

Legal Protection of Children of Incarcerated Mother- A Modern Day Necessity

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Abstract



Himanshu
Research Scholar,
School of Law
Justice &
Governance,
Gautam Buddha
University, Greater
Noida, U.P., India

Children of imprisoned parents are often considered as forgotten children and ignored victims of justice (Joan P., 20015). In India, children younger than 6 years are often brought to remain with mother inside the prison custody (Robertson O., 2008). According to Greenfield and Snell, approximately 7 in 10 women under correctional sanction in India have a child who is under the age of 18. These vulnerable children face tremendous difficulties and special needs demand attention. Therefore, in the present study, the authors have attempted to explore the phenomenon of parental incarceration and its impact on children of incarcerated parents in the light of the legal provisions made for protection of such children; and to devise legal solutions towards meeting the needs of these children and their families. The authors have used a doctrinal method of research and utilized material from secondary resources. The article then orients itself at the legal provisions present in India for protection of such children. A constitutional perspective is also taken on the issue and urgency for a separate legislation for the protection of children of incarcerated parents in India is proposed. Certain provisions of the Juvenile Justice Act, 2015 are also proposed to be extended to such children. The ultimate goal is to reorient the approach of the legal justice system towards the families of incarcerated persons.

Keywords: Incarcerated , Punishment, crimes, Juvenile Justice, Prison, Offense.

Introduction

Children of imprisoned parents are often considered as forgotten children and ignored victims of justice.¹ When a loved one is sentenced to prison, the emotional turmoil is difficult for everyone to handle. Perhaps those who are unintentional victims of crime – ‘children of incarcerated parents’, feel the heaviest burden.² A jail can never provide a family environment, which every child very much deserves.³ Therefore, children whose parents have been imprisoned (incarcerated) face unique difficulties.⁴

In India, children younger than 6 years are often brought to remain with their mother inside the prison custody.⁵ According to Greenfield and Snell, approximately 7 in 10 women under correctional sanction in India have a child who is under the age of 18.⁶ When a woman is imprisoned, in the absence of better solutions for the care of their children, women also prefer that their children remain with them in custody.⁷ According to the National Crime Records Bureau’s Prison Statistics India Snapshots – 2012, 1,394 existing prisons housed 385,135 inmates in the country. There were a total of 344 women convicts with their 382 children and 1,226 women awaiting trial with their 1,397 children lodged in various prisons in the country.⁸ These vulnerable children face unique difficulties, and their growing numbers and special needs demand attention.⁹ The innocent children are living under the vulnerable circumstances of prison that might lead to future development of low self-esteem and problem behavior. Children are not only deprived of recreational facilities, and affection of father/ family members but also exposed to criminogenic influences of other prison inmates (as reflected in their abusive language and frequent fights) making them vulnerable to future development of problem behavior. There is no systematic way of documenting the number of children with a parent in prison, let alone of confirming the accuracy of these figures. It is not required that prisoners release this type of information, and as of yet, there has been no attempt of direct measurement. Also, imprisoning parents is more likely to compound, than to mitigate, pre-existing family problems.¹⁰

As the country’s most basic support for vulnerable children, the child welfare system must begin to address the needs of children with incarcerated parents in a thoughtful, systematic way with recognition of their legal rights. This is of immense relevance in the Indian scenario where the rights of the child have always been given priority.¹¹ Over the last decade, efforts have also escalated at the international level to create policies specifically geared towards addressing the situation of the young children of incarcerated parents.¹²



Rama Sharma
Assistant Professor
School of Law
Justice and
Governance, Gautam
Buddha University,
Greater Noida, U.P.,
India

The UN Convention on the Rights of the Child (CRC) quotes in its Preamble the Declaration of the Rights of the Child, which stated, “the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.” The Preamble further recognizes “that, in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration.” Therefore, to identify the unique challenges involved, study the legal rights available to the children and devise solutions to the existing issues in this regard, the researchers have decided to choose this topic.

Conceptualisation of The Issue

There is a wide body of literature reviewing the emotional and psychological trauma faced by children of incarcerated parents. It also studies the rights of the child that have come into existence over the time. Scholars have expounded the vast corpus of laws and regulations governing the same in countries around the world. However, no definitive solutions have been proposed to collaborate the distributed efforts of various legal systems of the world and child welfare services to reduce emotional stress on children and reunify families. According to a summary of the Asian Human Rights Commission the Court ordered that children up to the age of six can remain with their incarcerated mother and then should be placed with a surrogate, if the mother so wishes, or an institution maintained by the Social Welfare Department¹³; children living with their mother in a prison should not be treated as detainees or convicts; they “should be provided with food, clothing, separate utensils, adequate sleeping facilities, and other necessary facilities” necessary for the “healthy development of a child;” they are also “entitled to medical care and vaccinations;” and they must be “provided with adequate educational and recreational facilities.” Following the Supreme Court ruling, Indian prisons must also “provide crèches for children under three and nurseries for children aged three to six.” However, especially in India there exist a variety of legal discrepancies about contact with their parents, physical care and custody and the children’s Fundamental Rights.

One of the most comprehensive works in the existing scenario is *The Impact of Parental Imprisonment on Children*¹⁴ by Oliver Robertson. This report provides a clear understanding of the particular problems faced by women prisoners and children of imprisoned mothers and how these problems can be better addressed by governments and policy makers. According to Oliver Robertson¹⁵, children of imprisoned parents are often described as the forgotten victims of imprisonment. When a mother or father goes to prison, their children are affected, usually adversely.

Similarly, Steve Christian, in *Children of Incarcerated Parents*¹⁶ states that imprisonment disrupts positive, nurturing relationships between many parents—particularly mothers—and their children. In addition, many families with children suffer economic strain and instability when a parent is imprisoned.

An interesting view is also presented by Katherine Gabel and Denise Johnston in the book *Children of Incarcerated Parents*¹⁷. The book states that, —There are no precise statistics on how many children of incarcerated parents there are, for the simple reason that, with all the statistics we keep on prisoners, we haven’t found it important enough to ask them about their children.” The authors, per se, are not against the idea of having definitive law enforcement but also are of the opinion that it still stands insufficient. These views produce issues like the dearth of data existing because no specific agency or system is charged with collecting data. The literature talks about the inadequacies of legal provisions and the child welfare system but not of their collective efforts, keeping the best interest of the child, as the priority.

Objective of the Study

The objective of this research paper is twofold:

1. To explore the phenomenon of parental incarceration and its impact on children of incarcerated parents in the light of the legal provisions made for protection of such children in India as well as other countries of the world.
2. To devise legal solutions towards meeting the needs of these children and their families.

**Research
Methodology**

The researchers have primarily adopted a doctrinal method of research for this paper. The researchers have relied heavily on legal provisions for children of incarcerated parents as stated in the Constitution of India and other countries of the world to understand the legal standing of such children and their rights. The researchers have also relied on the reports of specialized agencies like the National Crime Records Bureau to procure statistics and establish the dearth of information available. Apart from these, the other sources are case laws, which the researchers have considered to understand the legal and social needs of children of incarcerated parents and devise solutions. The secondary sources also include books and articles by several

authors, Indian and foreign, whose works have contributed significantly in the development of child rights and their recognition. This helped the researchers have a wholesome understanding of views prevailing in regard to the topic chosen.

**Legal Provisions For
Children of
Incarcerated Parents
In India**

Today, the hottest issue in and out of law is the protection of children from all types of abuses and exploitation.¹⁸ As Justice Krishna Iyer said in *Sunil Batra (II) versus Delhi Administration*¹⁹, 1980 "Convicts are not by mere reason of the conviction denuded of all the fundamental rights which they otherwise possess. Imprisonment in itself is the punishment." Upto the early 20th century, the functions of the State were regarded to be only (i) defence of the country and (ii) maintenance of law and order inside the country. In other words, the State was regarded only as a "Night Watchman Institution". However, subsequently, the concept of the 'Welfare State' arose, according to which the State has not only to look after defense and law and order but also after the welfare of the people.²⁰

If the child is an asset, it is the duty of the State to look after the child with a view to ensuring full development of its personality. That is why all the statutes dealing with children provide that a child should not generally be kept in jail. Even apart from this statutory prescription, it is elementary that a jail is hardly a place where a child should be kept. In general, courts and child welfare systems implement laws that attempt to strike a balance between the rights of parents and the best interests of their children.²¹

In India, each jail is governed by the state's jail manual, and the Indian prison administration is collectively under the Ministry of Home Affairs. Children are permitted to accompany their imprisoned mothers (and in some cases, fathers) inside jails until they complete six years. According to the NCRB Crime Report²², a total of 344 convicted women with their 382 children and 1,226 undertrial women with their 1,397 children were lodged in various prisons across India at the end of 2012. In effect, therefore, nearly 1800 children are at the mercy of the prison system.

The Model Prison Manual, 2019²³ suggests that a creche and nursery be made available for all children imprisoned, in a separate enclosure. However, guideline sets have not been addressed to their full potential in many cases, and in some cases not at all.

In 2010, the Allahabad High Court in the case of *Bachchey Lal v. State of Uttar Pradesh & Ors.*²⁴ took a bold step by directing the Secretary (Health) to ensure that fortnightly or weekly visits and visits whenever necessary are made by the female doctors employed in the State Health Services Schemes for addressing the medical and diet needs of female prisoners and their wards, (i.e. the minor children who are confined along with female prisoners) according to the aspect being emphasized by the Apex Court in *R.D. Upadhyay v. State of A.P.*²⁵ and others. The court also ordered the ADG (Prisons) and other jail authorities and the District Judges and DLSAs to send complete copies of the information regarding the convicted prisoners or under trial prisoners and their children, after getting the same cross checked and gaps filled in from the Courts concerned.

**Supreme Court of
India Guidelines**

More recently, in response to a public interest litigation –*R.D.Upadhyay Vs State of A.P.*,2006²⁶, the Supreme Court has emphasized the upholding of fundamental rights and formulated guidelines regarding pregnancy, child-birth, antenatal and post-natal care, and childcare in prisons. The Apex court has clearly stated the following, specifically with regard to childcare:

Female prisoners shall be allowed to keep their children with them in jail until they attain the age of six years. After six years, the child shall be handed over to a suitable surrogate as per the wishes of the female prisoner. Expenses of food, clothing, medical care and shelter shall be borne by the respective state.

There shall be a creche and a nursery attached to the prison for women where the children of women prisoners will be looked after. Children below three years of age shall be allowed in the creche and those between three and six years shall be looked

after in the nursery. The prison authorities shall preferably run the said creche and nursery outside the prison premises. A dietary scale prepared by the National Institute of Nutrition, Council of Medical Research, Hyderabad, provides guidelines for a balanced diet for infants and children up to the age of six.

In this case, the state legal services authorities were directed to periodically inspect and see that the directions regarding mothers and children in jail were being followed. The court also directed that the central government, state governments and union territories file affidavits with respect to the judgment's implementation, within four

Courts, however, do not have an independent machinery to crosscheck implementation. Only the time will tell whether this judgment has had any true impact on the condition of the children of women prisoners who are in jail with their mothers.²⁷ Jail manual and/or other relevant rules, regulations, instructions etc. were to be amended within three months of these directives in order to comply with the above directions.

National Expert Committee on Women Prisoners

In 1986, the Government of India constituted the National Expert Committee on Women Prisoners headed by Justice Krishna Iyer to examine the situation of women in jails. The committee submitted a report examining all possible issues regarding care and support for imprisoned women and children, including the treatment and care of pregnant or lactating mothers.²⁸

State Laws

According to the Constitution of India²⁹, prisons are under the jurisdiction of states. Various jurisdictions in India strive to provide financial support for the children of incarcerated parents. Prisons in Karnataka state, India, have set up crèches and nursery schools attended by children imprisoned with their parents, children of prison officials and children living close to the prison. These joint facilities prevent duplication of provision (one crèche for prisoners' children, another for everyone else) or the creation of crèches with very small numbers of users (there were just 29 children living with their mothers in Karnataka's prisons in 2006). The scheme helps to mitigate the problem of children living in prison becoming socially isolated by allowing them to mix with children from the surrounding area. However, crèche supervisors (who include imprisoned mothers) will need to ensure that children from one group (e.g. prisoners' children) are not stigmatized by those from another.³⁰ West Bengal has a law providing —that if a detained person has dependent children studying in school or college, the state government will help to pay for the child to continue attending school.³¹ In addition, —some schools in India have lowered their tuition fees for children who are staying in prisons. In the case of Sheela Barse v. Union of India³², it was held that the State Government must set up necessary remand homes and observation homes where children accused of an offense can be lodged pending investigation and trial. In the case of Gaurav Jain v. Union of India³³, it was held that the special police authorities should be established to coordinate with the social welfare.

Human Rights of Children

Children are considered as the nation's supremely important asset and its living malleable potential. The future of any nation is largely dependent on how its children grow and develop. The issues relating to the rights of the child have been constantly engaging the world. Children need special protection because of their tender age and physique, mental immaturity and incapacity to look after themselves. There is a growing realization in every part of the world that children must be brought up in an atmosphere of love and attain full emotional, intellectual and spiritual stability and maturity and acquire self confidence and self respect and a balanced view of life with full appreciation and realization of the role which they leave to play in the nation-building process, without which the nation cannot develop and attain real prosperity because a large segment of the society would then be left out of the developmental process.³⁴ In India, this conscience is reflected in the provisions enacted in the Constitution.³⁵ The social human rights of children include the right to the highest attainable standard of health and access to medical services, the right to special care for handicapped children.³⁶ The economic human rights of the child include the right to benefit from social security, the right to a standard of living adequate to ensure proper development and protection from exploitation. The cultural human rights of children include the right to education, access to appropriate information, recreation and leisure, and participation in artistic and cultural activities.

The Juvenile Justice (Care and Protection of Children) Act, 2015

The Juvenile Justice (Care and Protection of Children) Act, 2015, though does not deal with children of incarcerated parents, does lay down the law for protection of children. It is the relating to children alleged and found to be in conflict with law and children in need of care and protection by catering to their basic needs through proper care, protection, development, treatment, social reintegration, by adopting a child-friendly approach in the adjudication and disposal of matters in the best interest of children and for their rehabilitation. All of these principles are paramount in protection of the best interests of the child. In Chapter III, the act establishes a Juvenile Justice Board, the functions and responsibilities of which (as contained in 8.(3)) revolve around protecting the child and enforcing his/her rights in accordance with law. Chapter V of the act directs the State Government, by notification in the Official Gazette, to constitute for every district, one or more Child Welfare Committees for exercising the powers and to discharge the duties conferred on such Committees in relation to children in need of care and protection under this act. Most importantly, Chapter VI of the act, deals with Procedure in Relation to Children in Need of Care and Protection. It provides that, 1) Any child in need of care and protection may be produced before the(Committee by any of the following persons, namely:

- (i) any police officer or special juvenile police unit or a designated Child Welfare Police Officer or any officer of District Child Protection Unit or inspector appointed under any labor law for the time being in force;
- (ii) any public servant;(iii) Childline Services or any voluntary or non-governmental organization or any agency as may be recognized by the State Government;(iv) Child Welfare Officer or probation officer;(v) any social worker or a public spirited citizen;(vi) by the child himself; or(vii) any nurse, doctor or management of a nursing home, hospital or maternity home:

(2) The State Government may make rules consistent with this Act, to provide for the manner of submitting the report to the Committee and the manner of sending and entrusting the child to children's home or fit facility or fit person, as the case may be, during the period of the inquiry.

Chapter VII of the act deals with Rehabilitation and Social Integration and lays down the primary responsibility of the State governments to rehabilitate children and restore to them, an ordinary well being. The provisions include:

(1) The process of rehabilitation and social integration of children under this Act shall be undertaken, based on the individual care plan of the child, preferably through family based care such as by restoration to family or guardian with or without supervision or sponsorship, or adoption or foster care:

Provided that all efforts shall be made to keep siblings placed in institutional or non-institutional care, together, unless it is in their best interest not to be kept together. Though the act deals with juveniles, it does law down the law tantamount in protecting child interests in general.

A Conclusive Comparative Analysis of Provisions for Children of Incarcerated Parents

In India, unlike other countries of the world, children are permitted to accompany their imprisoned mothers (and in some cases, fathers) inside jails until they complete six years. The Model Prison Manual, 2003 suggests that a creche and nursery be made available for all children imprisoned, in a separate enclosure. The Supreme Court has elaborately given set guidelines in regard to children of incarcerated parents. However, the guideline sets have not been addressed to their full potential in many cases, and in some cases not at all. While several countries of the world have separate legislations on the subject, India lacks a separate legislation aimed at protecting the rights of children of incarcerated parents. In India, the Fundamental Rights and Directive Principles of State Policy, forming a part of the Indian Constitution (—the Supreme Law) are applicable to all citizens and protect such children as well. The most essential is the Right to Life (Article 21) which entitles children to a right to life of dignity, right to life free from exploitation, right to leisure, right to education, right to health care among other basic rights. The Supreme Court guidelines on this subject have proven to be one step away from legislation in providing a holistic framework for protection of incarcerated children. Also, in India, prisons are under the jurisdiction of states and different states have also made their own laws on this subject. However, the need of the hour remains to be a comprehensive legal reform that should strike at protecting and enforcing the rights of children of incarcerated parents in a meticulous and coherent manner.

A study of the Juvenile Justice (Care and Protection of Children) Act, 2015 also indicates that there are certain provisions in the said act which are tantamount in protecting the vested interests of children. These principles, if extended to children of incarcerated parents, could go a good mile in enforcing their rights and laying down a framework for their protection.

Recommendations

The need of the hour is a strong legislation by the Parliament specifically considering children of imprisoned parents. Certain provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015 should also be extended to children of incarcerated parents. A separate agency should be established to collect and analyze data regarding the children of incarcerated parents and keep a track on them till they attain the age of majority.

The child should have the right to be kept safe and informed at the time of the parent's arrest. Thus, there must be developed arrest protocols that support and protect children and offer children and/or their caregivers basic information about the post-arrest process.

The child should have the right not to be judged, blamed or labeled because his/her parent is incarcerated. Guidance should be produced about appropriate media reporting of arrests, so as not to stigmatize the children directly or indirectly. The child should have the right to be heard when decisions are made about him/her. Thus, it is necessary to train staff at institutions whose constituency includes children of incarcerated parents to recognize and address these children's needs and concerns. The child should have the right to be considered when decisions are made about his/her parents. This will turn arrest into an opportunity for family preservation. Support groups could be tremendously helpful in bringing together caregivers and/or children in a safe environment where they can be honest and open. These groups would additionally provide parents with an opportunity to network (for instance, to help each other locate agencies that may help with material and counseling needs). Such a group only requires a person or agency to initiate it, some advertising, and a space to meet and does not consume much in the way of resources and expense, especially if it is caregiver- led. Programmes allowing imprisoned parents to produce an audio recording of a book for their children to listen to should be implemented for strengthening the parent-child relationship, raising the self-esteem of prisoners and improving literacy among both children and prisoners.

The child should have the right to a lifelong relationship with his/her parents. Hawaii law could be implemented in India for re-establishing the parent-child relationship upon release of parents from prison. In Hawaii, the Department of Public Safety has been directed to —institute policies that support family cohesion and family participation in offenders' transition to the community. A Transformational Justice Interagency Task Force should be constituted to, among other things, develop and establish a parenting skills program for inmates who are within one year of release.

The eligibility criteria for certain forms of state support should be drawn after considering the impact that such criteria has on the families of prisoners who are often economically marginalized before imprisonment.

Lastly, it must be remembered that an avenue to address social stigma is expanded community education. The more aware the community is the more likely families with an incarcerated parent will be supported. For example, articles, stories, or workshops on the needs of these families could both inform and bring together key players including schools, churches, and local service providers. Education may also spark movement toward legislative advocacy to change policies, specifically those that concern prison visitation, in order to improve the experiences of these families.

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