab Jail Rules of 1978 and added Rule 545-A<sup>44</sup>. Provisions of the same nature were previously introduced in Khyber Pakhtunkhwa (KPK) in 2005 in Rule 544. Inmates with a sentence sentence of more than five years are allowed to live with a child who is below six years old and their legal spouse under Rule 545-A.

Three days, three times per year, given that they pass a number of security and identity checks. It is worth noting that the provisions do not apply to the convicted of anti-state activities or terrorism except with express government clearance<sup>45</sup>.

### **Rehabilitation through Conjugal Visitation**

Couple visits are becoming a means of rehabilitation to the Pakistani state as opposed to a luxury. Such visitations in every province would reduce the problem of drugs and sexual abuse among prisoners effectively as they are institutional issues<sup>46</sup>. Reforms proposed are the extension of these rights by either family meetings within prison properties or through usage of parole facilities where meetings are done in private and not exceeding a week after every four months<sup>47</sup>.

Criminological, such programs are helpful to decrease tension and long periodical isolation in

prisons. It has been shown that prisoners with solid social networks, that support them via the process of visitation, are more optimistic about their future and much less prone to violent misbehavior than prisoners who are not maintained in social networks<sup>48</sup>.

Although these are the theoretical advantages, there is an inherent disparity between policy and practice. There has been a structural underfunding and overcrowding of their jails making reform efforts ineffective in Pakistani jails. Although the judiciary system has employed a significance oriented interpretation of the constitutional rights to defend the inmates, the executive has found it hard to provide the required infrastructure<sup>49</sup>. Finally, the development of the subject of social support of inmates in Pakistan has increased over the last thirty years, still, the institution of conjugal rights is not evenly spread. The protection of such rights is not only a penal policy issue, but a constitutional obligation of the state to respect human dignity even in prison<sup>50</sup>.

## Conclusions

The comparison of the legal and Islamic regulation of the marital right of the detainees in Pakistan shows that there is a complex interaction between theological requirements, cultural values, and the contemporary human rights principles. Though the Islamic law has a very strong emphasis on the sacredness of the marriage bond and the need to maintain the family cohesiveness even in the incarceration period, the Pakistani legislative system is rather tacit. The existing provincial laws, namely Rule 545-A in Punjab and the KPK Prison Rules, allow a meeting between family members, but fail to go further to a national application of conjugal rights<sup>51</sup>.

Though Articles 9 and 14 of the Constitution provide a strong legal foundation of protecting the inmate dignity, the effective implementation is often hindered by the lack of effective infrastructure, bureaucratic inertia, and conservative social reaction. These reforms are now under the jurisdiction of provincial governments, which in turn have to fill the gap between the international expectations of the ICCPR and the reality of the penal system<sup>52</sup>. Finally, acknowledgment of conjugal rights is no dilution of security, but an employment of the Islamic and constitutional obligation of restorative justice<sup>52</sup>. Ultimately, recognizing conjugal rights is not a compromise on security but a commitment to the Islamic and constitutional duty of restorative justice.

## Recommendations

To ensure that the administration of the prison system in Pakistan is in accordance with Islamic morals and international human rights standards, it is suggested that the following strategic interventions could be implemented:

### Legislative Standardization:

The provincial governments ought to formally establish the conjugal rights into their prison manuals. It is suggested that Rule 545-A is to be reformed that will offer these rights to all inmates who receive the sentence with the minimum of three years in captivity and guarantee more access to rehabilitation<sup>53</sup>.

### **Infrastructural Investment:**

Specific, devoted funds should be provided to build special, closed conjugal units within the prison boundaries. Existing buildings used as family-visiting facilities should be re-dominated and used to engage into marital intimacy<sup>54</sup>.

### **Judicial Accessibility:**

Marital visit application process ought to be simplified. The inmate and his or her spouse are supposed to have the inalienable right to petition the court. When the request is met satisfactorily by the judges, it would compel the Jail superintendent to assist the visit within a given time limit.

### **Parole Integration:**

Probation and Parole Service Act should include a special parole program where inmates who are eligible enough can meet their marital and domestic needs within a community, which will lower the pressure of prison facilities<sup>55</sup>.

### **Health and Education:**

Prisons should also have advanced medical centers in order to offer compulsory screening and counseling. Inmates attending the conjugal program must be taught about reproductive health and prevention of sexually transmitted diseases in order to guarantee about the safety of both spouses<sup>56</sup>.

### **Sustainability and Revenue:**

In order to have the conjugal facilities maintained in the long term, the Jail Superintendent in consultation with the Sessions Judge may introduce a nominal but affordable conjugal fee. This revenue will be reinvested to the maintenance of the units hence the program is self sustaining without imposing pressure on the national budget<sup>57</sup>.

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