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Addis Ababa University

College of Law and Governance Studies

School of Law

**The Status of Prisoners' Right to Conjugal Visit in
Ethiopia**

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Declaration

I, the undersigned, hereby declare that this thesis is my original work, has not been presented for a degree in any other university or institution and that all sources of materials used for the thesis have been duly acknowledged.

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The Status of Prisoners' Right to Conjugal Visit in Ethiopia

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Acronyms

UN: United Nations

UDHR: Universal Declaration of Human Rights

ART: Article

ICCPR: International Covenant on Civil and Political Rights

ICESCR: International Covenant on Economic, Social and Cultural Rights

OAU: Organization of African Union

AU: African Union

NGOs: Non-Governmental Organizations

UNSMR: United Nations Standard Minimum Rules for the Treatment of Prisoners

UNGA: United Nations General Assembly

PMAC: Provisional Military Administration

PDRE: Peoples Democratic Republic of Ethiopia

FDRE: Federal Democratic Republic of Ethiopia

WHO: World Health Organization

ECHR: European Court of Human Rights

Chapter One

Introduction and Overview of the Study

1.1 Background of the Research

Most of the time a criminal who is convicted to a crime may be put in to a jail or prison centers, and the person who is imprisoned is known as prisoner. Even if imprisonment results into denial of certain rights of prisoners, especially the right to movement and other rights related with personal liberty, but it shall not mean that prisoners do not exercise any other rights, especially from the perspective of human rights. Like any other person, prisoners are entitled to the enjoyment of their human rights by the mere fact of being a human. The core International Human Rights Instruments clearly protect and acknowledges rights of prisoners. The International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment both safeguards prisoners rights particularly prohibiting torture and cruel, inhuman or degrading treatment or punishment, without exception or derogation.¹

Other documents relevant to an evaluation of prison conditions includes the Body of principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, the Basic Principles for the Treatment of Prisoners and, The Minimum Standard Rules for The Treatment of Prisoners, which has been revised and called Mandela Rules. Though not legally binding documents, the instruments represent the international consensus regarding minimum conditions on the treatment of prisoners.

In addition to International Human Rights Documents, Regional and National Human Rights Instruments and laws respectively, gave special consideration and due protection for inmates since they are susceptible for violation of fundamental freedoms and rights.

All these documents provide basic rights and freedoms of prisoners. From the right to be free from torture, inhuman and degrading treatment or punishment to the right to family visitation and communication with the outside world, the right to adequate standard of living is also some of the principal rights that prisoners should be entitled.

¹ Art 2(2) of CAT and Art 4(2) of ICCPR clearly prohibit any act of torture or inhuman or degrading treatment or punishment at whatever condition. There is no space for state parties to invoke any reason to justify torture.

Though prisoners are entitled to those rights and freedoms, the research focus on the so called extended family visitation or conjugal visit of prisoners. One of important right that must be guaranteed to the prisoners is the right to be visited by their family, legal counsel, religious leaders and this right is the one incorporated in many International, Regional and Domestic laws and standards.

The paper tries to look on the extended right to family visit .Basically, the right to communicate the family includes prisoners' right to contact with their family and spouse and the right to keep family attachment though they are behind bars. The paper particularly focuses on the extension of this right up to conjugal visitation. So, it tries to assess the meaning and relevance of conjugal visit in light of its interface with other fundamental rights of prisoners. It also deals on the justification or need to acknowledge the right in Ethiopia. It is also important to look other countries experience and recent jurisprudential development on the area.

1.2 Statement of the Problem

The writer believes that the continuous denial of sex to married prisoners is accelerating homosexuality and HIV/AIDS prevalence among inmates. Homosexuality, which is an illegal and immoral act, is the emerging social problem or crises in our country. The most enabling environment to involve in same sex activity is prison centers. Consequently, there might be consensual or non-consensual sex among inmates which ultimately violates the right to physical integrity of a person because of instances of an act of rape of same sex.

The other issue is the right to health. The right to health is one of the fundamental rights which is significant for the protection and promotion of other human rights. Since states have the obligation to respect, protect and fulfill human rights they are required to meet these obligations. The issue of health is not only about physical well-being, but psychological and social well-being is the cumulative requirements used to regard a person as a healthy. In case of prisoners' the right to health needs an extra effort and observation because they are vulnerable to different types of contagious disease, especially HIV/AIDS and other STDs. Guaranteeing Prisoners' right to conjugal visit may significantly reduce such diseases which may be caused by unsafe same sex and sexual abuse among inmates. Such visitation also helps to avoid psychological depression and violence in prison.

The other rationale of the research is preservation of family unit. Originally, prison conjugal visits were used as an incentive to motivate working prisoners to be more productive. They were scheduled visits

that allowed the prison inmate to spend one-on-one time with his or her legal spouse. Prisoners were lured by the idea of having the opportunity to have sexual contact with their spouses. Today, the main purpose of these visits is to preserve the family unit.

Conjugal visit should be also seen from the view point of rehabilitation. States that allows extended family including conjugal visit, believe that preserving the bond of the family unit makes the chances of the inmates rehabilitation greater. It is also believed that it helps to lessen the chances of them reverting back to a life of crime and returning to prison after release. Protecting the family bond does not just benefit the inmate, it is also important to the spouse, children and other immediate family members. It allows them the chance to interact privately with each other.

Finally, permitting prisoners to have a conjugal visit is also respecting the right of the spouse of the inmate because a spouse who hasn't committed a crime shouldn't be punished.

1.3 Objective of the study

1.3.1 General objective

The objective of the research is to highlight prisoners' right to conjugal visitation in light of international, regional and Ethiopian national human rights instruments and laws. It also intended to address scope and the content of the right to conjugal visit in Ethiopia.

1.3.2 Specific Objective

The research specifically tries to deal with;

- The meaning and contents of prisoners' right to conjugal visit
- The different opinions and debates on the right to conjugal visit
- The status of prisoners' right to conjugal visit in light with international and regional human rights instruments
- Justifications and the need to acknowledge the right to conjugal visitation and also it tries to discuss intersection between the right to conjugal visit and other human rights of prisoners
- The status of prisoners' right to conjugal visit having a look on national laws and the constitution of the country
- The legal gaps and proposed reforms regarding acknowledgment of the right to conjugal visit in the domestic laws of the country.

1.4 Significance of the study

This study is significant in the sense that it will put into perspective the intersection between prisoners' right to conjugal visit and human rights. It is also important for the legal system of the country to work on some legal gaps and deficiencies based on best practices of other countries. The study will also be valuable for the government and other stakeholders to see this right of prisoners as a right rather than as a privilege.

1.5 Methodology of the Research

Since the research is doctrinal type of research it basically relies on different publications like books, journals and articles. Information from internet and other binding and non binding soft laws and international and regional human rights instruments are important sources in which the research is being conducted.

1.6 Limitation of the Research

Being a less researched topic, the researcher envisages a number of limitations such as lack of related literatures on the area. It is also difficult to find jurisprudential precedents, lack of clear legal provisions are the major limitations of the study. Difficulties to access prisons and detention centers are also the major expected limitations of the research.

1.7 Overview of Chapters

This paper is composed of six chapters. Accordingly, the paper is classified into chapter by chapter as follows.

Chapter one: this chapter, for being an introductory chapter, deals with the general overview of the study including general background of the study, statement of the problem, significance of the study, general and specific objectives of the study, methodology and limitation of the research.

Chapter two: designed to discuss prisoners' right to conjugal visit. The content of the right and also the arguments against and for the right to conjugal visit are some of the sections of this chapter. In addition to these, the chapter incorporates and is devoted to discuss the status of Prisoners' Rights to Conjugal Visit under International and Regional Human Rights Instruments and Documents.

Chapter three: deals about some of the reasons and justifications to recognize the Right to Conjugal Visit. It tries to show the relevance of this right showing the intersection of the right conjugal visit with other Human Rights of Prisoners.

Chapter four: briefly discusses the legal status of prisoners' right to conjugal visits in line of the constitution and other relevant national laws and the major deficiencies of Ethiopian laws which fail to take into consideration the right to conjugal visit and the proposed reforms that must be taken

Chapter five: this last chapter will conclude the study providing some relevant recommendations.

Chapter Two

Prisoners' Right to Conjugal visit in General

Introduction

All human beings, including prisoners, have certain unalienable rights which are acknowledged by internationally recognized instruments². Since the Second World War, Human Rights have been quantified and set down in treaties and conventions. In 1948, the UN General Assembly Adopted the UDHR. Later, two covenants were adopted, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). These different instruments state that prisoners have rights, even when they are deprived of liberty in custody. The ICCPR in Art.10 specifically provides that 'all persons deprived of their liberty should be treated with humanity and with respect for the inherent dignity of the human person'

Prisoners' Right to Conjugal Visit is therefore, another dimension and the most controversial and not as such widely researched theme of right at National and International level. Some scholars and peoples believe that the right to conjugal visit is the extended family visit which gives a chance for spouses to spend some private time. Even if , this right is not widely acknowledged by many states, still there are countries in which the right to conjugal visit is expressly recognized under their law and the enjoyment of this right is fully respected.

Still most experts on the area do not reach a consensus whether the right to conjugal visit should be given to the person who is committed a crime and under detention. The two side arguments are very much strong to support their positions. Therefore, the chapter will deal on the debates regarding the right to conjugal visit and the status of the right to conjugal visit under different International and Regional Human Rights documents those documents which provide standards, rules or principles about the protection and promotion prisoners' rights.

² Hernan Reyes, Prisoners' Right to Health <http://www.icrc.org/eng/resources/documents/misc/59n8yx.htm>, last visited on 25 Nov, 2014 ,6:18 AM

2.1 Meaning and Content of Prisoners' Right to Conjugal Visit

Though the meaning of conjugal visit can be given using different explanations on of the possible definition is, it is a private time that a prisoner may spend with a spouse.³The idea behind such visitation is to allow inmates to have intimated contact, that is, sex, with their spouses. Depending on the state's extended family visitation program, a conjugal or extended family visit may last from as little as one hour to 48 hours in US.

The content of the right to conjugal visit or the so called extended visit will base its element from the definition or the meaning of the right. As It is tried to define conjugal visit, it is the other dimension of family visit in which the spouses will get a chance to spent private time excluding any person including prison guards. The private time is necessary for those spouses to make sexual intercourse in order to strength trust and confidence even if they are far apart. Therefore, strictly speaking, the right to conjugal visit includes, first the right to visit of inmate by his/her spouse, second , the right to get a chance to stay privately and the right to make sex are the fundamental constitutive elements of prisoners right to conjugal visit.

2.2 The Experience of States in Recognition of the Right to Conjugal visit

Many states allow such right for prisoners to be visited by their spouse. Among these states, Denmark, France; France allows prisoners who have earned the right to conjugal visit to stay in decorated home like apartments during extended visits, Pakistan; in Pakistan, an appeal has been made in 2010 to allow male prisoners conjugal visits from their female spouses and in a recent ruling allowed prisoners to have sex in Pakistani jails, in private, Russia; In Russia penal system, since a campaign of prison reform that began in 2001, well-behaved prisoners are granted an eighteen-day holiday to see loved ones. Prisoners also get extended on site family visits , approximately once per month, United States; The United States Federal Bureau of Prisons does not allow conjugal visits for prisoners in federal custody. For prisoners in state custody, a conjugal visit is governed by the law of the particular state. Today, conjugal visitation survives

³ <http://www.criminaldefenselawyer.com/resources/criminal-defense/state-felony-laws/states-that-allow-conjugal-visits>, last visited 4/16/2016

in six States: California, Connecticut, Mississippi, New Mexico, New York, and Washington. In June 2007, the California Department of Corrections announced that it would allow same –sex conjugal visit.⁴

The US and Canadian experience is discussed below elaborately.

2.2.1 U.S.A

There are 195 prison facilities operated by the Federal Bureau of Prisons; the facilities house approximately 211,000 prisoners.⁵In relation to Conjugal visit currently, only six U.S. states allow prison conjugal visits within their prison systems; California, Connecticut, Mississippi, New Mexico, New York and Washington. All of these states have their own regulations and policies on the management of conjugal visits. For the purpose of this topic let us have a look on Mississippi Prison.

The Conjugal visit at Mississippi state penitentiary for example should not be viewed as an isolated phenomenon; it is only a part of the general visitation and leave program which has been in operation in the prison since 1944 and which is the most liberal in the United States. Under the Mississippi program, called the Holiday suspension program, each year from December 1 until March 1, inmates who have been in the penitentiary at least three years in good behavior records may go home for a period of ten days. As evaluated by Mississippi prison and state officials, this program has proved a success and an important element in the rehabilitation and morale of the inmates.

Apparently, much of the success of conjugal visits depends on the adequacy of the facilities provided for the privacy of the inmate and his wife. For this effect the Mississippi prison made considerable change building the so called Red Houses, which are private rooms .But the red houses are still unsatisfactory in terms of absolute privacy. Another important element in the Mississippi prison, conjugal visiting appears to be the small community camp arrangement. This arrangement seems to be amenable to the conjugal visit. It affords more freedom of visitation in general since each camp is somewhat isolated. The visitors go directly to the camp they wish to visit, where the sergeant searches the male visitors and the sergeant’s wife searches the female visitors. Since all inmates are not married one and because of the arranged

⁴ Radhakanta Tripathy, Advocate Supreme court of India , Pravin H.Parekh(Ed), Human Rights Year Book, “Human Rights Vis –A-VIS Reproductive Rights of Prisoners”, (2010),p.138

⁵ American Prison culture in an International Context ;an examination of Prisons in America ,Netherlands and Israel ,Lucian E.Dervan,p.415

schedule the number of inmates wishing to visit to use the red house is never large. The small numbers add a more respectable atmosphere and provide a more informal situation.⁶

One unified policy that all six states agree on is that Extended Family visits are “not a right, but a privilege”. Prisoners must earn the opportunity to participate in this program. They must be low-to-medium security level prisoners, with no history of disciplinary problems within the prison system. They cannot be incarcerated for violent offences or have a history of child abuse or domestic violence. Prisoners being housed in maximum security level prisons are not eligible, even if they meet all other eligibility requirements. They must undergo testing for and be free of HIV and all STDs.⁷

2.2.2 Canada

The Private Family Visit (PFV) was established by the Correctional Service of Canada (CSC) to encourage inmates to develop and maintain family and community ties in preparation for their return to the community.

If they meet certain criteria identified in their correctional plan, inmates have the opportunity to use special units within the confine of a correctional institution. Most units are simple two –bedroom structures with combination of kitchen and living area.

Inmates are eligible for private family visits unless they are at risk for family violence, participating in unescorted temporary absences for family contact purposes, in a special handling unit, or recommended or approved for transfer to special handling unit or in disciplinary segregation at the time of the scheduled private family visit.

Under the Canadian rule the immediate family members are the first group of persons entitled to private family visit which ultimately incorporated the inmate’s spouse or common-law partner.⁸

⁶ Journal of Criminal law and criminology, the conjugal visit in Mississippi State Penitentiary, Columbus B.Hopper,vol.53.Issue 3 Sept. p 342-343

⁷ <http://crime-punishment.yoexpert.com/prison-system/2-what-us-states-allow-prison-conjugal-visits-3543.html/> 5/25/2016

⁸ <http://www.csc-scc.gc.ca/family/003004-1000-eng.shtml,5/27/2016>

2.3 Debates on Prisoners' Right to Conjugal Visit

Up to date there has not be common understanding and agreement whether prisoners has to be entitled with the right to conjugal visit. There are arguments against and for the extended visit of inmate.

Those who opposes prisoners right to conjugal visit argues that one of the purpose of imprisonment is to punish the criminal by depriving him of certain rights which could be enjoyed at liberty, including the enjoyment of family life, the exercise of conjugal rights and the right to found a family.⁹The opponents argue that imprisonment shall result incapacitation of the convicted persons from exercising basic rights comparing with a person at liberty At his press conference to end conjugal visitation ,Mississippi's Corrections Commissioner Chris Epps, stated that there are costs associated with the staff's time, having to escort inmates to and from the location, supervising personal hygiene and the upkeep of the building .In addition to the budgetary reasons , even though we provide contraception, women get pregnant and have to raise the child as a single parent.¹⁰ This is another argument against the right to conjugal visitation. Here the commissioner raises the additional cost that conjugal visitation requires is creates pressure on other activities and burdens the work of prison staffs resulting additional duties.

Proponents of conjugal visits note that the benefits are emotional as well as biological .One writer proposes that, "conjugal visitation could be instituted in many prison settings without disruption of proper procedures and with a lessening of tension and frustration. Complete isolation of men and women from all sexual activities of a heterosexual nature is completely unrealistic and results in hostile, aggressive and sometimes dangerous behavior toward other inmates and prison personnel. Maintenance of some family communication and integrity by the inmate's being with his wife and children would certainly lessen the high number of divorces which occur after a man goes to prison."¹¹

⁹ , Helen Fenwick, Rivhard Glancey ,Civil Liberties and Human Rights, 2013-2014, p 204

¹⁰ http://blog.gulflive.com/mississippi-press-news/2014/01/civil_rights_group_protesting.html 2/19/2015)

¹¹ Ronald G .Turner, "Sex In Prison "Tennessee Bar Journal , 36 – AUG Teen. B.J. 12 August ,(2000), p,6

2.4 The Status of the right to Conjugal Visit under International and Regional Human Rights Instruments

2.4.1 Global Human Rights Instruments

2.4.1.1 Universal Declaration of Human Rights

When governments -, activists, or United Nation's documents refer to 'human rights' today they are almost certainly referring to the human rights recognized in international or national law rather than rights in a moral or philosophical sense.¹² Among these documents Universal Declaration of Human Rights (UDHR) is a pillar for all preceding laws and standards relating to human rights. The UDHR represents a great step forward taken by the international community in 1948.¹³ Its persuasive moral character and political authority derive from the fact that it is agreed to be a statement of generally accepted international principles.¹⁴

When we look at the text of the declaration, it has 30 articles and it is classified in specific groups of certain rights. Under the preamble of the declaration it acknowledges the inherent dignity and the equal and inalienable rights of all members of the human family as the foundation of freedom , justice and peace in the world. Art.5 of the document also guarantees that the right to be free from torture or to cruel, inhuman or degrading treatment or punishment. This article has significant importance for the protection of prisoners from such act of government brutality in which prisoners may be considered as lower position for the entitlement of the right. Art.3,5,7,8,9,10 and 25 are also typical examples which manifest that the declaration has given a due consideration to rights directly or indirectly related with prisoners issues.

2.4.1.2 International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) is an essential component of international bill of human rights and the most important authoritative legal instrument in the field of

¹² Andrew Clapham, Human Rights, A very short Introduction, (2007), Oxford University Press, p.23

Art.3 is about the right to life, liberty and security of person, Art.5 states about the prohibition of torture and of cruel, inhuman and degrading treatment or punishment, Art. 7 of UDHR talks about equality before the law, Art.8 is about the right to effective remedy in case of violation of fundamental rights and freedoms, Art.9 is the right not to be arbitrarily detained or arrested, Art.25, about the right adequate standard of living including food, clothing and housing

¹³ Manual on Human Rights Training for prison officials, Human Rights and Prisoners, United Nations, New York and Geneva, (2005), p.8

¹⁴ Ibid

civil and political rights, or “probably the most important human rights treaty in the world”.¹⁵ The ICCPR was adopted by the United Nations General Assembly Resolution 2200 A(XXI) on 16 December 1966 and entered into force on 23 March 1976. There are 168 states parties to the covenant as of April 2014 and Ethiopia is became party to the covenant on 11 Jun 1993.

The ICCPR comprises all of the traditional human rights, Part I starts out with the rights of self-determination which is considered to be the foundational stone of all human rights (article 1) , Part II(article 2 to 5) contains a number of general principles that apply across the board, among them in particular the prohibition of discrimination. Part III enunciates an extended list of rights, the first of which being the right to life (article 6). Article 7 establishes a ban on torture or other cruel, inhuman or degrading treatment or punishment, and article 8 declares slavery and forced or compulsory labor unlawful. ¹⁶The aim of the provision of article 7 of the covenant is to protect both the dignity and the physical and mental integrity of the individual. It is the duty of state party to afford everyone’s protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity. The prohibition in article 7 is complemented by the positive requirements of article 10, paragraph 1, of the covenant, which stipulates that “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”.¹⁷

The state’s obligation to protect detainees against lethal violence and inhuman treatment by other prisoners as well as against suicide and self –harm has thus broadly acknowledged in the jurisprudence on the main international and regional human rights conventions, among these conventions the ICCPR is the particular one. All the rights involved (the right to life, the prohibition of torture and inhuman treatment, and the right to humane treatment of prisoners) are absolute and in addition, save for Art.10 ICCPR, they are non- derogable. ¹⁸This means that the rights are not subject to limitation or suspension in any circumstances even in state of emergency which threatens the peace, security or even the lives of the

¹⁵ Shiyun SUN, “The Understanding and Interpretation of the ICCPR in the context of China’s possible Ratification”, Chinese journal of International Law, 6(1), (2007), p.1

¹⁶ Christian Tomuschat, International Covenant on Civil and Political Rights, United Nations Audiovisual Library of International Law, <http://legal.un.org>, last visited on 11/10/2014, 12:00 PM

¹⁷ General comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment), forty-fourth session (1992), paragraph, 2

¹⁸ Piet Hein Van Kempen, Positive obligations to ensure the human rights of prisoners, <http://www.internationalpenalandpenitentiaryfoundation.org>, last visited 10/25/2014, 2:00PM

nation at large. States cannot invoke lack of material resources to justify a defective performance of this duty.

Under its general comment 9, the UN committee of Human Rights described Art. 10 of the covenant that the human treatment and respect for the dignity of all persons deprived of their liberty is a basic standard of universal application which cannot depend entirely on material resources. While the committee is aware that in other respects the modalities and conditions of detention may vary with the availability of resources, they must always be applied without discrimination, as required by article 2(1) of the covenant.¹⁹

2.4.1.3 International Covenant on Economic, Social and Cultural Rights (ICESCR)

Economic, Social and Cultural Rights are those rights relating to the workplace ,social security, family life, participation in cultural life , and access to housing, food , water, health care and education.²⁰ These rights are human rights .Like other human rights, they contain dual freedoms; freedoms from the state and freedom through the state. ²¹In order to safe guard Economic, Social and Cultural Rights, the UN General assembly adopted the Covenant on economic, social and Cultural Rights.

The International Covenant on Economic, Social and Cultural Rights was adopted in 1966 and entered into force in 1976.Ethiopia has ratified the Covenant 11 Jun 1993 .Today the ICESCR is the most detailed instrument of the United Nations which protects and promotes economic, social and cultural rights in the United Nations human rights system ²².The legally binding covenant recognizes the rights to social security,²³ the right of everyone to an adequate standard of living,²⁴ the right to health and healthcare²⁵ and the right to education.²⁶

¹⁹ General comment No. 9: (which is replaced by General Comment 21) Article 10 (Humane treatment of persons deprived of their liberty, Sixteenth session (1982)

²⁰ Fact sheet No.33, frequently asked questions on Economic, Social and Cultural Rights, office of the UN High Commissioner for Human Rights,

²¹ Ibid

²² Pauline Tionenji Mulanda Ngoma, A critical examination of the socio-economic rights of prisoners in Zambia in the context of International Minimum Standards,(2011), paper presented for the fulfillment of LLM multi –disciplinary human rights, University of Pretoria, p.25

²³ see Art 10

²⁴ see Art 11

²⁵ see Art 12

²⁶ see Art 13

The covenant requires, in most cases, active and positive involvement from the state parties for the realization of the stated rights. Art.2 provides that each state party undertakes to take steps to the maximum of its available resources 'with a view to achieving progressively the full realization of rights recognized in the present covenant.'²⁷ Reporting and individual complaints are the major mechanism to monitor the implementation of Economic, Social and Cultural Rights. The reports from member states were originally examined by a working group established by ECOSOC composed of fifteen members selected from government representatives. It should be noted that the rights of this covenant are formulated not as a directly binding obligations, but described in terms of a program depending on the good will and resources of states. Ultimately, this makes the rights recognized in the present covenant the legal obligation rather weak.²⁸

But it is important to note that there are many situations in which the concept and practice of Economic, Social and Cultural Rights are widely accepted.²⁹ The right to education, at least primary school level, is almost universally recognized and has achieved extensive constitutional recognition.³⁰ When people are forcibly evicted from their homes and have nowhere else to live, most legal system recognizes some dimensions of their right to shelter or housing.³¹ The deliberate denial of access to food whether in relation to detainees, displaced persons, disfavored ethnic or racial groups, or in the context of embargo is widely acknowledged to violate basic human rights norm.³²

Prisoners, being a human being are entitled to enjoy those rights enshrined under the covenant. These rights include the right to adequate food, clothing and housing and the continuous improvement of living conditions. Moreover, Art 11, paragraph 2, recognizes the fundamental right of everyone to be free from hunger. In addition, in article 6,7,8,9,10,12,13 and 15 the covenant details the right to work; to reasonable conditions of employment, to organize trade unions , to social security and social insurance ;to protection of families and children ;to health; to education; and to take part in cultural life.

²⁷ Malcolm N. Shaw, *International Law*, Cambridge University Press, 6th ed.(2008),p 308

²⁸ Peter Malanczuk, *Modern Introduction to International Law*,7th ed.(1997),p 216

²⁹ Henry J, Steiner, Philip Alston and Ryan Goodman, *international Human Rights In Context*, Oxford University Press, 2007,p.280

³⁰ Ibid

³¹ Ibid

³² Ibid

2.4.2. United Nations Minimum Rules and Principles for the Treatment of Prisoners.

The standard Minimum Rules for the Treatment of prisoners from 1955 provide global and authoritative guideline to prison administrations and staff and are often described as a ‘blueprint’ for prison management.³³ In 2010, recognizing the importance of the rules, the UN General Assembly requested the establishment of an Expert Group to look at modernizing the rules and bringing them into the 21st century by updating them so that they reflect current international standards and advances in correctional science since 1955.³⁴

The UNSMR were drafted primarily in order to provide standards that could be incorporated into the national penal codes of individual nations, with adaptations as required by the political, social and legal circumstances of individual nations. The UNSMR prescribe the minimum standard of treatment for all categories of civil and criminal prisoners, including remand and special prisoners, and require the prisoners be informed of their rights under the rules. The rules include requirements for the provisions of basic necessities, such as adequate and nutritional food, clean drinking water, and suitable basic clothing. The UNSMR also require that prisons be appropriately staffed with medical officer, whose duties should include inspecting and reporting on the standard of hygiene in areas such as food preparation, sanitation, and quality of heating and lighting.³⁵

The UNSMR also provide guidelines on the maintenance of prisoners’ access to social and cultural information. The Rules direct that prisoners be allowed to correspond with, and receive regular visit from, family members and ‘reputable friends’. Prisoners should also be provided with access to library that is adequately stocked with educational and recreational material, and receive information about the more important items of news that occur outside prison, through access to newspapers, radios and the like. The relatively detailed rules concerning religion and religious services require that prisoners be able to attend services, possess religious books, and receive visits from appropriately qualified representative of prisoner’s chosen religion. Prisoners are also entitled to refuse visits from religious representatives. It is worth noting that many of the provisions governing religion, such as the possession of religious writings or the appointment of a pastoral representative, are not unqualified. Instead, prisoners may only

³³ Penal Reform International; <http://www.penalreform.org/blog/step-updated-version-standard-minimum-rules-treatment-prisoners/>, last visited 12/23/2014 ,2:11 PM

³⁴ Ibid

³⁵ Mtthew Groves ,International Law and Australian Prisoners,(2001),p.25-26

enjoy the benefit of some rules subject to the approval of prison officials; alternatively, prison officials may only be required to meet the standards set by the rules when it is possible to do so.³⁶

Generally, the UN standard rule for the treatment of prisoner classified into two parts, Part I of the rules covers the general management of institutions.³⁷ These rules are applicable to all categories of prisoners, criminal or civil, untried or convicted, including prisoners subject to “security measures” or corrective measures ordered by the judge. Issues covered in part I can be relevant to migration –related detention include; registration; the separation of different categories of prisoners, including the “legal reason for their detention”, minimum standards for their accommodation, clothing, bedding, food, exercise, and medical services; complaint mechanisms for prisoners; and contact with the outside world.³⁸

Part II of the standard minimum rules, which encompass rules that are applicable to special categories of detainees, determines that “In countries where the law permits imprisonment for debt, or by order of a court under any other non-criminal process, persons so imprisoned shall not be subjected to any greater restriction or severity than is necessary to ensure safe custody and good order”³⁹

Body of principles for the protection of all persons under any form of detention or imprisonment is another set of standard which provides certain principles that has to be observed to protect detained or imprisoned persons.

Adopted by the UN General Assembly on December 8, 1988, the body of principles for the protection of all persons under any form of detention or imprisonment contains detailed provisions for the protection of persons held in any type of detention. Many of the principles are relevant to non-citizens held in administrative detention, including principle 4, which provides that any form of detention shall be ordered by , and subject to , the effective control of judicial or other authority; principle 11, which determines that a person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority and the right to be assisted by council ; principle 15, which affirms the right of detainees to not be denied communication with the outside world, in particular his family or counsel , for “ more than a matter of days”; principle 16, which provides that a non-citizen in detention shall be promptly informed of his right to communicate by appropriate means with a

³⁶ Supra note 39,p 26

³⁷ Global Detention Project ; <http://www.globaldetentionproject.org/law/legal-framework/international/un-declarations-principles-guidelines.html#c1260>, last visited on 12/23/2014,3:11 PM

³⁸ Ibid

³⁹ Ibid

consular post or diplomatic mission of the state of which he is a national(or in the case of a refugee under the protection of an intergovernmental organization, with the representative of the competent international organization); and principle 32, which affirms the right of detained persons to challenge the lawfulness of his or her detention.

One can raise the legality or the binding effect of these minimum standards, principles, declaration and such similar documents, which are adopted by UNGA or any other international or regional organization. Such kinds of instruments are most of the time known as soft laws whose legal status is non-binding on states. Though , the instruments are not binding, they have a paramount importance putting moral obligation on states, being source of international law, domestic and international courts and judicial may use them as indicator of international standards, these soft laws may do have significant value clarifying an ambiguous international law provisions whenever interpretation came into question.

2.4.3 Regional Human Rights Instruments

2.4.3.1 African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights (hereinafter the African Charter) was adopted by member states of the then Organization of African Unity(OAU) and all 54 member states of the current African Union(AU) are states parties to the African Charter(Ethiopia has ratified the charter on 11 Jun1998) , which provides for the establishment of a regional human rights body- the African Commission- with the mandate to promote the observance of the African Charter, monitor its implementation, ensure the protection of the rights and freedoms set out therein, interpret the charter and advise its implementation.⁴⁰

⁴⁰ Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa,(2012),p 2 Note; the special Rapporteur on prisons and conditions of detention in Africa is established in 1996 by the African Union Commission and it has the mandate to examine the situation of persons deprived of their liberty within the territories to the African charter, to inspect and report on prison conditions in order to protect the rights of those held therein, research on prison conditions, communicates with African governments regarding the state of their penal system, entertain individual complaints about prison conditions , and reports to the commission on a yearly basis. These and other are the major mandates and activities of the special rappourter.

The charter acknowledges the right of every individual to the respect of his life and integrity of his person,⁴¹ every individual is entitled a right to respect of dignity and free from any form of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment,⁴² the right not to be arbitrary arrested or detained,⁴³ the right to health,⁴⁴ and the right to education are some of rights recognized by the African charter on human and peoples' rights which are also equally applicable to prisoners.

The African Charter was innovative, idiosyncratic even, in that it contains a wide range of rights; not simply civil and political rights but also economic, social and cultural rights and extending even peoples' rights and duties. The enforcement of these rights was entrusted to a commission, the African commission on Human and Peoples' rights, comparable in many ways to bodies such as the UN committee on Human Rights or the now defunct European Commission on Human Rights.⁴⁵

Apart from the African charter, the Union has provided different mechanisms for the protection and promotion of human rights. One of among these mechanisms is the constitutive act of the African Union. The constitutive act of the African Union represents a serious commitment to the promotion and protection of human rights, at least in comparison to the charter.⁴⁶

It has been noted that the progressive provisions of the constitutive act are only as good as the AU member states are willing to act upon them. Certainly from and its instrumentative stand point the constitutive act inspired the adoption of a plethora of new human rights instruments that sought to broaden the scope of human rights protected under the African human rights system.⁴⁷

2.4.3.2 Kampala Declaration

The 1996 Kampala Declaration on Prison Conditions in Africa and Plan of Action, refer to the "prison conditions", and in brief, the declaration recommends that prisoners rights be safeguarded at all times , that they retained " rights should not be taken away by virtue of being in detention", and that the

⁴¹ see art.4 of the charter

⁴²see art 5 of the charter

⁴³ see art 6 of the charter

⁴⁴ 16 & 17

⁴⁵ Malcolm Evans, Rachel Murry, The African Charter on Human and Peoples' Rights, The system in Practice 1986-2006, Cambridge University Press, .(2008), 2nd ed,p.24-25

⁴⁶ Joseph M.Isanga, "The Constitutive Act of the African Union, African Courts and the Protection of Human Rights; New Dispensation?" Santa Clara Journal of International Law, Vol.11, Issue 2, (2013), p.270,272

⁴⁷ Ibid

prisoners' living conditions should respect their human dignity and the prison regulations must be such that they do not "aggravate the suffering already caused by the loss of their liberty."⁴⁸

The Declaration addresses issues concerning prison conditions, remand prisoners, prison staff and alternative sentencing, as well as making recommendations for the African Commission on Human and Peoples' Rights and setting out an agreed Plan of Action.⁴⁹

One of interesting statement of the declaration on paragraph one No.2 acknowledges that prisoners should retain all rights which are not expressly taken away by the fact of their detention. The statement could be a ground to argue claim conjugal visit unless otherwise such visit is expressly denied, the right to conjugal visit is still a right which could be exercised during detention.

2.4.3.3 Ouagadougou Declaration and Plan of Action on Accelerating Prison and penal Reform in Africa

In addition to the Kampala declaration, the African Union has passed Resolution on the Adoption of the OUGADOUGOU Declaration and Plan of action on accelerating Prison and Penal Reform in Africa. Both of these instruments contain recommendations on reducing overcrowding, making prisons in Africa more self-sufficient, promoting rehabilitation and reintegration programs, making prison administrations more accountable for their actions, encouraging best practices, promoting the African Charter on Human and Peoples' rights, and supporting the development of a charter on the Basic Rights of Prisoners from the UN.⁵⁰

.This declaration is a document which does not have a binding effect but puts aspiration and plan to achieve in the future. The rationale behind the declaration is to support the better implementation of Kampala Declaration on Prison conditions in Africa and other international instruments relating to the

⁴⁸ Pauline Tionenji Mulanda Ngoma, A critical examination of the socio-economic rights of prisoners in Zambia in the context of International Minimum Standards, paper for the fulfillment of the requirements for the degree LLM multi-disciplinary human rights, University of Pretoria,2011,p.32

Note; Between 19-21 September 1996, 133 delegates from 47 countries including 40 African states, met in Kampala, Uganda. Delegates, including the President of the African Commission on Human and Peoples' Rights, Ministers of State , Prison Commissioners, Judges and international, regional and national non-governmental organizations concerned with prison conditions were participants of the Kampala Conference

⁴⁹ <http://www.penalreform.org/resource/kampala-declaration-prison-conditions-africa/> last visited 3/19/2016

⁵⁰ Supra note 16,p 3-4

promotion of the rights of persons deprived of their liberty in general and penal reform in particular. Most importantly the declaration is designed reaffirming the necessity to promote and protect the rights of persons deprived of their liberty through penal reform. The declaration classified into two major parts. Part one discusses about recommendations given by the participants. The recommendation mainly includes reduction of the prison population, making African prisons more self –sufficient ; which is basics to tackle challenges relating to finance and other resources, Promoting the reintegration of offenders into society ;it is suggested that greater effort should be made to make positive use of the period of imprisonment or other sanction to develop the potential offenders and to empower them to lead a crime free life in the future, application of the rule of law to prison administration; formulation of laws which clearly state the rights and duties of prisoners and their administration in order to limit the power of the administrators and avoid potential violation of rights in the premises of the prison, Encourage best practice, exchange of best penal practice at national, regional and international level is suggested as an important tool for the better development of prison administration, promote to the adoption of African Charter on Prisoners’ Rights and looking towards the United Nations Charter On the basic Rights of prisoners’ are the major recommendation given by this declaration.

An additional instrument, the Robben Island Guidelines, adopted by the Commission in 2002, encourages African nations to adopt minimum international standards on prison conditions and give detailed instructions on how to achieve them.⁵¹

The Robben Island Guidelines are very detailed about the conditions of detention that are deemed acceptable and that conform to minimum international standards.⁵² The Guidelines are explicit about different aspects of penal systems, including judicial independence, actual physical conditions, and the role of NGOs, the use of alternative sentencing to alleviate overcrowding, the separation of vulnerable groups such as children and women, and increasing awareness and training of staff, among many other provisions.⁵³ The Guidelines also established a follow- up committee that is charged with disseminating information about the Guidelines to countries, proposing strategies to the African Commission for the implementation of the Guidelines domestically, promoting and facilitating the implementation of the

⁵¹ supra note 24

⁵² Sarkin, Jeremy, Human Rights In African Prisons, ,(2009), Ohio University Press ,p.31

⁵³ Ibid

Guidelines within member states, and inviting NGOs and other actors to disseminate and use the Guidelines in their work.⁵⁴

To sum up, the African Commission on Human and Peoples' Rights plays a pivotal role in examining prisons and making recommendations to states to improve the status of human rights on the continent.⁵⁵ While the objectives of the commission are admirable, with regard to prisons the commission at times lacks a clear and coherent approach and policy.⁵⁶ The commission uses various instruments to improve conditions of detention, including hearing cases, drafting resolutions and questioning governments.⁵⁷ Its most important contribution, however, has been the creation of the Special Rapporteur on Prisons and Conditions of Detention.⁵⁸

2.4.4 The European Convention on Human Rights

The European Convention on Human rights was adopted on 4 November 1950 and entered into force on 3 September 1953.⁵⁹ The Convention consists of several sections, the instrument as a whole having been supplemented or amended by eleven protocols.⁶⁰ Thirteen articles of the convention, together with three in the first protocol, contain the rights which the contracting parties undertake to secure for everyone within their jurisdiction.⁶¹

The Convention's provisions broadly cover the individual's personal life and the need to live life to the full, according to personal wishes, together with those rights which are involved in instances of conflict with the authorities and the law.⁶² Life is to be protected by the law and the European citizen is to be brought up in privacy of the home surrounded by family and possessions.⁶³ Education should be guaranteed, or at least not prevented, and where it is provided by a system of schools, the wish and

⁵⁴ Ibid

⁵⁵ Supra note, 26, p.30

⁵⁶ Ibid

⁵⁷ Ibid

⁵⁸ Ibid

⁵⁹ Donna Gomien, David Harris, Leo Zwaak, Law and Practice of the European Convention on Human Rights and the European Social Charter, published by council of Europe, (1996), p.17

⁶⁰ Ibid

⁶¹ Ibid

⁶² R. Beddard, Human Rights and Europe, (1995), Cambridge University press, 3rd ed, p.2-3

⁶³ Ibid

beliefs of parents should be respected. Everyone who is of age has the right to marry and found a family.⁶⁴

Liberty and security are valued next to life itself and the convention's provisions protecting the individual from arbitrary arrest and imprisonment.⁶⁵The European prisoner, when lawfully detained, is not to be tortured, inhumanly treated or punished and, furthermore, he must be brought to trial expeditiously and only for offences which were offences at the time they were committed.⁶⁶

Apart from the convention, the European human rights system has provided additional mechanism for the better protection and promotion of prisoners' rights, which is known as Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules. The rules seek to provide a blueprint for prison services through the establishment of basic principles which purport to be "essential to human conditions and positive treatment in modern and progressive systems" and which are designed to "serve as a stimulus to prison administrations" to further "good contemporary principles of purpose and equality".⁶⁷

The basic principles enshrined under this rule includes;-

1. All persons deprived of their liberty shall be treated with respect for their rights.
2. Persons deprived of their liberty retain all rights that are not lawfully taken away by the decision sentencing them or remanding them in custody
3. restrictions placed on persons deprived of their liberty shall be the minimum necessary and proportionate to the legitimate objective for which they are imposed
4. Prison conditions that infringe prisoners' human rights are not justified by lack of resources.
5. Life in prison shall approximate as closely as possible the positive aspects of life in the community
6. All detention shall be managed so as to facilitate the reintegration into free society of persons who have been deprived of their liberty.
7. Co-operation with outside social services and as far as possible the involvement of civil society in prison life shall be encouraged

⁶⁴ Ibid

⁶⁵ Ibid

⁶⁶ Ibid

⁶⁷ J.L.Murdoch,The Treatment of Prisoners: European standards,(2006),Printed at the council of Europe,p.36-37

8. Prison staffs carry out an important public service and their recruitment, training and conditions of work shall enable them to maintain high standards in their care of prisoners.
9. All prisons shall be subject to regular government inspection and independent monitoring.⁶⁸

Regarding rule 1, when deprivation of liberty is used questions of human rights inevitably arise. The rule underlines this truth in context of requiring respect for prisoners' .Such respect in turn demands the recognition of their essential humanity. Rule 2 also complements rule 1 emphasising that the undoubted loss of the right to liberty that prisoners suffer should not lead to the assumption that prisoners automatically lose their political, civil, social, economic and cultural rights as well.

Rule 3 emphasises the limits to the restrictions that may be placed on prisoners. It highlights the overall principle of proportionality that governs all such restrictions. Rule 4 is designed to make it clear that the lack of resources cannot justify a member state allowing prison conditions to develop that infringe the human rights of prisoners. Rule 5 emphasise the positive aspect of normalization. Generally, these rules seek to be comprehensive without burdening member states with unrealistic demand.

European Court of human rights noted that more than half of the contracting states allowed for the conjugal visits for prisoners. However, while it has 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. 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.⁶⁹

2.5 State Obligations towards the Right to Conjugal Visit

UN human rights council of the committee on Economic Social and Cultural Rights has came up with a General Comment on right to Sexual and Reproductive Health which is named as General Comment No.22, which prescribes two categories of State obligation towards the right to sexual and reproductive health.

⁶⁸ Supra note 31.p.37 also see European Prison rule part one.

⁶⁹ http://www.coe.int/t/dghl/standardsetting/minjust/mju30/COURT_n3256787_v1_Recent_case-law_on_prisoners_rights.pdf,last visited 4/16/2016

2.5.1 General Obligation

According to the stand of the committee state parties are under immediate obligation to eliminate discrimination against individuals and groups and to guarantee their equal right to sexual reproductive health.⁷⁰For the effective fulfillment of this obligation, states are required to repeal or reform laws and policies that nullify or impair certain individuals and groups ability to realize their right to sexual and reproductive health.

State party has the duty to establish that it has the maximum available resources, including those made available through international assistance and cooperation, with a view to complying with its obligations under the covenant.(paragraph 37 of the general comment)

2.5.2 Specific legal Obligations

Obligation to respect it requires states to refrain from directly or indirectly interfering with individuals' exercise of the right to sexual and reproductive health. State must not limit or deny anyone access to sexual and reproductive health. State should reform laws that impede the exercise of the right to sexual and reproductive health. The obligation to respect also requires states to remove and refrain from enacting laws and policies that create barriers to sexual and reproductive health.

The second specific obligation of state is the obligation to protect. The obligation to protect requires to take measures to prevent third parties from directly or indirectly interfering with the enjoyment of the right to sexual and reproductive health.(paragraph 43)States must prohibit and prevent private actors from imposing practical or procedural barriers to such sexual rights.

The third specific obligation is the obligation to fulfill. Under this obligation states are required to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures to ensure the full realization of the right to sexual and reproductive health. The obligation to fulfill also requires states to eradicate practical barriers to the full realization of the right to sexual and reproductive health.

In addition to the obligation of the single contracting states, the international community has also an obligation to ensure sexual and reproductive rights. International cooperation and assistance are a key

⁷⁰ General Comment 22 on sexual and reproductive rights, Parag.34

element of Art.2.1 of the covenant and are crucial for the realization of the right to sexual and reproductive health. Donor States and international actors have an obligation to comply with the human rights standards, which are also applicable to sexual and reproductive health. (53).Intergovernmental organizations, and in particular the United nations, specialized agencies , programmes and bodies, have a crucial role to play and contribution to make in the universal realization of the right to sexual and reproductive health.(54)

Chapter Three

The Justification for Recognizing Prisoners' Right to Conjugal Visit

3.1 Intersection between Prisoners' Right to Conjugal Visit and Other Human Rights as a Justification

One of the major characteristics of human rights is its interdependency and indivisibility. Indivisibility is linked to the concept of interdependence – meaning that each right forming part of human rights is only fully enjoyed when the other rights are also being enjoyed. That is why we say that human rights are indivisible and interdependent; every right forming part of human rights is equally important, deserves equal protection and promotion and can only be truly enjoyed if all other rights are concurrently implemented.

In case of the right to conjugal visit, the protection and recognition of this specific right has paramount importance for the better protection of other human rights of prisoners. The right to conjugal visit has a direct impact the family unity of the person behind bar and the spouse outside the prison. Family as a fundamental unit of the society, it is important to take the necessary steps to avoid obstacles that endanger the very unity of family. In addition to safeguarding family unity, the right to conjugal visit has strong relationship with the right to health. Both physical and psychological well- being of prisoners could be affected if such right is deprived. It is also necessary to recognize the right to conjugal visit for the effective realization of the purpose of imprisonment which is rehabilitation. Most importantly imprisonment is intended to rehabilitate those criminals and making them productive and achieve behavioral change whenever they integrated to the rest of the society.

3.1.1 Conjugal visit Vs The Right to Health

The right to health is a fundamental part of our human rights and of our understanding of a life in dignity. The right to the enjoyment of the highest attainable standard of physical and mental health, to give it its full name, is not new. Internationally, it was first articulated in the 1946 Constitution of the World Health

Organization (WHO), whose preamble defines health as “a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity”.⁷¹

UN general Comment No.14 parag.8 states that the right to health is not to be understood as a right to be healthy. The right to health contains both freedom and entitlements. The freedom includes the right to control one’s health and body, including sexual and reproductive freedoms, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation and by contrast, opportunity for people to enjoy the highest attainable level of health.⁷²

The right to health is recognized in different International and Regional treaties like the 1965 International Convention on the Elimination of All Forms of Racial Discrimination Art.5(e)(iv), the 1966 International Covenant on Economic, Social and Cultural Rights Art.12, the 1979 Convention on the Elimination of All Forms of Discrimination against Women Art.11(1)(f), 12 and 14(2)(b), the 1989 Convention on the Rights of the Child Art.24 and the African Charter on Human and Peoples’ Rights(1981) of Art.16 and the European Social Charter are some of among the regional human rights instruments which duly acknowledged the right to health as one of a fundamental human right.

When we come to sexual health the technical consultation defined sexual health as follows;

Sexual health is a state of physical, emotional, mental and social well-being in relation to sexuality; it is not merely the absence of disease, dysfunction or infirmity. Sexual health requires a positive and respectful approach to sexuality and sexual relationships, as well as the possibility of having pleasurable and safe sexual experiences, free of coercion, discrimination and violence.

The right to sexual and reproductive health is an integral part of the right to health enshrined in article 12 of the ICESCR. The adoption of the programme of Action of the International Conference on Population and Development in 1994 further highlighted reproductive and sexual health issues within the human rights framework.⁷³

⁷¹ fact sheet 31 on the right health, office of the United Nations High Commissioner for Human Rights, The world Health Organizations, p.1)

⁷² General comment on the right to health 14 parag.8

⁷³ Supra note 65, paragraph 1

Sexual health in prisons is not merely the absence of disease or dysfunction. It is not merely the absence of HIV in prison. Indeed, neither is it the mere absence of sexual violence or abuse. Sexual health involves the whole person; the physical, the emotional, the mental and social aspects of the person. Advancing sexual health in prisons means paying attention to all these aspects, and addressing the needs of the prisoner holistically rather than piecemeal. Sexual health is related to life's basic necessities, such as food, clothing, bedding, leisure activities, the personal security of the person, and adequate living space. General living conditions are not dissociated from sexual health. Separating these from sexuality and sexual health is perhaps another illusion of prison systems.⁷⁴

The right to sexual and reproductive health is also indivisible from and interdependent with other human rights. It is ultimately linked to civil and political rights underpinning the physical and mental integrity of individuals and their autonomy, such as the right to life; liberty and security of person; freedom from torture and other cruel, inhuman or degrading treatment; privacy and respect for family; and non-discrimination and equality.⁷⁵

Laws, policies, and programmes, including temporary special measures, are required to prevent and eliminate discrimination, stigmatization and negative stereotyping that hinder access to sexual and reproductive health. Prisoners, refugees, stateless persons, asylum seekers and undocumented migrants, given their additional vulnerability by condition of their detention or legal status, are also groups with specific needs that require the state to take particular steps to ensure their access to sexual and reproductive information, goods and health care. States must ensure that individuals are not subject to harassment for exercising their right to sexual and reproductive health.

Therefore, allowing sex in prison or the entitlement of right to conjugal visit for prisoners is beyond sexual gratification of their sexual desire or need. It has strong relationship with their physical and mental well-being.

⁷⁴ Godfrey D Kangaude, "A sexual rights approach to addressing gender –based sexual violence among male prisoners in Malawi", African Human Rights Journal, 14 AHRLJ, 2014, p 5

⁷⁵ Supra note 65 .parag10

3.1.2 Conjugal Visit Vs The Right to Family

Family is a fundamental element for any society in which the overall societal make up goes to the root which is known as a family. Family relationship are an important part of the glue that holds society together and they traditionally been regard as one of the key determinants of social cohesion.

The right to marry and found a family is enshrined in the UDHR (Art.16), the ICCPR (Art.23) and the European Convention on Human Rights (Art.12).It is also recognized under the FDRE constitution Art.34.

The right to family encompasses the right of men and women of marriageable age to marry and to found a family, the right to procreate and live together and equality of men and women before, during and after marriage. There shall not be any discrimination based on sex.

Since prisoners are incapacitated, during the time of incarnation we can not to expect exercise of rights like a person in absolute liberty. But for the sake of producing offspring of the couples, to keep family tie and continuation of the marriage I personally agree that prisoners' should be given the right to conjugal visit during their period of stay in prison. There might be break up of marriage if both of the spouses prohibited to enjoy and spent privately for long time.

Art 23 of the International Covenant on Civil and Political Rights recognizes that the family is the natural and fundamental group unit of society and is entitled to protection by society and the state. Protection of the family and its members is also guaranteed, directly or in other indirectly, by other provisions of the covenant. ⁷⁶ Art.23, parag.2, of the Covenant reaffirms that the right of men and women of marriageable age to marry and to found a family.

European Court of Human Rights have ruled a case applied by Mr. Varnas and a respondent state of Lithuania (Application no 42615/06 9 July 20013) on the issue of conjugal visit for persons on remand.

Facts of the case is in March 2004 , the applicant was arrested on suspicion of belonging to a criminal association and placed on remand during the pre-trial investigation, where he remained for over two years. In June 2006 the applicant was convicted and sentenced to 12 years' imprisonment and in

⁷⁶ General comment 19 on the right to family life, parag.1

September of the same year he was transferred to a correctional facility to commence serving his sentence .In June 2007, a second criminal investigation was brought against the applicant and he was again placed on remand, this time until February 2008.In October 2009 he was sentenced to five years imprisonment in relation to the second set of criminal charges.

During the periods of time the applicant was held on remand, he was not permitted to receive conjugal visits from his wife, despite repeated requests. In comparison, convicted persons serving a custodial sentence were permitted to receive conjugal visits.

The applicant has brought to ECHR three main complaints before the court among these his inability to receive conjugal visits while on remand violated article 8, which is about the right to family of the convention along, and in conjunction with article 14 of the prohibition of Non- discrimination. Here, my concern is not to discuss whether there is discrimination or not among persons on remand and the others convicted persons, but I want to show the complaint of the applicant on his right to family and the final decision of the court.

The applicant argued that his inability to receive conjugal visits from his wife while on remand caused him mental and physical suffering so severe it amounted to torture. The inability to maintain a social and physical connection with his wife also violated article 8 of the convention as it” denied him the possibility of having children and risked breaking up his marriage and the loss of family happiness”

Finally, even if the respondent state, Lithuania, argued to the contrary the court found Lithuania in violation of article 14 in conjunction with article 8 of the convention. The overall the case point of contention and the final decision shows that the right to conjugal visit is a crucial for prisoners to keep in touch the family relationship healthy and long lasting.

Therefore, the widest recognition of conjugal visit is a basis to preserve family bonds and increase the chances of successes for prisoner’s eventual return to life outside prison.

3.2 Rehabilitating the Prisoners as a Justification

Most people may think of prisons as nothing more than facilities where criminals are incarcerated and deprived of their freedoms while serving a sentence for a crime .While this is true, the concept of imprisonment is also intended to rehabilitate the prisoners.

The basic idea of rehabilitation through imprisonment is that a person who has been incarcerated will never want to be sent back to prison after they have set free. It is hoped that an inmate's experiences while locked up will leave such a lasting impression that a former prisoner will do whatever it takes to avoid a second term.⁷⁷ Conjugal visit also mean that inmates are strongly motivated to comply with those day to day rules and regulations of the prison.

Since one of the goal of imprisonment is to rehabilitate criminals to make them not to involve in criminal activities in the future and to give for the society a reproductive a learned individual from his past wrong doings hence successful rehabilitation can sometimes depend on the extent to which a prisoner is able to maintain ties to the outside world, so that when he is released he does not find himself isolated and excluded from mainstream society.⁷⁸

3.3 Other Justifications

The spread of homosexuality in prison can be taken as another justification for allowing conjugal visit in prison. Homosexuality is not generally considered as a normal means of sexual fulfillment. Though homosexuality is recognized in different countries as a legal right, most religious conservative nation still denied homosexuality and even they categorized the act as a criminal act which is punishable by law. In case of Ethiopia the new criminal code homosexuality is punishable by simple imprisonment.⁷⁹

The other issue under this sub section is the threat of rape among inmates. Rape, defined as “sexual acts between inmates that is accompanied by the use of threat of force or coercion, or the provision or denial of privileges among inmates.”⁸⁰

Conjugal visit is also mentioned as a system to make the inmate easily adopt the life after imprisonment. Keeping such contact with their spouses, it will not be difficult those inmates who stayed long time imprisonment and integrate with the family and the society.

⁷⁷ <http://www.crimemuseum.org/crime-library/rehabilitative-effects-of-imprisonment> last visit 3/6/2015)

⁷⁸ . Clare Ovey” Ensuring respect of the rights of prisoners under the European convention on human rights as part of reintegration process” Registry of the European Court of Human Rights p3

⁷⁹ Art.629 of the criminal code

⁸⁰ Niyi Awofeso and Raymond Naoum “Sex in prisons-a management guide “ Australian Health Review vol. 25.No.4 2002 p.8

Chapter Four

Prisoners' Right to Conjugal visit in Ethiopia

Legal Gaps and Proposed Reforms

Introduction

In order to look at the status of the right to conjugal visit under Ethiopian laws, it is better to start making a brief observation on previous constitutions of the country. For constitutional purpose, the historical development of the Ethiopian state prior to the establishment of present constitutional order may be broadly divided into four unique periods; the first, from pre-Christian times to the eighteenth century; the second, the succeeding century known as the Zemene Mesafent (the Era of Princes); the third, the modern monarchical period of Ethiopia's reunification from the middle of the nineteenth century to the fall of the monarchy; and the last, the 17 years of the Derg period. From 1931 onwards, however, a new element in Ethiopian constitutional history, the written constitution enters the picture.⁸¹

Despite the fact of the existence of constitutionally significant documents in traditional Ethiopia, no written constitution in the modern sense formed the basis for the constitutional process. The Monumental Fetha Negest was basically a Codex of law providing for secular and religious legal provisions rather than a constitution. The Kibre Negest colorfully moves the legend of a Solomonic Dynasty and thereby served certain politico-religious needs of the times in the constitutional process. The Serate Mengist of the nineteenth century also provided certain administrative and protocol directives useful to the constitutional process. But none of these were constitutions in the modern sense, even though they were instrumental documents that served specific purposes within the constitutional process.⁸²

Ethiopia as a state experienced the first written constitution in 1931. The written constitution of 1931 had not even recognized any rights of prisoners except making a general statement on the right to free from unlawful detention.(Art.23).The same is true for the revised constitution of the 1955.The revised constitution stated in general language that no one within the empire may be deprived of life, liberty or property without due process of law.(Art.43).

⁸¹ Fassil Nahum., Constitution for a nation of Nation, Red Sea Press(1997), p.3,

Note; the first written constitution of Ethiopia was adopted in 1931 during the Emperor Haileseilasie.

⁸² Ibid 17

All in all, the constitutions of the then empire of Ethiopia during the reign of Emperor Hailesillase, prisoners had entitled neither fundamental rights and freedoms nor the right to conjugal visitation.

When we look at the 1987 Constitution of the Dergue regime, the constitution which was approved by the referendum on 1st February 1987 devoted some parts of its provisions on the rights and duties of Ethiopians under chapter seven. Regarding its provisions of rights of detainees or convicted persons, it generally stated about arrested persons who are in trial. It includes the right to presumption of innocent, the non retro- activity of criminal law, the right of accused to defend himself and other rights in relation the right to fair trial (Art.45).

The 1987 constitution had not provided prisoners rights in general and the right to conjugal visit in particular. Rather, most of the constitutional provisions were devoted to rights of arrested persons in trial.

In relation to correctional institution history of Ethiopia, the Ethiopian prison system was re-established on a country wide basis, and was given a semblance of modernity after the promulgation of proclamation No.45 of 1944 entitled a proclamation relating to prisons. Though some of the articles are superseded by the provisions of the 1957 penal code and the criminal procedure of 1961, this remains to be one of the bases for correctional administration in Ethiopia. The proclamation had nothing to say about prisoner's right to visitation up to conjugal visit⁸³. In addition to that constitutional legal framework; Ethiopia has adopted prison commission establishment proclamations and related regulation which determines various rights of detainees and the administration of correctional centers.

4.1 The 1995 FDRE Constitution

A new constitution was ratified in December 1994 and adopted in May 1995 and put into effect on 22 August 1995. The constitution included crucial human and democratic rights provisions based on the UDHR, which declared for unconditional respect of human rights.⁸⁴

The constitution devotes more than one third of its content to provisions on fundamental human and people's rights. Moreover, there are provisions that deal with national policy principles and objectives which either establish important guarantees or have direct relevance for the interpretation of fundamental

⁸³ Andargachew Tesfaye, *The crime problem and its correction*, vol.II, p.222, Addis Ababa University Press, 2004)

⁸⁴ Berhanu Gutema Balcha, "Constitutionalism in the horn of Africa ; lesson from the new constitution of Ethiopia ", DIIPER research series working paper No.15 ,(2009).p.1

rights. The constitution imposes a responsibility and duty to the respect and enforcement of fundamental rights and freedoms at all levels of the federal and state legislative, executive and judicial bodies.⁸⁵

The constitution explicitly guarantees human rights and democratic rights making some distinction. Therefore, prisoners as a human being, they too are entitled to exercise those constitutional rights. In addition to incorporation of International human rights instruments in which Ethiopia became party for it, the constitution explicitly referred some particular rights in for convicted persons.

Art.18 of the constitution, which is the supreme law of the land, prohibits any inhuman treatment of peoples. It provides that these are inalienable rights that cannot be denied even under emergency conditions. The constitution also provides for the protection of peoples against cruel, inhuman and degrading treatment or punishment .Article 21 of the constitution provides that persons held in custody and imprisoned upon conviction and sentencing have the rights to treatments respecting their human dignity. The same article provides that all persons shall have the opportunity to communicate with, and to be visited by, their spouses and partners, close relatives, friends, religious counselors, medical doctors and their legal counsel. Various regional state constitutions also carry similar provisions. Besides, the Federal Constitution in Article 9(4) accepts all international and African agreements ratified by Ethiopia as an integral part of the law of the land.

The 1995 FDRE constitution , which is the most detailed and incorporated extensive provisions on fundamental rights and freedoms, is the one which has the best constitution in the history of Ethiopian constitution addressing prisoners rights in detail. Art.21 of the constitution is about the rights of persons held in custody and convicted prisoners.Sub.Art.2 of Art.21 states that all persons shall have the opportunity to communicate with, and to be visited by, their spouses or partners, close relatives, friends, religious councilors, medical doctors and their legal counsel.

Here the constitution does not clearly provide the extent of a visit of the spouses. The minute of discussion during the time of adopting constitution and commentaries by the drafters of the constitution failed to put in black and white whether spousal visitation includes the extended visit or conjugal visit. The minute simply describes the content of Art.21 of the constitution it as a “close spousal visit”. We cannot infer from this statement and conclude that spousal visit is acknowledged under our constitution. It is obvious that there is strong linkage between husband and wife. Both religious commandments and

⁸⁵ Supra note 67, Adem p.43

secular laws support the cohabitation and oneness of spouses. On the revised family code, spouses shall have with one another the sexual relations normal in marriage unless these relations involve a risk of seriously prejudicing their health (Art 53(2)) of revised code. Most importantly, the law stipulates that any agreement to the contrary shall be no effect (53(3)). Therefore, this clause of the constitution shall be interpreted in line of the principle of cohabitation and in a way that enable to strengthen family unity of the detainee. Therefore, we can make an interpretation that since the constitution has given such weight and concern for family unity, it is possible to make interpretation of the constitution in a way which permits prisoners' right to conjugal visit.

4.2 Proclamations and Regulation

4.2.1 The New Criminal Code

The new criminal code is adopted after the repeal of the old 1957 penal code of Ethiopia. The criminal law is mainly come into force to ensure order, peace and the security of the state and its peoples, and inhabitants for the public good. The new criminal code aims to prevent crime and criminal activities giving a due notice crimes and penalties prescribed by law and should this be ineffective by providing for the punishment of criminals in order to deter them from committing another crime and make them a lesson to others, or by providing for their reform and measures to prevent the commission of further crime.⁸⁶ From it is understandable to note that the purpose of punishment in case of Ethiopian criminal law is not revenge or retributive justice of eye to eye, rather it gives a due consideration to rehabilitate or reform criminals and deter other from committing a crime.

Book II of the criminal code is entirely dedicated to “the criminal punishment and its application.” The principle of this book urges law enforcement organs to take note of the objective of the law under article 1 of the code. It also provides penalties and measures shall be in conformity with human dignity. In a nut shell, punishments and their enforcement is divided based on age: punishment for adults and young offenders. Punishments applicable to adults can have form of Fine, Confiscation, Sequestration, Compulsory Labor and Imprisonment.⁸⁷

⁸⁶ Art. 1 of Crm.C.

⁸⁷ Addisu Gulilat, ,The Human Rights of Detained Persons in Ethiopia: Case Study in Addis Ababa”, (2012) p.42, Senior thesis for the partial fulfillment of Masters Degree in Law, Addis Ababa University(Unpublished)

The criminal law makes segregation of prisoners based on their status. Article 110 of the law allows separation of sexes and segregation. Accordingly same sex prisoners shall serve their sentence in same prisons or corners and prisoners who are sentenced to rigorous imprisonment or special confinement shall be kept separate from prisoners under age of eighteen years or from adult prisoners who are serving a sentence of simple imprisonment. Convicted and detainees awaiting trial also under different category.

The criminal law has a provision which obliges prisoners to do work and benefits accruing the reform. Even though prisoners compelled to perform works in the prison, the law tries to balance healthy condition of the prisoner and the obligation to work. The law expects only those prisoners who are in a good health to perform such activities.

Ethiopian criminal law has expressly acknowledges capital punishment and detail provisions has been laid down on the execution of capital punishment. The very interesting thing with this issue with all stringent execution procedure the law requires humane means of execution of death penalty. Article 117(3) provides that the sentence of death shall not be carried out in public by hanging or by any other inhuman means. The penalty shall be executed by a humane means. The penalty shall be executed by a humane means within the precincts of the prison. The means of execution shall be determined by the executive body having authority over the Federal or Regional prison administration concerned.

As a treaty party to the Convention against Torture, Inhuman Degrading Punishment or Treatment Ethiopia has manifested her commitment incorporating act of torture as of one of a criminal act punishable by law. The criminal in its article 424 prohibits any act of torture against persons in custody either convicted or waiting trial.

Therefore, it can be seen that the criminal law made efforts for the protection of persons under custody. Though, the criminal law does not provide any provision regarding the right to conjugal visit and related issues, efforts are made to provide a better protection and safeguard for prisoners who are under the control of the government. But still there is no single provision which prohibits and punish conjugal visit in prison.

4.2.2 A Proclamation to Provide for the Establishment of the Office of the Central Attorney General of the Transitional Government of Ethiopia Proc.No.39/1993

Proclamation No.39 of 1993, which established the office of the Central Attorney General, under Article 12, gave extensive supervisory authority to the attorney General over prisons, as quoted below

1.to supervise the legality of the imprisonment or detention of prisoners, detainees, inmates held in prisons, temporary centers of detention and corrective or medical institutions, and ensure that their rights are duly respected;

2. To ensure that the rights of any individual under custody are respected;

3. To ensure that appropriate steps are taken for the rehabilitation and social integration of prisoners;

4. In cooperation with appropriate institutions to formulate and strive for the materialization of solutions relating to the rehabilitation and social reintegration of prisoners upon release.

5. To visit, at any time convenient to it, prisons or centers of detention or other places where prisoners are held;

6. To order the release of prisoners detained or imprisoned in violation of the law;

7. To ensure that penalties are executed and protective measures are taken in respect of prisoners in accordance with the law and those prisoners are properly treated; to cause the rectification of irregularities that it may come across.

The proclamation has nothing said on the right to conjugal visit, furthermore, it had not even incorporated those ordinary right to be visited by other individuals and the family. It simply states that the central attorney has the power to ensure that the rights of prisoners but there is no single right particularly mentioned under the proclamation.

The purpose of citing the above proclamation is not to discuss its elements and legalities of the attorney general, but it is to show the concern given by the government to legally protect the rights of prisoners even in the time of no constitution.

4.2.3 Federal Prison Commission Establishment Proclamation No.365/2003 and Regulation No.137/2007

In addition to the above constitutional framework and laws, Ethiopia has adopted proclamations and regulations at the federal and state level for the administration of prisons and for the better protection of persons under custody. Among these proclamations I would like to discuss the Federal Prisons Commission Establishment Proclamation No. 365/2003.

The federal prison Commission Establishment Proclamation No.365/2003 enacted by the house of Peoples Representative by based on Art.52 of the EFDRE constitution which empowers the house to enact legislation. One of the major objectives to establish the commission is to admit and ward prisoners, and provide them with reformative rehabilitative services in order to enable them make attitudinal and behavioral changes, and become law abiding, peaceful and productive citizens. Here, like that of the Criminal law dealt on the previous section, the proclamation also reaffirms the countries policy of imprisonment which incorporated rehabilitating inmates. (Art5)

Apart from admitting and warden prisoners, the commission is empowered with the following powers and assumed to perform duties;

- warden and reform prisoners
- take prisoners to court
- maintain prisoners' health care
- provide prisoners with academic education, vocational training and social work services and counseling services
- transfer prisoners from one prison to another
- determine and implement disciplinary measures
- gather and organize country-wide data and statics about prisoners
- submit to the competent organ recommendation of parole or pardon
- recruit , employ, train and administer staff and prison wardens
- facilitate opportunities for training
- undertake studies and research that can help improve the custody and treatment of prisoners
- provide professional, technical and advisory assistance to Regional prisons

- Stand as a legal person.

Part four of the proclamation is devoted to treatment of prisoners expressly stating the rights and duties of prisoners during their stay of imprisonment. Accordingly, prisoners' right to be treated conditions of respect for human dignity is duly recognized. This right is basics for the protection of all other rights of prisoners. Classification of prisoners based on convicted and waiting trial, civil and criminal prisoners, female and male, age, degree of offences.

Inclination of the law towards respect and protection of Human Rights of Prisoners is also reflected in the regulation No.137/2007 which is enacted to provide for the administration of Federal Prison Wardens. The moral and legal commitment of Prison wardens for the protection of prisoners' rights begins from their Oath during recruitment time. Every newly recruited warden is expected to give an oath which encompass. They give their word to do their work in accordance with the law, in particular to respect and protect the human rights and dignity of prisoners.⁸⁸

Council of Ministers Regulations on the Treatment of Federal Prisoners, Regulation No. 138/2007 is another national legal instrument to administer and supervise treatment of federal Prisoners. It is more detailed regulation illustrates all the principles and rights of prisoners enshrined under the proclamation.

Accommodation shall be as good as for health in addition health care service and food are provided free of charge to maintain prisoners' health and adequate standard of living.

Prisoners have been given the right to communicate with their spouses, close relatives, friends, medical doctors, legal counselors and religious leaders.⁸⁹This provision of the proclamation entitles prisoners the right to be visited by those individuals giving the commission a power to adopt directives to manage control such visit. Here important question that we need to raise is regarding the extent of spousal visit under this particular proclamation. From the reading of the provision we do not have any place to positively interpret that spousal visit has different privilege than the other listed individuals. The law doe not put any special treatment for the spouse and the detained partner. Moreover, I could not find any administrative document or directive related with this proclamation in which either impliedly or expressly allows the extended spousal visit or conjugal visit.

⁸⁸ Art.7 of Regulation

⁸⁹ Proc.365/2003 Art.29

Experts in Ethiopia also have great concern on the issue. I conducted an interview with a person called Mr.Hailu who served as commissioner of prison administration commission of the regional state of Tigray and currently working at Prison Fellowship (Justice for All) as an adviser, he supports that there should be legislation which expressly allow conjugal visitation for married prisoners. He personally observed the complicated social, health and psychological problems which are resulted by the deprivation of the right. Depression, anxiety and sometimes prisoners become aggressive whenever their sexual demand is high. He believes that since the ultimate goal of imprisonment is rehabilitation, to achieve such goal it is necessary measure to allow conjugal visitation in prison. According to the interviewee the topic have been raised at many meeting and policy discussions but still not reached on consensus and the concerning government authorities have not taken any measure to this effect. According to the interviewee if the law include conjugal visitation, there might not be problem to implement the law as many fears. Cooperative effort from the government and other stake holders may easily enable to implement the law into practice.⁹⁰

One of the interviewee named Mr.Tesfaye has been convicted for 10 years of imprisonment from this period, he served 5 years. He strongly support that married prisoners of both sex should be given a chance to have private time with their spouses. He personally experienced and witnessed problems within the prison and the effect goes outside families of the prisoner. His co-prisoners who was convicted by murder sentenced for 15 years has experience that his wife was involved in affair with his friend and finally they divorced and the children faced psychological and financially problems. The ex-prisoner Mr.Tesfaye therefore strongly argues that these and other problems can be pushing factor to result the enactment of conjugal right visitation under Ethiopian laws.⁹¹

The other interview conducted with Mr.Negussie who is sentenced for 7 years. He surprisingly and with a great concern stated that prison centers are becoming source for evil practices that the society rejects in general. He witnessed that many new prisoners have been victim of same sex rape and sexual assault. He insists that the very reason for the occurrence of this mess up is the prohibition of conjugal visitation at least for married inmates. Furthermore, the interviewee added that this complete prohibition of conjugal visitation is also resulting maladministration and corruption in the prison in a sense that some prisoners and prison guards have been using as an opportunity to take bribery and other economic benefit during at

⁹⁰ Interview with Mr.Hailu from Prison Fellowship Ethiopia, conducted on 15/01/2015

⁹¹ Mr.Samson Yohanees, Interview conducted on 23/01/2015

the time when the prisoner is temporarily out of the prison for different reasons like medical case or to attend any other social events by the permission of the prison authority.⁹² As I tried informally to make a discussion with those prison officials from ordinary guard to the authority, they strongly oppose the rumors that same sex practice occurs within the prison and they uphold the strong consequences on someone who is found committing such legally and morally prohibited act.

In relation to keeping family unity, I discovered an incident where the husband having three children and beloved wife has been sentenced for 6 years. During his stay in prison, the wife already started an affair with someone and the whole family was finally displaced and the marriage was dissolved .Here, we can notice that conjugal visitation rights is not only the issue of the person who is behind bar, but it has long impact on the life and sexual demand of the other spouse who is at liberty to do his/her will to satisfy the demand of sexual need which finally result break up of family unity.

Therefore, even if with many constrains and unwillingness of prisoners and prison official to make a detail and extensive interview and communication, still I easily observed the actual problematic areas regarding conjugal visit and the existing multi- dimensional and even complicated problems existed because of lack of clear laws on the area

4.3 Ethiopia's Commitment to the International and Regional Human Rights Instruments

Ethiopia is party to the key international and regional human rights instruments. The country has ratified the major bill of rights and incorporated fundamental human rights and principles under the domestic laws. The followings are those key international and regional human rights instruments ratified and adopted by Ethiopia;

- Convention Against Torture, Cruel, Inhuman Treatment or Punishment Ratified on 14 March 1994
- International Covenant on Civil and Political Rights ratified on 11 Jun 1993
- Convention Elimination of All Forms of Discrimination Against Women ratified on 10 Sep.1981
- International Covenant on Economic, Social and Cultural Rights ratified on 11 Jun.1993
- International Convention on The Rights of The Rights of the Child ratified on 14 May.1991

⁹² Mr.Negussie,Interview conducted on 9/01/2015

In addition to the above international instruments, Ethiopia as a state party and one of the founding member states to the Organization of African union has shown its commitment adopting the regional instruments

- African Charter on Human and Peoples' Right ratified in 1998
- African charter on Rights and Welfare of the Child in 2002
- OAU Convention Governing the Specific Aspects of Refugee problems of in Africa ratified in 1969
- Constitutive Act of the African Union in 2001

These are some of the steps that has been taken by the country to shows at least the commitment and willingness of the state to expose itself for the further commitment and political willingness to be abide by and respect those fundamental human rights including the rights of the detainees.

Furthermore, the Constitution under its Art.9(4) has recognized and acknowledged the above instruments as an integral part of the law of the land which gives a better strength for the realization of the intended standard of protection of human rights. In addition to the above constitutional provision, the constitution also incorporated another provision of Art 13(2) which says "The fundamental rights and freedoms specified in this chapter shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and International Instruments adopted by Ethiopia" Though this particular provision is subject to criticism lacking clarity as to who, the when, and the how of interpretation of chapter three⁹³, still it has importance for the interpretation of the constitution in line with the core international human rights instruments and principles.

Unfortunately, most international human rights instruments and principles and minimum standards in relation to prisoners' right to conjugal visit, still they did not came up with a precise rule and standard which directly deals on the right to conjugal visit. All in all they laid down fundamental rights and standard of treatment which may ultimately important for recognizing such right of prisoners.

⁹³Tesfaye Regassa" Making Legal Sense of Human Rights;The Judicial Role in Protecting Human Rights in Ethiopia" Mizan law Journal vol.3(2),p 319

4.4 The Need for Comprehensive Recognition of Prisoners' Right to Conjugal Visit in Ethiopia

As it is tried to address the issue of conjugal visit in line of international and domestic legal frameworks and best practice of other countries, it is inevitable to take major legislative and policy reforms in Ethiopia. All the above discussed domestic legislations including the constitution, do not have any say regarding the right to conjugal visit of prisoners.

Since Ethiopia is a federal state structure, the regional and the federal governments have their authority to adopt laws according to the jurisdiction given by the federal constitution. The increment of prisoners in number and multiplicity is could be a pushing factor.

Ethiopia is known by its strong family and social relationship, therefore the government has a responsibility to keep and safeguard such family and societal intimacy among the nation. Therefore, we need prison administration reform which expressly recognizes the right to conjugal visit and incorporating it in proclamation and regulation for the administration of federal and state prisons. Up to now there is no single legislative document which expressly allows or even raise conjugal visit as an issue of prisoners.

In addition to the above pushing factors, as a contracting party to the major international and regional human rights treaties and documents, Ethiopia is expected to create a better environment for the protection and safeguard of fundamental human rights and freedom particularly the rights and treatment of prisoners.

Chapter Five

Conclusion and Recommendations

5.1 Conclusion

As it has been discussed in the previous chapters of the thesis, prisoners are one of the vulnerable groups for threat of violation of fundamental rights and freedoms. As it is said that one of the rights of convicted persons held in jail or prison is, the right to communicate with their spouses, families, legal councilor and religious leaders. The paper has discussed the status of prisoner's right to conjugal visit or sometimes named as the extended spousal visitation that has a vital role for the protection and respect for other fundamental human rights of prisoners.

The issue of conjugal right of prisoners is the most controversial topics with two extreme opposing arguments. In one side, some peoples argue that the right of prisoners to have sexual relationship with their spouses must be respected because imprisonments shall not result deprivation of every single right of the prisoner. Therefore, conjugal rights shall be one of the rights that have to be respected and fulfilled in prison. There has been also important argument for the conjugal visit in with regard to keeping the tie between the prisoner and their families. Since family is a fundamental element of the society it needs to be protected and shall be given a due consideration. There are also counter argument against prisoners right to conjugal visitation mainly raising the rationale of imprisonment. They argue that one of the rational to detainee a criminal is to deter and penalize unlawful activities. Therefore, the one who is convicted and imprisoned must be deprived his fundamental rights and freedoms that include the prohibition of conjugal visit. They believe that if conjugal visit is allowed, the purpose of imprisonment and penalty would be lost.

The right to conjugal visit is the most undermined issues. No international, regional and domestic human rights instruments, in Ethiopian case, address under their provisions. In case of Ethiopian law and practice, the issue of conjugal rights of prisoners is the very untold and not widely enough researched area. From the constitution to federal and regional prison administration proclamations said nothing about it. The only right regarding prisoners' right with their family attachment is the right to be visited by their spouse which is understood and being practiced as a visit like any ordinary persons visit which

mainly include visits, correspondence and possibly other forms of communication such as telephone calls.

So, we can easily observe that both the federal and state laws in Ethiopia do not give any attention to the concern of prisoners' right to conjugal visit. But the reality within the prison is totally different. The complicated problems arising from the deprivation of conjugal visit is becoming a great risk and prisoners and prison officials are taking the issue seriously. It has been creating multi dimensional problems with regard to prisoner's right to health, family life, rehabilitation and other socio-economic aspects. I can conclude that guaranteeing prisoner's r right to conjugal visit has a paramount importance for the protection and respect of other related rights fundamental human rights of prisoners.

5.2 Recommendations

General Recommendation

As vulnerable group for abuse and deprivation of rights, prison system should be supported with strict regulation and policies for the better protection and respect of prisoners' rights in general. Authorities should take legislative and administrative measures to ensure to the better protection of the right of prisoners in general and particularly prisoners' right to conjugal visit.

Promotional Measures

The government, particularly the concerned authorities of the government, shall take all necessary measures promoting fundamental rights of prisoners in general, and particularly the issue of prisoners' right to conjugal visitation shall be put into as an agenda. More should be done on awareness creation and the topic must be put on the table and continuous discussion shall be made. Researches and publications on prisoners' right to conjugal visit must be encouraged to assess the significance, the scope and the applicability of the right.

Legislative Measures

As untold, not widely researched and undiscovered topic, prisoners right to conjugal visitation must be addressed in pre legislative detailed researches and forum should be made to scrutinize the legal gap and the government should adopt laws that expressly address and solve the issue of conjugal visit and the law must be framed in a way which addresses those complicated problems that results by the denial of the right to conjugal visit.

Temporary Measures

Until the stake holders reaches to the consensus on the significant of conjugal visit, authorities shall take temporary measures to minimize the effects of deprivation of conjugal visit within the prison. These measure could be avoiding overcrowding of prison, putting strict disciplinary rules regarding sexual violence in the prison, providing well-organized and effective psychological counseling service, provide better recreation facilitates and education and other vocational training which make prisoners busy and occupy by their own business and other possible measures.

Regional and International Measures

Though there are plenty of international and regional human rights instruments, like treaties and protocols which devote specific aspects of rights or group of individuals, there has no any codified instruments which deal on prisoners rights in detail. So, the international and regional organization shall came up with conventions or any other binding documents which solve and give a detailed explanation of prisoners rights and it may framed in a way incorporating prisoners right to conjugal right.

International organizations like, the UN human rights committee shall also address by its general comment explaining prisoners right to contact with their family, the scope and the rationale that shall be considered in relation to family visit, particularly spousal visit.

Experience share

One of the vital elements to develop ones legal system and to adopt updated legislation, countries should exchange their own experience. So, having no legislation experience on prisoner's right to conjugal visitation, the government of Ethiopia shall consult and take experience from those countries which already incorporated prisoner's right to conjugal visit under their laws.

Advanced Medical Care to prevent STDs

As the research tries to investigate the existence of some sexual activities within the prison, care must be taken to prevent the transmission of sexually transmitted disease among the prisoners even if the adoption of the law on conjugal rights. Prisons should be equipped with better medical centers and practitioners. In addition to this, prisoners should have easy access to get condoms and get training and skills on how to protect themselves from STDs like HIV/AIDS

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