

LEGAL PROVISIONS FOR CHILDREN RESIDING WITH THEIR INCARCERATED MOTHERS IN INDIA

¹Arjun Raghuvanshi, ²Dr. Parantap Kumar Das, ³Arun Kumar Singh
¹LL.M. Student, ²Head of Department, ³Assistant Professor
¹School of law and Legal Affairs, Noida International University,
 Gautam Budh Nagar, Uttar Pradesh

Abstract: The children are the future of the nation, hence it is our responsibility to more attentive towards their requirements and also give them access to a wide range of opportunities for their all round development. It is the right of every child to live a dignified life. The family of child with the encouraging and happy atmosphere plays very important role for his/her physical, psychological and social wellbeing. The children residing with their incarcerated mothers in jails are out of sight to the outside world. They are living a life similar to orphans having no childhood and parental affection. The vulnerable atmosphere of prison leads these children into person of low self esteem and problematic behavior. These guiltless children have incarcerated childhood.

Index Terms –Children residing in prison, Incarcerated mothers.

I. INTRODUCTION

Child survival needs the basic right of being born in a secure and equitable atmosphere. Children need extraordinary safety as they are easily vulnerable to abuse and abandon. In most of the countries of the world, children have occupied an extraordinary position in requirement of security due to their growing stage of development.

Over a decade many efforts have intensified at the global level to formulate the various schemes for dealing the condition of children of incarcerated parents. These legal policies are dissimilar in different countries due to their dissimilar socio-culture and economic conditions. Some countries are in favour of children resided with their parents in jails, whilst some countries are in against this legal provision. Prisons are considered as the place of reformation and rehabilitation but the meager conditions of jails all over the world depicts that imprisoned exaggerate the pitiable conditions of the prisoners. Unfortunately in India, these rights and opportunities for all round development are not availed by the child whose mother is in prison. There are two categories of such children:

- 1.Children (under six years) who go along with their mothers in jail or those who are born in prison.
- 2.Children (under six years) taken into prison with their mothers but who have been sent outside the prison once they reached the age of six years, while the mother remains imprisoned.

II. OBJECTIVE

To study the legal provisions for the children residing with their incarcerated mothers in India.

III. METHODOLOGY OF STUDY

Researcher has adopted a doctrinal approach of research, mainly relied on the legal provisions for such children as mentioned clearly in the Constitution of India as well. Also considered the reports made by agencies such as National Crime Records Bureau to extract the statistics and information. Later on, books and articles by various authors that has contributed very well in the development of child rights were the secondary sources.

IV. LEGAL PROVISIONS FOR CHILDREN OF INCARCERATED MOTHERS IN INDIA

In Sunil Batra (II) v. Delhi Administration, Justice Krishna Iyer said that there should not be infringement of fundamental rights of convicts only because of conviction. Incarceration in itself is the punishment. The courts and child welfare systems execute laws that try to make an equilibrium between the rights of parents and the best interests of their children.

According to the National Crime Records Bureau (NCRB) prison statistics- 2016, in India there were 20 women prisons with total capacity of 5,197. About 83.1% of all women prisoners were imprisoned in other types of prisons other than women prison because of inadequate capacity of women jails. In India the total prisoners in jails were 433,003 in which males were 414,505 whilst females were 18,498. The 400 women prisoners were convicts resided with 459 children whereas 1,192 were undertrials living with 1,409 children.

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.

The findings of the study of the National Institute of Criminology and Forensic Sciences on children of women prisoners in Indian jails brought to the notice of all Governments in February 2002,

The Model Prison Manual, 2003 recommended that facility of crèche and nursery should be accessible for all children residing in prison with their incarcerated mothers.

In the case of **Bachehy Lal v. State of Uttar Pradesh & Ors.** Allahabad High Court guided the Health Secretary to ensure that fortnightly or weekly visits and visits whenever required 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 children residing with them. The court also ordered to update the information regarding the convicted prisoners or undertrial prisoners and their children.

In the case **R. D. Upadhyay v. State of A.P., 2006**, the Supreme Court has issued guidelines for the development of children who are incarcerated with their mothers. The Constitution of India has specific provisions for the best interest of the children both in Part III and IV moreover other provisions in these parts which are also important.

The Supreme Court has clearly stated the following, specifically with regard to childcare:

- Women prisoners shall be permitted to keep their children with them in jail until they attain the age of 6 years. After 6 years, the child shall be handed over to a suitable substitute as per the desires of the female prisoner.
- The respective States shall bear the expenses of food, clothing, medical care and shelter. 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.
- There shall be a crèche and a nursery attached to the prison for women where the children of women prisoners will be looked after. Children below 3 years of age shall be allowed in the crèche and those between 3 – 6 years shall be looked after in the nursery. The prison authorities shall preferably run these crèche and nursery outside the prison premises.
- 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 months. Courts, however, do not have an independent machinery to crosscheck implementation.
- 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.
- However, the elaborated guidelines given by the Supreme Court have not been addressed to their full potential in many cases, and in some cases not at all.

Fundamental Rights

The Indian Constitution guarantees to the people certain basic human rights and freedoms and these rights in substance, constitute inhibitions on the legislative and executive organs of the State. These rights protect the individual and grant him the freedom to live the life which he has been granted by God. These rights are available to all and also strive to protect children of incarcerated parents.

Article 21 comprises of right to livelihood, better standard of living, hygienic conditions in the workplace and leisure. In **F.C. Mullin v. Administrator, Union Territory of Delhi**, the Supreme Court held that freedom of life and liberty guaranteed by Article 21 is not only violated when physical punishment scars the body, but also when it scars the mind of the child and robs his dignity. Any act, which traumatises, terrorizes a child, or adversely affects his faculties falls out of Article 21.

In **Parents Forum for Meaningful Education v. Union of India**, it was held that the right to life guaranteed in a civilized society implies the right to food, water, decent environment, education, medical care and shelter.

Article 21A added by 86th Constitutional Amendment provides for free and compulsory education to all children of the age of 6 to 14 years.

Article 23 prohibits trafficking in human beings and forced labour.

Article 24 prohibits employment of children below the age of 14 years in any factory or mine or engagement in other hazardous employment.

Article 14 guarantees that every child shall have equal opportunities to grow and prosper.

Article 15 prohibits discrimination on grounds of religion, race, caste, sex or place of birth. The children (born in prisons) of incarcerated mothers should not be discriminated because of their birth place.

Article 15(3) provides that this shall not prevent the State from making any special provision for women and children. So, special provisions are to be made by the state for the upliftment of the children of incarcerated parents.

Article 19 provides right to freedom in case of **A.K. Gopalan v. State of Madras**¹⁴³, a question has arisen if deprivation of liberty by detention or incarcerated is merely a denial of the right to personal liberty under Article 21 or also the right to movement under Article 19(1)(d). After a good deal of controversy it has been settled in case of **Maneka Gandhi v. Union of India, (1978) 1 SCC 248**,

Directive Principles of State Policy

Article 38 states that State secure a social order for the promotion of welfare of the people.

Article 39 provides that certain principles of policy to be followed by the state.

Article 39(e) directs the State to ensure that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength. Under this such children should not be harassed.

Article 39(f) provides that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

Article 42 provides that the State shall make provision for securing just and humane conditions of work and maternity relief.

Article 45 stipulates that the State shall endeavor to provide early childhood care and education for all children until they complete the age of 6 years.

Article 46 provides that the State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

Article 47 provides that the State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.

The Juvenile Justice Act, 1986 was substituted by the Juvenile Act, 2000 to act in accordance with the provisions of the Convention on the rights of the child which has been endorsed by India in 1992. However this act deals with juveniles but it also defending child interests in general.

State Laws

According to the Constitution of India, prisons are under the jurisdiction of States. In Maharashtra, children are allowed to live with their mothers up to the age of 4 years. In the Andaman & Nicobar Islands and Jharkhand children are allowed to live with their mothers up to the age of 5 years. In Assam, Chhattisgarh, Karnataka, Mizoram, Tamil Nadu and Uttar Pradesh children are allowed to live with their mothers up to the age of 6 years. In Bihar, children are allowed to live with their mothers up to the age of 2 years and up to 5 years in special cases where there is no other caretaker for child. In Himachal Pradesh, Madhya Pradesh and Orissa children are allowed to live with their mothers up to the age of 4 years or in special cases up to 6 years by the approval of the Superintendent.

In the case of **Sheela Barse v. Union of India**, it was held that the State Government must setup necessary remand homes and observation homes where children accused of an offence can be lodged pending investigation and trial. In the case of **Gaurav Jain v. Union of India**, it was held that the special police authorities should be constituted to synchronize with the social welfare officers of the State Government and public spirited persons, NGOs locally available and look that the juvenile homes are to efficient and effective management and are properly protected and psychologically treated, education imparted and rehabilitation succeeded. They should also be provided with proper accommodation, maintenance facilities for education and other rehabilitation facilities.

United Nations Provisions for the Rights of the Child

Declaration of the Rights of the Child

There has been great concern for the welfare of the child at the international level concluding in the Declaration of the Rights of the Child adopted by the General Assembly of the United Nations. The Declaration in its Preamble indicates that 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 that mankind owes to the child. The UN Convention includes 41 articles, each of which explain particular type of right. These rights are classified on the basis of themes as follows:

- **Survival Rights** - consist of the children's right to life and the requirements that are most fundamental to survival, such as food, haven, a sufficient living standard, and reach to health care services.
- **Development Rights** - consist of the right to education, play, free time, cultural activities, right to use information, and liberty of thought, ethics and religion.
- **Protection Rights** - make sure children are protected against all forms of abuse, abandon and misuse, including special care for refugee children; protection for children in the criminal justice system; safeguards for children in employment; security and rehabilitation for children who have suffered mistreatment or abuse of any kind.
- **Participation Rights** - include children's liberty to convey thoughts, to have a speak in affairs impacting their own lives, to link associations and to gather peacefully. When their capabilities develop, children should have escalating chances to take part in the social activities, in preparation for adulthood.

United Nations Convention on Child rights

India being ratified to UNCRC which is the UN Convention on the Rights of the Child is bound to abide by its recommendations and the provisions adopted by it which says under:

Article 2 that all the rights ensured by the UNCRC must be obtainable to all children without discrimination due to status and condition of their parents.

Article 3 that the best interests of the child should be a primary consideration in all activities concerning children.

Article 6 that every child has the right to life, survival and development.

Article 9 that children separated from their parents have right to be in direct and regular contact with their parents.

Article 12 that the child's opinion must be contemplated and taken into account in all affairs impacting him/her.

Article 19 that State has the responsibility to secure children from abandon and abuse.

Article 24 that child must have the easy access to the best possible health care and medical services. The State should give specific importance to primary and preventive health care and public health education.

Article 28 that every child has the right to education and it is the responsibility of the State to provide free and compulsory education to all; take steps to evolve different types of secondary education and approachable to all children.

Article 31 that every child must have free time to rest, play and to involve in cultural and creative activities.

Article 36 that the children must be safeguarded from all other types of ill treatment and misuse which is injurious to their well being.

The **Model Prison Manual, 2016** highlights on computerization of prisons, special provisions for female prisoners, focus on after-care services, prison inspections, rights of prisoners sentenced to death, improved focus on prison correctional staff. Ministry of Home Affairs suggested the State Governments/Union Territory Administrations that for establishing basic homogeneity in rules and regulations of prison, all States and UTs should amend their existing Prison Manuals by embracing the provisions of the National Model Prison Manual, 2016.

V. CONCLUSION

Even though the various committees have given suggestions, the problems of insufficiency of jail staff, overcrowding and deficiency of appropriate care and medical facilities in Indian prisons remain as such. Various countries of the world have separate legislation designed for protecting the rights of children of incarcerated parents whilst in India there is a lack of such separate legislation. It is the need of the hour to consider alternatives to imprisonment to reform and rehabilitate the offenders. It has been suggested in the Report of the Law Commission of India, Malimath Committee Report, 2003. In the world there are many open-prison institutions for transforming prison inmates responsible and better persons. Aadhar cards should be made for women prisoners and their children residing with them in prison for obtaining benefits of various government welfare policies.

REFERENCES

- [1] Basu P. *Laws Relating to Protection of Human Rights Under the Indian Constitution and Allied Laws*, Modern Law Publications, Second Edition; 2012
- [2] D. Srivastava & P. K. Singh, *Legal Protection of Children of Incarcerated Parents: A Modern Day Necessity*, 3(3), International Journal of Law and Legal Jurisprudence Studies, 2016, 50-86.
http://ijlljs.in/wpcontent/uploads/2016/07/children_of_incarcerated_parents.pdf,
- [3] E. Reichert, *Social Work and Human Rights*. Jaipur: Rawat. 2004.
- [4] http://www.academia.edu/7851966/Exploring_Alternatives_To_Imprisonment_Is_The_Need_Of_The_Hour_In_India
- [5] <http://ncrb.gov.in/StatPublications/PSI/Prison2016/Executive%20Summary-2016.pdf>
- [6] <https://mha.gov.in/MHA1/PrisonReforms/guidelines.html>
- [7] <http://bprd.nic.in/WriteReadData/userfiles/file/5230647148-Model%20Prison%20Manual.pdf>
- [8] *INDIA: Innocent Children Forced to Live in Prison with Convict*, Asian Human Rights Commission (Jan. 8, 2014), available at <http://www.humanrights.asia/news/ahrc-news/AHRC-STM-006-2014> (citing R. D. Upadhyay v. State of Andhra Pradesh, A.I.R. 2006 S.C. 1946).
- [9] Jain M.P. *Indian Constitutional Law*, LexisNexis Butterworths Wadhwa, Volume 1. 6th Edition, 2010.
- [10] Pohelman J. et al. *Children's Contact with Their Incarcerated Parents*, Am Psychol; 2010
- [11] R. S. Kouli, *Issues Concerning Children*, Yojana, A Development Monthly, New Delhi: Ministry of Information and Broadcasting. Nov. 2012.
- [12] Singh M.P. *V.N. Shukla's Constitution of India*, Eastern Book Company. 12th Edition; 2013
- [13] Yadav N. & Kumari A. *Lightening the Load of 'Parental Conviction' on Children*, Army Institute of Law. 2014
- Cases**
- [14] A.K. Gopalan v. State of Madras AIR 1950 SC 27
- [15] Bachchey Lal v. State of Uttar Pradesh & Ors. CRIMINAL WRIT-PUBLIC INTEREST LITIGATION No. - 2357 of 1997
- [16] Francis C. Mullin v. Administrator, Union Territory of Delhi, AIR 1996 SC 1051
- [17] Gaurav Jain v. Union of India 166,166 AIR 1997 SC 3021
- [18] Maneka Gandhi v. Union of India, (1978) 1 SCC 248
- [19] Parents Forum for Meaningful Education v. Union of India, AIR 2001 Del 212
- [20] R. D. Upadhyay v. State of AP, AIR 2006 SC 1946 Writ Petition (civil) 559 of 1994
- [21] Sheela Barse v. Union of India AIR 1986 SC 1773
- [22] Sunil Batra (II) v. Delhi Administration 1980 AIR 1579