

The Rights of Inmates to Conjugal Rights: Uganda in Perspective

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Ssentongo Yakubu

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ABSTRACT

Conjugal rights¹ for inmates exist when conjugal visits are made by their spouses or family to their places of confinement. They are considered a privilege for prisoners who have exhibited good behaviour during their term of incarceration. Consequently, it has been given legal backing in constitutions and enactments like Corrections Management (Private Family Visits) Policy 2009². Similarly, the Uganda Law Reform Commission (ULRC) is set to amend the Prison's Act to, among other things, reflect the current situation and public demands, including availing conjugal rights for inmates³. This article is intended to discuss whether conjugal rights are privileges or rights, examine the arguments for and against conjugal rights for inmates and explain the different aspects of conjugal rights.

1.0 INTRODUCTION

1.1 What Are Conjugal Rights?

These are rights and privileges arising from a marriage relationship including the mutual rights of companionship, support, and sexual

* Ssentongo Yakubu, Law Student at Kampala International University, Student Research Assistant to the HoD Public and Comparative law at the School of Law

¹ The sexual rights or privileges implied by and involved in the marriage relationship or the right of sexual intercourse between husband and wife. Merriam Webster dictionary definition of conjugal rights

² The ACT(Australian Capital Territory) authorizes conjugal visits through the Corrections Management (Private Family Visits) Policy 2009, Notifiable instrument NI2009-155 made under the Corrections Management Act 2007, section 14(1)(corrections policies and operating procedures)

³ H. Sekanjako, "Inmates will soon enjoy conjugal rights" available at <https://www.newvision.co.ug/new-vision/news/1318217/inmates-soon-enjoy-conjugal-rights> (accessed 16 December 2016)

relations⁴. In *Kiggundu v Kiggundu*⁵ the allegations were that “the defendant had refused for seven years to afford the plaintiff conjugal rights”. The court found that the denial of conjugal rights for so many years is a serious matter particularly where the defendant is unable to give a credible and reasonable explanation for such. The court held that, having found that the plaintiff as a credible witness particularly on the issue of denial of conjugal rights and the utterances he attributes to the defendant, he had proved his case on a balance of probabilities. On such basis, the court granted a rule *nisi* for divorce as the marriage had broken down irretrievably. Conjugal rights are offered to inmates during conjugal visits. A conjugal visit is a scheduled period in which an inmate of a prison or jail is permitted to spend several hours or days in private with a visitor, usually their legal spouse. The parties may engage in sexual activity.

In 1960, Mildred Carter arrived at Parchman Penitentiary in Mississippi to visit her husband, George Carter, a forty-two-year-old convict serving ten years for assault and battery. After driving up the long road to the prison and being searched by guards, she greeted her husband, and the couple walked to a small, rundown cabin in the prison yard. The guards gave the couple privacy, so what happened in the cabin is not known. The couple may have held hands, George may have asked Mildred about their two daughters, they likely had sex⁶. It was, after all, a conjugal visit. Parchman Penitentiary was the sole prison in the United States that allowed conjugal rights in the 1960's. Its history with conjugal visits began just after its founding in 1904. In 1904, Parchman Penitentiary was a 19th century plantation recreated with its black convict labour force working in the prison's cotton fields like slaves. Conjugal visits were a paternalistic, ad-hoc reward system. If black convicts worked hard, they got to have sexual relations on Sunday with their wives or prostitutes organized by guards and had sex in the rows of Parchman's cotton fields. The guards' actions were not prison

⁴ Black's Law Dictionary(8th ed. 2004) Page 912

⁵ 2008 3 BLR 442 HC

⁶ A. Mayyasi “The Dark Origins of Conjugal Visits” available at <https://priceconomics.com/the-dark-origins-of-conjugal-visits/> (accessed 16 December 2016)

policy, but administrators tolerated the practice for decades. This is the first documented case of conjugal visits in America and around the world which the guards organized, to increase productivity and exercise control over Parchman's black convict workforce⁷. This article critically analyzes conjugal rights, whether they are rights or privileges, the need for them, the arguments for and against them, as well as their performance over the years.

2.0 THE LAW CONCERNING CONJUGAL VISITS FOR INMATES

Around the world, different countries have different rules and perspectives concerning conjugal visits⁸. The generally recognized

⁷ A. Mayyasi "The Dark Origins of Conjugal Visits" available at <https://priceconomics.com/the-dark-origins-of-conjugal-visits/> (accessed 16 December 2016)

⁸ In Australia, conjugal visits are permitted in the Australian Capital Territory and Victoria "Conjugal visits support inmates' relationships: Hargreaves" (8 June 2009) available at <http://www.abc.net.au/news/2009-06-08/conjugal-visits-support-inmates-relationships/1707438> (accessed 24 December 2016); ACT prisons allow conjugal visits. NZ Herald, available at www.nzherald.co.nz/world/news/article.cfm?c_id=2&objectid=10577199 (accessed 24 December 2016); Other jurisdictions, including Western Australia and Queensland do not permit conjugal visits. In Brazil, while visits are generally freely granted to male prisoners, many states go against the idea for female inmates. Those that do allow them for women, often insist on extremely tight regulations. Also, in Spain, prisoners are allowed conjugal visits every four to eight weeks. 'Sex on sentence', BBC News, 29 June, 2000 available at news.bbc.co.uk/2/hi/uk_news/812165.stm (accessed 16 December 2016); In Denmark, conjugal visits are permissible. The State Prison of East Jutland has apartments for couples, where inmates who have been sentenced to more than 8 years in prison can have visitation for 47 hours per visit. Germany allows prisoners and their spouses or partners to apply for conjugal visits. Those who are approved are allowed unsupervised visits so that prisoners can preserve intimate bonds with loved ones on the outside. The Israel Prison Service (IPS) allows standard conjugal visits to inmates who are married or are in a common-law relationship in which their partner has been visiting them for at least two years, and have been on good behaviour. Haaretz "Gay Israeli Prisoners Win Right to Conjugal visits" available at <https://forward.com/news/breaking-news/179765/gay-israeli-prisoners-win-right-to-conjugal-visits/> (accessed 20 December 2016); R. Ben-Zur, "Israel-Conjugal visits for gay prisoner? Not in Israel" available at <https://www.ynetnews.com/articles/0.7340.L-4291171.00.html> (accessed 18 December 2016); In Mexico, according to Olivero, conjugal visits are a

universal practice in Mexico, independent of a prisoner's marital status; in some correctional facilities entire families are allowed to live in prisons with their imprisoned relative for extended periods. J. M. Olivero (1998), "The crisis in Mexican prisons: The impact of the United States"; N. South, P. R. Weiss, "Comparing Prison Systems" available at <https://www.amazon.com/Comparing-Prison-Systems-International-Studies/dp/9057005115> (accessed 18 December 2016); BBC News, "Mexico allows gay conjugal visits" (30 July 2007) available at [news.bbc.co.uk/2/hi/Americas/6922140.stm](https://www.bbc.co.uk/2/hi/Americas/6922140.stm) (accessed 18 December 2016); In Canada, all inmates, with the exception of those on disciplinary restrictions or at risk for family violence, are permitted "private family visits" of up to 72 hours' duration once every two months. "Private Family Visiting". Correctional Service of Canada www.csc-scc.gc.ca/family/003004-1000-eng.shtml; In the Russian penal system, since a campaign of prison reform that began in 2001, well-behaved prisoners are granted an eighteen-day holiday furlough from incarceration to see loved ones. Prisoners also get extended on-site family visits, approximately once per month. W. Giles (2 June 2006). "After the Gulag conjugal visits computers and a hint of violence"; As for Turkey Since April 2013, the Turkish General Directorate of Prisons and Detention Houses offers conjugal visits as a "reward" to the well-behaved prisoners. "Example 'conjugal visit' rooms introduced in eastern province" available at www.hurriyetdailynews.com/example-conjugal-visit-rooms-introduced-in-eastern-province-44059 (accessed 18 December 2016); In India 2015, the Punjab and Haryana High Court held that the right of married convicts and jail inmates to have conjugal visits or artificial insemination for pregnancy was a fundamental right. "High court allows jail inmates to have sex with their partners", Times of India available at <https://m.timesofindia.com/india/High-court-allows-jail-inmates-to-have-sex-with-their/partners/articleshow/45785525.cms> (accessed 24 February 2018); Zimbabwean 1998 officials considered introducing conjugal visits in an effort to curb the spread of HIV/Aids in prisons; Sex on sentence', BBC News, 29 June, 2000 available at [news.bbc.co.uk/2/hi/uk_news/812165.stm](https://www.bbc.co.uk/2/hi/uk_news/812165.stm) (accessed 16 December 2016); In Belgium, inmates in open prisons are allowed a three night home stay every three months. Conjugal visits are only permitted to high security prisoners if their spouse is an inmate as well. In Republic of Ireland, Marie and Noel Murray, an anarchist married couple imprisoned for a 1976 murder, lost a 1991 appeal for conjugal rights. The Supreme Court ruled that the Constitutional right to beget children within marriage was suspended while a spouse was lawfully imprisoned. "Constitutional right to beget children within marriage is suspended while one spouse is lawfully imprisoned". New Zealand does not permit conjugal visits.

In United States, in the case of *Lyons v. Gilligan* (1974), the United States District Court for the Northern District of Ohio held that the prisoners have no constitutional right to conjugal visits with their spouses during sentences. The United States Federal Bureau of Prisons does not allow conjugal visits for prisoners in federal custody. For prisoners in state custody, the availability of conjugal visits is governed by the law of the particular state. Where conjugal visits are allowed, inmates must meet certain requirements to qualify for this

basis for permitting such visits in modern times is giving them a legal backing (constitutionally and using statutory instruments), with legislators claiming that the move is intended to preserve family bonds and increase the chances of success for a prisoner's eventual return to life after release from prison. Additionally, they serve as an incentive to motivate inmates to comply with the various day-to-day rules and regulations of the prison and to avoid any infringement which might disqualify them from having a conjugal visit.

The laws have stipulated that the visit will usually take place in designated rooms or a structure provided for that purpose such as a trailer or a small cabin. Supplies such as soap, condoms, lubricant, bed linens, and towels may be provided.

Members of Parliament of the Republic of Uganda on the Committee of Human Rights disagreed over a proposal to grant conjugal rights to convicts where some legislators argued that giving inmates such a privilege would be an “exaggeration of fundamental freedoms”. The debate on conjugal rights was reignited by Mr. Simeo Nsubuga (NRM-Kasanda South) who said it is part of convicts’ freedom⁹. Condemned prisoners did not lose all their constitutional rights and freedoms except those rights and freedoms that have inevitably been removed

privilege. In the United Kingdom neither the English, Welsh, Scottish, nor Northern Irish prison systems allow conjugal visits. However, home visits, with a greater emphasis on building other links with the outside world to which the prisoner will be returned, are allowed. These home visits are usually only granted to prisoners who have a few weeks to a few months remaining of a long sentence. Furthermore, home visits are more likely to be granted if the prisoner is deemed to have a low risk of absconding i.e. prisoners being held in open prisons have a better chance of being granted home visits than prisoners being held in closed conditions.

The Ghana Prison Service said it couldn't guarantee conjugal visit for married inmates citing the lack of facilities and resources. Acting Director General of Prisons, Emmanuel Adjator said that granting conjugal visit was not going to be possible anytime soon, he said the service needed a constitutional backing to be able to facilitate it.

⁹ M. Kyeyune, “MPs disagree over conjugal rights for convicts” available at www.monitor.co.ug/News/National/MPs-disagreeconjugalrightsinmates/688334-3486242-u74nd0z/index.html (accessed 20 December 2016)

from them, by law, either expressly or by necessary implication¹⁰. The Commissioner General of Prisons, Dr. Johnson Byabashaija opined that the prisons department is not yet prepared to grant inmates conjugal rights, he said:

I do not have a problem with conjugal visits, but prisons department is not yet able to provide these services because we neither have facilities nor the mechanism to offer them. We have far pressing issues to deal with like improving the welfare of the prisoners.¹¹

There is no law catering for conjugal visit, as seen when the officials from Uganda Law Society asked the Parliament to amend the *Prisons Act, 2006* to ensure that prisoners are granted conjugal rights. Patrick Nyakana, a commissioner with Uganda Law Society argued that the clause is not reflected in the *Prisons Act, 2006* yet it is a human right¹². Bulamogi County MP, Kenneth Lubogo also disagreed with fellow law makers accusing them of exaggerating the pursuit for human rights. “Not all rights are absolute, if we grant conjugal rights to inmates it may not serve the purpose of the sentence,” he said¹³.

3.0 CONJUGAL VISITS AS A RIGHT

A right is something that is due to a person by just claim, legal guarantee, or moral principle (the right of liberty), a power, privilege or immunity secured to a person by law (right to dispose of one’s

¹⁰ *Susan Kigula & 416 Others v Attorney General* (Constitutional Petition No. 6 of 2003) [2005] UGCC 8 (10 June 2005)

¹¹ P. Mudoola, “No conjugal rights for inmates-Byabashaija” available at https://www.newvision.co.ug/new_vision/news/1318755/conjugal-rights-inmates-byabashaija (accessed 27 March 2017)

¹² P. Mudoola, “No conjugal rights for inmates-Byabashaija” available at https://www.newvision.co.ug/new_vision/news/1318755/conjugal-rights-inmates-byabashaija (accessed 27 March 2017)

¹³ M. Kyeyune, “MPs disagree over conjugal rights for convicts” available at www.monitor.co.ug/News/National/MPs-disagree-conjugal-rights-inmates/688334-3486242-u74nd0z/index.html (accessed 20th December 2016)

estate)¹⁴ As seen, for anything to be regarded as a right, it must have legal or constitutional backing for everyone. The debate of conjugal rights in Uganda has not taken serious shape, but looking at similar common law jurisdictions, the Punjab and Haryana High Court, in the case of *Jasvir Singh and another v State of Punjab and Others*¹⁵ gave a very novel judgment recognizing conjugal rights of the prisoners within the jail premises, considering it as part and parcel of right to life under article 21¹⁶. Here, the petitioners were husband and wife being tried for an offence under section 302/364-A/201/120-B IPC for kidnapping and brutally murdering a sixteen year old minor for ransom. The trial court awarded them death sentence which was confirmed by the High Court of Punjab and Haryana. The Honourable Supreme Court commuted the death sentence awarded to wife into life imprisonment. The petitioners thereafter sought enforcement of their perceived right to have conjugal life and procreate within jail premises. They sought 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. *Amicus curiae* were appointed by the court keeping in view the vital issues of public importance¹⁷. Various observations made by them include, but not limited to the petitioners' fundamental focus, was on Article 21 of the constitution¹⁸. They insisted that the right to life has two essential ingredients,

¹⁴ Black's Law Dictionary 8th edition Pg. 4120

¹⁵ CWP No.5429 of 2010(O & M): Decided on, 29 May 2014

¹⁶ The Constitution of India [India], 266 January 1950, art. 21

¹⁷ I. Sehgal "Friend of the court - Amicus Curiae" available at www.legalserviceindia.com/article/1282-Amicus-Curiae.html (accessed 24 February 2018) "The role of an Amicus is as stated Salmon LJ (as Lord Salmon then was) in *Allen v Sir. Alfred Mc Alpine & sons Ltd* (1968)2 QB 229 at p.266 F-G 'I had always understood that the role of an amicus curiae was to help the court by expounding the law impartially or if one of the parties were unrepresented, by advancing the legal argument on his behalf. In India, the courts have time and again welcomed the idea of permitting amicus curiae to associate themselves with proceedings generally involving public interest. By doing so the court is guided not only by the academic perspective required for the particular case, but also enables the court to have an understanding which would allow them to do justice in its entirety".

¹⁸ *Supra*

namely, (i) preservation of cell; and (ii) propagation of species, of which sex life is a vital part¹⁹. The decision in *State of Andhra Pradesh v Chalaram Krishna Reddy*²⁰ was relied upon to urge that a prisoner, whether convict, under trial or a detainee, continues to enjoy the Fundamental Rights including right to life which is one of the basic Human rights. The petitioners also referred to well-regulated concept of conjugal visitations successfully implemented in the advanced countries like the USA, Canada, Australia, UK, Brazil, Denmark and Russia etc. The State of Punjab 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. Paragraph 498 of the Punjab Jail Manual lays down the method for separation of male and female prisoners. Even artificial insemination as a viable and alternative solution suggested by the petitioners, was not acceptable to the State of Punjab as according to its affidavit.

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...

The father of the minor victim, who was murdered for ransom by the petitioners, also joined these proceedings to oppose the petitioners' prayer.

The following, amongst other issues 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 pen logical interest of the State permits or ought to permit creation of facilities for the exercise of right to procreation during incarceration?

¹⁹ Sunaina, "Judicial Introspection of Conjugal Rights vis-à-vis Human Rights of the Prisoner" *International Journal of International Law*: ISSN: 2394-2622 (Volume 1 issue 2)

²⁰ (2000) 5 SCC 712

- 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 number (iii) is answered in the affirmative, whether all categories of convicts are entitled to such right(s)? (either the convicts or the under-trials)

3.1.1 Judgment

The writ petition was disposed of with the following directions:

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;

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;

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;

3.1.2 The impact of the judgment was;

The court observed that the learned 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 jail. In *Lawrence v. Texas*²¹, the court noted that "after *Griswold*, it was established that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship." Also *Planned*

²¹ 539 U.S. 558, 565 (2003)

*Parenthood v Casey*²² recognized the right to “bear or beget a child” as fundamental. In *Skinner v. Oklahoma*²³ the court held that the right to procreate is a fundamental right guaranteed by the Constitution. A person does not lose his human rights merely because he has committed an offence as he also has some dignity which must be protected²⁴

4.0 CONJUGAL VISITS AS A PRIVILEGE

This is a special legal right, exemption, or immunity granted to a person or class of persons; an exemption to a duty. A privilege grants someone the legal freedom to do or not to do a given act. It immunizes conduct that, under ordinary circumstances would subject the actor to liability²⁵. For various reasons, conjugal visits were granted as a privilege as earlier stated for prisoners who have exhibited good behaviour during their term of incarceration. Recently, it was a point of contention between members of Parliament on the Committee of Human Rights with some legislators, that giving inmates such a privilege would be an exaggeration of fundamental freedoms²⁶. Some have the money to bribe prison wardens to have the conjugal visits, such as in South Africa where a former Pollsomoor inmate told the jail commission that "as an awaiting-trial prisoner, rules allowed him only non-contact visits" however, warder Xolile Madikane a section head at Pollsomoor, had told him he could arrange contact visit (conjugal visit) and the next time his fiancée, Shahieda Alexander, came to visit, with one of his children, Madikane put them in an isolation cell,

²² 505 U.S. 833, 851 (1992).

²³ 316 U.S. 535, 542-543 (1942).

²⁴ *Supra* note 17.

²⁵ Black's Law Dictionary 8th edition Pg.3790

²⁶ M. Kyeyune, “MPs disagree over conjugal rights for convicts” available at www.monitor.co.ug/News/National/MPs-disagree-conjugal-rights-inmates/688334-3486242-u74nd0z/index.html (accessed 20 December 2016)

although Madikane raised the amount from R100 to R250 in the second period²⁷.

5.0 THE ARGUMENTS FOR CONJUGAL RIGHTS.

In the year 2015, during celebrations to mark the World Aids Day, inmates of Luzira Prison asked to be granted the right to have sex with their spouses within the prison walls saying this would help in their rehabilitation²⁸ The prisoners further argued that granting those rights to have sex within the detention facility will help to reduce the HIV/AIDS prevalence rate among inmates²⁹. American prison reformers embraced conjugal visits for a simple reason: former criminals will be much more likely to stay out of prison if they have close friends and family. As Parchman Superintendent, Bill Harpole explained in 1960,

In Mississippi, where a prison conviction is automatic grounds for divorce, families of convicts would fall apart if wives were not permitted the Sunday visit. Allowing prisoners to receive visitors is not just a nice privilege; it reduces crime rates.³⁰

Sex is a physiological need that strengthens the bond between couples, thus the plea from some prisoners to be allowed to satisfy their sexual

²⁷ Available at <https://www.iol.co.za/news/south-africa/i-just-bribed-warden-for-conjugal-visits-70141> (accessed 1 February 2017)

²⁸ Patrick Nyakana <https://24tanzania.com/tag/patrick-nyakana/> (accessed 27 March 2017)

²⁹ P. Mudoola “No conjugal rights for inmates” available at https://www.newvision.co.ug/new_vision/news/1318755/conjugal-rights-inmates-byabashaija (accessed 20 December 2016)

³⁰ A. Mayyasi “The Dark Origins of Conjugal Visits” available at <https://priceconomics.com/the-dark-origins-of-conjugal-visits/> (accessed 16 December 2016)

needs in a move to cut down on sodomy in prisons³¹ is reasonably justified.

6.0 THE ARGUMENTS AGAINST CONJUGAL RIGHTS

An inmate at Luzira prison by the name of Simon Ssegawa, while in an interview with NTV was against the idea of conjugal right saying, “the women they leave in public cannot be trusted, and they could contract sexually transmitted diseases from those unfaithful women they leave home”³². Mr. Kenneth Lubogo, MP Bulamogi County, said the Members of Parliament who were proposing conjugal visits needed to address themselves more on the congestion in prison cells, as well as other basic needs that are lacking in detention centres across the country, “All prisons are heavily congested with many children being detained with adults in several instances”, Lubogo said. He disagreed with fellow lawmakers accusing them of exaggerating the pursuit for human rights. “Not all rights are absolute, if we grant conjugal rights to inmates it may not serve the purpose of the sentence, “he said³³. According to the commissioner of prisons in charge of inspectorate, Wycliffe Kururagire, the Uganda Prison Service cannot consider establishing facilities for inmates to enjoy conjugal rights now when the institution is inundated by overcrowding.³⁴

7.0 CONCLUSION

³¹ Prisons Service; Married Inmates cannot have Conjugal visits available at www.myjoyonline.com/news/2016/September-8th/prisons-service-married-inmates-cannot-have-conjugal-visits.php (accessed 18 December 2016)

³² On 24th December 2016 at Ntv Ku Ssaawa Emu

³³ M. Kyeyune, “MPs disagree over conjugal rights for convicts” available at www.monitor.co.ug/News/National/MPs-disagree-conjugal-rights-inmates/688334-3486242-u74nd0z/index.html (accessed 28 December 2016)

³⁴ P.Kwesiga available at https://www.newvision.co.ug/new_vision/news/1306620/prisons-space-inmates-enjoy-conjugal-right (accessed 16 December 2016)

The debate on conjugal visits has been around from 1904 in Parchman Penitentiary till date, with arguments in support and against. However, what can be picked from all this is that conjugal rights are very important both physically and mentally, and it is on this basis that some countries have granted these visits by legislating on them to give a legal backing and putting up the necessary facilities in the correction centres. The problem in Africa and other countries that are not in support of visits is that they perceive conjugal rights as an exaggeration of human rights. These countries still consider corrections, as prison and conviction, as punishment and not a means to correct mistakes that led to crime. This is evident in the way convictions are executed in prison, with an example of Uganda where inmates are subjected to cruel, harsh and inhuman treatment, and the little funding to these facilities from the central governments of these countries against conjugal visits³⁵. But for the sake of controlling the increasing HIV infection in prisons due to Sodomy as an alternative to conjugal rights, this provides a good enough reason for the need of conjugal visits in prisons or correction centres around the world.

³⁵ *Supra* note 32

