

Children of arrested parents- Developing Parental Arrest Policies

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ABSTRACT: *There are 1649 women in prison with 1942 children; the Model Jail Manual, 2016 provides for a child under the age of six to live with her mother in the jail if there is no other relative to accept the child's responsibility. The Indian jails are no paradise for innocent children to grow as rightly stated in the RD Upadhyaya case (2006). The research conducted by the National Institute of Criminology and Forensic Sciences supported the fact that Indian jails are miserable for the children to live. With increasing crime rate and involvement of women in them, India is in need to develop a thorough Parental Arrest policy and safeguard the children of these arrested parents. The paper tries to analyse the prevalent system for these hidden victims in India and also puts some light on parental rights of the incarcerated parents. Whether these parents are given any right of choice with regard to their child's upbringing and if there is a duty upon every parent to rightly bring up their children then are these incarcerated parents given the right in the first place to bring up their child as per their choice? The children welfare policies of India need to look beyond the conventional policy making that mostly do not include children of incarcerated parents. The paper discusses an approach to solve this problem that may become serious in the coming decade.*

KEYWORDS: *Incarcerated parents, Parental arrest policy, women prisoners, Parental rights, women offenders.*

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I. THE CRISIS- AN INTRODUCTION

The crime rate has been growing over the past few years and many of the prisoners and under trial people are women and out of those some are with minor children. Growing up in an Indian prison is not an easy task, these prisons hardly have any facility for the growing children even though the rules provide for it. Moreover, the psychological impact of living in jail is huge as the children might not have much exposure to the world and may be accompanied by some violent inmates. These hidden victims stay unacknowledged and unaided. As a matter of rule, a child is allowed to stay with her mother till the age of six and then after the child is either sent to a relative's place or any child care institutions. However, the education of these children gets affected as the jail authorities hardly provide for standard education and these children become a victim of sheer ignorance. The incarceration of the parents may prove to be detrimental to the parent-child relationship and a child's adjustment to society. Even if the child is allowed to stay with the mother in the prison, do we have a prison that could adapt to the needs of a child? Or is it mentally healthy for the child to live in a prison? The apex court has recognised this fact that jail is certainly not a place for an innocent child to grow¹. Moreover, if one looks at the biases of the law, the jail manuals do not provide for a child to live with his father if the child has no other family member, it all depends on the jail authority whether they allow them or not. These children become victims without a fault. Out of the total incarcerated person in India, 31.3% are convicts, 67.7% are under trial, 0.7% Detenues and 0.3% are others, as per 2016 data.² And out of this, there are 5,923 female convicts and 11,834 under trials.³ And most importantly there are 1649 women with 1942 children in prison.⁴ The number might have increased and facilities for these many children is quite questionable. The National Institute of Criminology and Forensic Sciences conducted a research study of children of women prisoners in Indian jails. This report was also cited in the case of R.D. Upadhyaya case by the honourable apex court, it pointed out the living conditions of children in the jails of India which turned out to be miserable. There was no basic facility for them, the diet of women bearing a child was the same as other inmates. The young children were left to their mother without any assistance from any other staff. Lack of proper upbringing and affection, diet, shelter and crowded environment were other drawbacks pointed out. The guidelines pointed out, in this case of 2006, have played a major role in changing the jail system of India but the question still remains that is it enough in the present time, the initial years are vital to the development of a child keeping that in mind isn't a complete revamp in the system required?

II. LAWS- OR ARE THERE ANY?

1. The Constitution

The Constitution of India plays a major role in protecting the children, it has enumerated all the general needs of a child, from education to well being. But the problem lies in the peculiarity of every child. And also the fact that the constitution provides for all these protection under the Directive Principles⁵ and makes it unenforceable.⁶ Article 39(f) directs the State to provide for “opportunity and facility” to “develop in a healthy manner”; Article 41 directs to make provision for education, which is already done and judiciary must be credited for it,⁷ As per Article 45, the state shall “endeavour” to provide early education to the children below 6 years of age. Article 47 says it is the duty of the state to raise the level of nutrition of its people. It is undeniable that the government has been making plans, policies and law for the children of the nation, but there are two aspects of a policy making, first, the aspects that it covers and second the implementation of it. There are more than ten laws⁸ in this nation that deals with the welfare of a child in some way or the other but there are barely any laws that specifically considers the children of incarcerated parents. Although these children ultimately will be governed under the same laws as the children outside the jail, it must be taken into consideration that these children are not facing the same problem as the other children. As per the Jail Manual, 2016,⁹ a child is allowed to live with the mother in jail till the age of six if the child has no other relatives to take care which means an unnecessary confinement of an innocent child in its early years of development. The researcher acknowledges the impracticality of making laws for every disadvantaged sect but this disadvantage of confinement is created by the authorities themselves. The child ultimately becomes the least aware when they step outside and also there is least chances for them to get a family as imprisonment leaves a negative impact on family relations. It's similar to compromising with the future of these children.

2. Model Prison Manual, 2016

The Model Prison Manual, 2016¹⁰ provides for some appreciable facilities and rules for the women with children in prison although not flawless. But the management of jail comes under the state list¹¹, making the Model Jail Manual just a guiding or optional document. This in practicality adds to the misery of these children as well as the prisoners. The Apex court in 2017, while addressing the miserable conditions of prisoners in the country emphasised the need to implement the Model Prison Manual, 2016.¹² A report¹³ by the Ministry of Women and Child Development also suggests a proper and full acceptance of the Manual by the states. As far as the guidelines for children in prison goes, the MWCD report and Prison Manual, 2016 are on the same line and suggest similar things. The researcher must emphasise that none of it suggests a minimum diet or level of nutrition for the children in prison, this is especially important because the children in prison are in their formative years and need a diet and environment that helps in their overall development. Moreover, this Manual is silent over incarcerated men being the sole parent of a child under 6 years of age, it does not provide for a child to live with the father in prison in case there is no other guardian of a child. It is up to the discretion of the jail authorities whether they allow the child to live with father or not. Their decision is also affected by the fact that male cells can be dangerous for the children as gravity of violence in such cells can stretch to any extent. It must also be brought to notice that the new Prison manual has not been incorporated in most of the state manuals, some of them are ages old like Andhra Pradesh and Assam.

3. MWCD report - “Women in Prison”

The welfare of women in prison is not unrelated to the welfare of the children in prison with them. The Model Prison Manual, 2016 recognises the principle of appointing one guarding staff for every six prisoners and also says to appoint one women DIG to look after women prisoners. The report points out that there is a scarcity of women employees in the prison at supervisory level. As per data¹⁴ of 2015, out of all the jail employees, women constitute only 8.28%. This ultimately makes the male employees responsible for the women. The report also talks about the overcrowded jails of India. National average occupancy was reported at 114.4% in 2015, with some states showing even higher rates. A child that lives in such jail will surely lack facilities and needed attention as overcrowding directly relates to lack of facility and space. The report points out the infrastructural incapacities of Indian jails that have created a lot of problems for the women prisoners and it ultimately extends to their children. The report emphasises that despite setting minimum nutritional levels by states the realities of the prisons are very different. It also makes reference to BPR&D report of 2009¹⁵ which reveals that creche and other proper facilities for the growth of children are not present in every prison. The NHRC jail visits have shown that apart from milk other special diets for these children are barely provided.

4. UN Convention on Child Rights, 1989

The United Nations signed this convention in 1989, it was the most widely ratified convention. It was the first step that drew worldwide attention to the needs of the children. The time when this convention came into existence, children were treated like mere objects controlled by their parents, with barely any specific law

addressing problems of the children. This treaty came as a break through international law that addressed the problems of children. . According to the United Nations Convention on the Rights of the Child (hereinafter, CRC), “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”¹⁶ But on a close analysis of the treaty, it is seen that there is barely some discussion upon the children of incarcerated parents. The article that explicitly talks about it, only mentions that the child or any appropriate members of the family should have information regarding the “whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child”.¹⁷ And this, to no extent works towards solving the real problems of such children. It only says that the child should be aware about where his/her parents are, if they are incarcerated. This treaty failed to recognise the problems that have been or could have been faced by these children, was it too far fetched or beyond the age thought that children could be imprisoned with the mother? The concept of “prison nurseries” (where mothers live with their new born baby) is very old, it has existed since the beginning of the 20th century, the question here would be why didn’t the treaty acknowledge the fact that these children need special recognition as they are amongst the “helpless collateral convicts” and it should be the duty of every state to work effectively for the welfare of these children. Although widely ratified, this treaty does not even recognise a large section of children worldwide.

5. UN Rules for the Treatment of Female Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules), 2010

It was in 2010 that the international community for the very first time acknowledged the problems of children in prison with their parents. This rule touches upon some of the basic necessities of a growing child (in prison), in the most elaborate manner possible for an international text. The UN Bangkok Rules were initiated by the Government of Thailand. HRH Princess Bajrakitiyabha of Thailand played a pivotal role in the development of the Rules. Rule 9 talks about checkup and health care of children that are accompanied by women prisoners. Rule 33(3) provides for the training of the staff regarding child development and their healthcare needs. Rule 39 talks about pregnant juveniles and their medical needs acknowledging the fact that there can be greater risk in such cases it provides for special monitoring by health experts. Supplementing Rule 23 of Standard Minimum Rules for the Treatment of Prisoners (1977), is Rule 48-52 of Bangkok Rules, which provides elaborated provisions for the care of children of incarcerated women. It takes into account every vital thing of a child’s development, it begins with unobstructed breastfeeding to monitoring of health by specialists, in collaboration with community health service. The Rules also provide for removal of a child from the mother based on “individual assessment”, but limits it within the scope of national laws.¹⁸ The Bangkok Rules also lays down an important rule wherein, “Non-custodial sentences for pregnant women and women with dependent children shall be preferred where possible and appropriate...”¹⁹, only serious and violent crimes should be considered for custodial sentences for such women. This text seems to be amongst the most elaborated text, in the modern days, on female prisoners and their basic necessity. If properly implemented it could prove to be extremely useful as far as the welfare of children of incarcerated parents is concerned.

III. PARENTAL RIGHTS OF INCARCERATED PARENTS

As an incarcerated parent it becomes extremely difficult to fulfill parental obligations in the best possible manner because of obvious reasons of restraint. In fact, once the child is in prison with the parent, the parent hardly exercises any right of choice over the child’s upbringing. More or less, every essential thing of a child’s upbringing is decided by the Prison Manuals of respective states where they grow up. It begins from education to exposure to the outer world, it all depends on the jail authorities. And India isn’t very famous for good jail administration, violence and inadequate infrastructure facilities tops the list. According to one of the Amnesty reports²⁰ of Belgaum Central Prison in Karnataka, where it covered the life of a child living in prison with her mother, it was revealed that the child had barely any contact with his family and outer world, he came to know what a dog is only when he went out with his mother for her trial and this was just one case that came to light, such incidences affects the growth of the child’s personality.

Parental rights of incarcerated parents become complicated majorly because of the fact that they are in jail. To have a duty, therefore, is also to have at least a prima facie right to fulfill that duty.²¹ Here the right to follow one’s own conscience also comes in which is barely possible in a jail. This right to follow one’s own conscience may include the right to choose how one’s child shall grow up, that is, the kind of education to be imparted whether religious and practical or only practical, diet of the child, educating the child about specific things, like sex education, in specific manner, moral education, and this might include many things varying person to person. The parents’ scope of obligation is quite extensive, it begins from the gestation period of the child to the physical, psychological and rational independence.²² Morally and culturally parents are responsible to take care of the child until they are capable of caring for themselves, caring for children includes not only

taking decisions on their behalf but also progressively training them to take decisions on their own. The imprisoned parents' barely get any chance to take part in their child's development after they are separated or if they have children above 6 years of age or mentally or physically challenged child. In fact, the visitation by children is only allowed once a week²³, this leads to an obvious emotional gap between the Parent and Child and a very little say in the upbringing of the child. The circumstances and challenges faced by these parents' in a prison ultimately leads to a breach of their parental rights, although with their own fault in the first place. But the question here is even if it were their fault but does that mean they shall have no say in the upbringing of their child? Answering this the US Supreme Court said "The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their children to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life."²⁴

Such a situation gives rise to "other parents" or the guardian appointed by the jail authorities. And there is a possibility of conflict in later life between the natural parent and the one who took charge of the child until the parent was incarcerated. Courts over the years have shifted their view from traditional, parents should be the only person to be allowed custody, to "welfare of child". It may be possible that the courts allow custody to such other guardians who took care of the child, keeping in mind the welfare of the child. The judiciary has always been determined to keep welfare before anything²⁵, in fact it went on to say that the welfare of the child is paramount and not the parental rights under any statute.²⁶ The court has not bound itself to any strict law, while enumerating certain principles for determining the custody of the child, the Apex Court said "A Court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting a proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child. Thus the strict parameters governing an interim injunction do not have full play in matters of custody."²⁷

There are many factors that could affect the custody of a child and possibly the incarcerated parent might end up losing their child, ultimately affecting their parental rights. But as already stated, the judiciary only considers the well being of the child, irrespective of emotional attachment, the welfare of the child is paramount and above parental rights.

IV. CONCLUSION

Parental Arrest Policy- India is in need of developing a better arrest policy than the prevailing one for the arrest of a person with children, right from the arrest to release and the sole purpose of such a policy should be the welfare of the arrestee's children. And in due course not forgetting the children who reside with the parent in prison. Countries like the USA have such policies in many of its states. Studies suggest that witnessing the arrest of a parent leaves a severe negative impact on the child, it may linger with them for years and have long term effects.²⁸ In such circumstances it becomes important for the law enforcement agencies to take care of the children while the parent(s) is being arrested. The training of these enforcement agencies should properly emphasise on dealing with children in such a situation. The police should not be as harsh as they usually are when they arrest a person in front of their child. Moreover, if the child is in the care of a single parent and that parent is arrested then they should be compulsorily given extra time and calls for locating an appropriate relative for their children instead of sending the child to government children shelters, as this could save money for the government as well. But at the same time developing an agency or allocating the work to child welfare NGOs that could keep a check on the relatives so that they don't mistreat the child in case the child is not with either of their parents. When the release date comes near, the parent(s) in the prison should be given lessons in better parenting by the child welfare NGOs in collaboration with a psychiatrist. This will help them get closer to their children after the release. Over and above all this the real stakeholders are the one who could give some more genuine solutions to this problem. While developing its Parental Arrest Policy, the San Francisco Police Department used a variety of experts. For example- a local child and family advocate and an external police oversight agency, the Office of Citizen Complaints and also the feedback of children with actual experience. More experts can play a major role in drafting such arrest policies like the Juvenile Justice board members, child rights activists, legal professionals, psychiatrists and other recognised jurists and academicians.²⁹

Alternatives for arrest of a parent with minor children- Both the parents play an important role in the well-being and development of the child, but the mother's role is irreplaceable in a minor child's development as children seem to be extremely dependent upon their mother as far as the health of the child goes³⁰ and also it is seen that they are more emotionally attached to the mother. It is always difficult for the minor child to live without his/her mother. In such cases the judiciary and the legislature have to think above the traditional ways of punishment. There can be alternatives to arrest for less grievous crimes, especially for the mother and also for any single parent taking care of the child all by him/herself. First of it could be avoiding pretrial detention. Then, arrest of women with minor and dependent children may be refrained. Bail and parole policy for such women could be eased if there is any conviction. Moreover, there can be an open prison system,

where they could go out and work or meet their children in normal circumstances and return back to the prison. It is important to recognise the problems of children of incarcerated parents and find out a suitable way to encounter such problems. Imprisonment should be the last punishment for these parents instead of being the first.

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