

CHILD OF INCARCERATED PARENTS: A DEEMED CRIMINAL

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ABSTRACT

The need for special attention to the unattended marginalized community i.e., children of incarcerated parents, is now being realized by lawmakers of several democratic countries. As a result, attempts are made to ensure the protection of such children by religiously adopting the internationally recognized Mandela rules and Bills of rights of children of incarcerated parents. Strangely, in India, those children are still considered as stigma for the society and are automatically designated by society as ‘a deemed criminal’ by citing Sanskara Inheritance doctrine. However, as in when judiciary intervenes in the matter, governments start taking initiatives by making child/family friendly provisions and framing national policies. The purpose of the present study is to analyze the rights and entitlements of incarcerated parents, their dependent children and the issues of violations of such rights. This will assist in gathering the possible way out to eliminate social and legal stigma from their children. This paper will also unearth the best practices adopted by Indian states for rehabilitating human rights of such children. This paper will also emphasize upon the role which can be played by private players and NGOs in countering this proliferating social problem. Lastly, this paper concludes after addressing the policies of first world countries which, if applied, can possibly benefit India in understanding such challenges.

Keywords : *Incarcerated Parents, Human Rights, Children’s Rights, Prison Reforms, human dignity*

I. Introduction**II. Issues and Its Analysis****III. What the Law Says and Whether it Observes Silence?****IV. Appraisal of Best Practices and Recommendations****V. Bill of Rights for Children of Incarcerated Parents****VI. Conclusion****I. Introduction**

OVER THE last thirty-five years, society has experienced the need for reforms in two key institutions of the criminal justice administration system, and they are Police Reforms and

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Prison Reforms. It is not incorrect to pay credit to Indian judicial system which has come forward for both of these causes and gave some landmark judgments in taking lead in these issues. Though the subject-matters of both the needed reforms are different, but the more apparent similarity between them is that neither of the two reforms has been implemented in its full-spirit despite rendering of several landmark judgments in that regards.

While settling the issue of Prison reform, the Apex Court, time and again, has held that prisoners are also a person. A prisoner is a person who is inherently entitled with all the basic human rights, human dignity and human sympathy.¹ Their fundamental rights do not flee as they enter the prison. However, these rights might get shrieked as necessitated by such incarceration.² A Russian Novelist Dostoyevsky's famous maxim is very apt to be referred here which says that "a society should not be judged on how it treats its outstanding citizens but by how it treats its criminals".

Per the available data, prisoners mainly belong to deeply indigenous families. Their sufferings of poverty would deteriorate further when many jail-related problems in prison cells also get added up. A government of a civilised country can fail to implement social justice and secure the human rights of its civilians in several ways- it can fail either because of an absence of governance³; due to the failure of the government to implement already enacted laws; or because of mis-governance⁴ by the governments at any level; or because of the fact that there is no operative law⁵ enacted by the state as such concerning the issue.

The theme of this research paper is related to the human rights issues of children of incarcerated parents and the attempts made by governments to address such challenges. The author hypothesises that the government has failed to enact any operative law to address the plight and hardships of these unattended marginalised sections of society. These marginalised sections are socially stigmatised and are essentially designated as a 'deemed criminal'. A famous Sanskrit *shlok* most relevant for the on-going discussion, may be resorted to. It says:

*एकेन शुष्क वृक्षेण दह्यमानेन वह्निना।
दह्यते तद्वनं सर्वं कुपुत्रेण कुलं यथा॥*

¹ *T. K. Gopal v. State of Karnataka*, (2000) 6 SCC 168.

² *Sunil Batra (II) v. Delhi Administration*, (1980) 3 SCC 488.

³ *Bandhua Mukti Morcha v. Union of India*, (1997) 10 SCC 549; *Sampurna Behura v. Union of India*, (2018)

4 SCC 433; *Swaraj Abhiyan v. Union of India*, (2016) 7 SCC 498.

⁴ *Common Cause v. Union of India*, (2017) 3 SCC 501; *Goa Foundation v. Union of India*, (2014) 6 SCC 590; *Manohar Lal Sharma v. Principal Secretary*, (2014) 9 SCC 516.

⁵ *Laxmi v. Union of India*, (2014) 4 SCC 427; *In Re: Noise Pollution (V)*, (2005) 5 SCC 733; *Environment & Consumer Protection Foundation v. Union of India*, (2017) 16 SCC 780; *M.C Mehta v. Union of India*, (1997) 2 SCC 353.

This *shlok* means that due to the only parched tree, the entire forest is caught by fire. Similarly, only one trait son ruins the entire family. A wicked son with vices destroys (brings troubles, tensions, disrepute) the whole family (dynasty, clan), eliminating-wiping it out completely.

Not merely aphorisms, even the recent criminological studies⁶ have also established that children of criminal parents have a greater chance of becoming criminals themselves. This criminological stand was perhaps justified by earlier criminologists in their studies of criminal behavior. According to a famous criminologist Donald R. Cressey, there are two types of criminal behavior, one is mechanistic or situational, and the other one is genetic or historical.⁷ For the present context, it is the genetic process by which a child comes out to engage in criminal behavior.

This is so because it is a widely accepted phenomenon that criminal behavior is learnt while interacting with parents during the communication process, and the degree of association may vary depending on the frequency, duration, priority and intensity of such interactions. This genetic explanation of criminal behavior is attributed to the famous theory of Differential Association, which was propounded by Edwin H. Sutherland in 1939.⁸ Having learnt this understanding, it becomes genuine for anyone to start developing resentment towards the children of criminals or those incarcerated parents who are presumed to be a criminal by law.⁹

II. Issues and its Analysis

It is commonly seen that these forgotten or ignored children of incarcerated parents (hereinafter referred to as 'children of prisoners') are formally identified in two senses.¹⁰ Those children who either live with their parent (mostly with mother) in jail premise or those who take birth in the jail itself. Those children whose parents are imprisoned but they are still living in the society. As far as first category of children is concerned, only nine countries in

⁶ Sytske Besemer, "A systematic review and meta-analysis of the intergenerational transmission of criminal behaviour" 37 *Journal of Aggression and Violent Behavior* 161 (2017).

⁷ Donald R. Cressey, *Delinquency, Crime and Differential Association* 3 (Martinus Nijhoff, Hague, 1st edn., 1964).

⁸ E.H. Sutherland, D.R. Cressey, *et.al.*, *Principles of Criminology* (General Hall, New York, 11th edn., 1992).

⁹ Jennifer Rosenberg, *Children Need Dads Too: Children with Fathers in Prison* 14 (Quaker United Nations Office, Geneva, 1st edn., 2009).

¹⁰ Joan Petersilia, *From Cell to Society: Who Is Returning Home?* (New York, Cambridge University Press, 1st edn., 2005).

the world do explicitly recognize fathers as possible primary caregivers and allow children to live with them in prison, while in others, it is only the mother or women who takes care of their children in custody.¹¹

Before, analyzing each category of these children, it is pertinent to note down that the Government of India for the first time gave recognition to these children of prisoners as children of vulnerable groups in the year 1997 only. The government in its official document titled “*Universal Children’s Day, 50 Years of Child Development-The Challenges Ahead*” recognized these children as ‘children of different circumstances.’ This term includes children who are more vulnerable in terms of the harm/danger/risk to their right to survival/development/participation than others.¹² These children can neither be called as orphan nor be called as ‘child in conflict with law’ and hence the only available term which suits them appropriately is ‘child in need for care and protection’.

Those children who live with their parents within the jail premises

Judiciary and legislatures, time and again, have come for the rescue of children belonging to this category (*i.e.*, those who live with their parents inside prisons) by way of collecting demographic data, conducting extensive surveys about the mental and physical growth of these children in jail. Such researches and studies have given some valuable information on children living with their parents inside the prisons. The settled position after the 2006 judgment of the Apex Court is that children up to the age of 6 years can live with their mother inside the prison custody, provided the jail has taken all the measures as prescribed by the court in its verdict.¹³ According to the National Crime Records Bureau’s ‘Prison Statistics India Snapshots – 2021’, “around 1,319 existing prisons in India housed nearly 5,54,034 inmates. There were a total of 1,650 women convicts with their 382 children and 1,226 women awaiting trial with their 1,397 children lodged in various prisons in the country.”

However, despite being signatories of various international commitments and obligations¹⁴, India has barely started taking any serious view over the plight of these children of prisoners

¹¹ These countries are Spain, Denmark, Bolivia, Australia, Finland, Germany, Portugal, Sweden, Thailand.

¹² Government of India, “National Plan of Action for Children, 2005” (Department of Women and Child Development, 2005). See also, para 11.2.2.

¹³ *R. D. Upadhyaya v. State of Andhra Pradesh*, WP(C) 559 of 1994; Oliver Robertson, *Children Imprisoned by Circumstance* (Quaker United Nations Office, Human Rights & Refugees Publications, 1st edn., 2008).

¹⁴ UN General Assembly, Convention on the Rights of the Child, GA Res. 44/25 (Nov. 20, 1989); UN General Assembly, UN Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), GA

until this April 2006 judgment of the Apex Court. The Apex Court, after carefully examining the neglected attitude of governments had rendered a landmark verdict which recognizes the children of prisoners as a distinct group.¹⁵ The Apex Court gave prisons pan India a three months' time-slab to comply with its order. However, years have passed by and jails have still not fully complied with the judiciary's orders.

Field survey reports submitted by TISS in 2007 and National Institute of Criminology and Forensic Science in 2009 were also not being adhered to by the prison authorities of the country. The children living in jails are also not secured as per the current situation of Indian jails. Issues which the inmates and with their children¹⁶ face in prison are Unnatural death of prisoners¹⁷; over-crowding; Delay in trial; Torture and ill-treatment; Neglect of health and hygiene; Insubstantial food and inadequate clothing; Prison vices; Management of open-air prisons; Streamlining of jail visits; Deficiency in communication.¹⁸

All these inside-prison issues are now in the process of being addressed by a three-member committee constituted¹⁹ by Supreme Court in 2018 which is headed by a former SC Judge Justice Amitava Roy, along with Inspector General of Police, Bureau of Police Research and Director General (Prisons), Tihar Jail as its members to look into the issues of reforms in prison administration and prison management. This issue was also addressed in the recently conducted 6th National Conference on Prison reforms of Heads of prison of states and UTs in Bhopal.

But on the other hand, there is almost no information available regarding those children of prisoners who are surviving with other society members. Thus, keeping all these developments in mind, this research paper is deliberately intended to focus extensively only upon the issues and challenges faced by those children of incarcerated parents who do live within the society but are still being made socially isolated.

A/RES/40/33 (Nov. 29, 1985); UN General assembly, UN Rules for the Protection of Juveniles Deprived of their Liberty, GA Res. 45/113, (Dec. 14 1990); UN General assembly, The UN Guidelines for Alternative Care of Children, GA Res. A/64/434 (Dec. 18, 2009).

¹⁵ *R.D Upadhyay v. State of Uttar Pradesh*, 1996 (3) SCC 422.

¹⁶ A term, which includes both under-trial as well as convicted prisoners.

¹⁷ Letter dated June 13th, 2013 addressed by Justice R.C. Lahoti, former CJI to the then Chief Justice of India.

¹⁸ *Rama Murthy v. State of Karnataka*, (1997) 2 SCC 642.

¹⁹ *In Re: Inhuman Conditions in 1382 Prisons*, (2016) 3 SCC 700.

Those children of prisoners who are living within the society

As noted, various guidelines and directions were passed by the Apex Court and other courts in India to bring new hope of just and dignified environment for the children who live within jail premise. However, the same courts have failed to address those categories of children of prisoners, who live outside the jail premise. Barring a few, no concrete guidelines or circulars have been passed so far either by court or by legislatures or executives- which could have specify for the care and protection of children of prisoners who are older than 6 years of age and lives in societal home.

Although, few committees were constituted – including ‘Thirteenth Lok Sabha committee on Empowerment of women (2001-2002)’ for examining the situation of Women in Detention and Justice V. R. Krishna Iyer committee on ‘Women Prisoners’ in 1986-87- all of them did try to focus on the plight of women and their children but still failed to appreciate the issues of those children who lives outside the jail in the societal companionship. Even the verdicts of our courts²⁰ did not address the children who are being left behind in the community unattended. Such an indolent attitude of the statesman and judiciary shows that most of these children are deprived of their basic human rights and had no one to take care of them. As a result, the mental and physical developments of these children are severely affected.

Few years back, one of the rarest study about these categories of children of prisoners were done by the West Bengal government, along with an assistance of Kolkata based NGO named ‘OFFER’. The study titled²¹ as “*Children of Prisoners Back Home Project*” had observed that thousands of children between the age group of 4-18 are facing social discrimination and are considered as stigma in society for being the children of prisoners. Such a hostile perspective of society towards these children gives the latter an equal burden of punishment as is given to their parent. Having no care and protection of their childhood or even adulthood, would, by default, lead these children getting into anti-social behavior, which essentially will throw them into the dark crime society full of neglect and deprivation.

²⁰ *Re- Inhuman Conditions in 1382 prisons v. Director General of Prisons, State of Andhra Pradesh*, 2016 (10) SCC 17; *R.D Upadhyay v. State of Uttar Pradesh*, 1996 (3) SCC 422.

²¹ West Bengal Prison Directorate, “Report on Children of Prisoners Back Home Project” (Sep. 24, 2006), available at: http://wbcorrectionalservices.gov.in/prisoners_children05.html (last visited on March 20, 2023).

In this report, it is also found that physical and psychological abuses have become a usual feed for them as are reflected in their abusive language and frequent fights. Still, 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.²² Hence, in order to deal with such issues, statistics and information is must and hence need to be promoted. Unless a definitive system of procuring consolidated information about this category of children of incarcerated children and their circumstances is procured, it becomes way more difficult for policymakers to address their predicaments in the requisite manner.²³

The trauma that these children, frequently experiences, may be summarised as below- which express a sense full of dismay and destitute towards them. These are:-

- Society looks down on children of incarcerated parents²⁴:- In Northern part of India, there is a famous saying that:-

“बाढ़े पूत पिता के धरमे और खेती उपजे अपने करमे”

It means, Son succeeds due to fathers' good deeds whereas farming succeeds due to its own factors. The father's progress is the advancement of his son. Rather looking at them as innocent victims of their parent's act they are considered as a deemed criminal themselves. In southern India, especially in Karnataka region, people call these children as “*kallara makkalu*”, the English translation of which means a ‘thief's child’.

- It is believed that the child up to the age of 16 years is considered as a blank paper and in this tender childhood age, a child go through the phases of emotional withdrawnness, regression in behaviours like bedwetting, and difficulty in forming relations with other stranger members.²⁵
- School staff, school kids and the parents of their batch-mates ostracise these children and advise their own kids to make relative distant with such children. By virtue of which, these children gets teased and bullied at school, thus resulting into a steep decline in their academic performances too.²⁶

²² Katherine Gabel and Denise Jhonston, *Children of Incarcerated Parents* 72 (Lexington Books, 1st edn., 1995).

²³ Quaker United Nations Office, “The Impact of Parental Imprisonment on Children” (April 2007). *available at*: http://penal-reform-azerbaijan.org/_ld/3/320_Impact_of_paren.pdf (last visited on March 23, 2023).

²⁴ *Ibid* at 17.

²⁵ Charlene Wear Simmons, *Children of Incarcerated Parents* (California Research Bureau, California, 2000).

²⁶ Hanna Johansson, *Once there was a girl who was born in jail* (2011) (unpublished Bachelor's thesis, University of Gothenburg).

- Primary socialisation, as per sociologists, takes place in the family of the child and is mostly dependent on kinship relations. With the advent of nuclear families unlike joint family, the child suffers lot both physically and mentally if either of the parents goes behind the bar.
- Other than this, India has also no special legislation or policy which can support the kinship carers.²⁷ As a result of which, these unattended children, are the one who bears the brunt of social exclusion the most. They also get sexually abused by relatives or outsiders or they are thrown in prostitution businesses, or are used in human trafficking rackets or are being inducted into the running gangs of smuggling or that of organ transplanting or they are forced to beg on the street.²⁸ Failure to protect children has serious consequences for the physical, mental, emotional and social development of the child.

III. What The Law Says and Whether It Observes Silence?

The Juvenile Justice (Care and Protection of Children) Act, 2000 (*hereinafter* referred as ‘JJ Act’), which is considered the comprehensive law on child care in India, initially did not include children whose parents are in jail under its scope at all.²⁹ It is as recent as May, 2017 when the honorable Supreme court of India, in the judgment of *Re: Exploitation of Children in Orphanages in the State of Tamil Nadu v. Union of India (UOI)*³⁰ interpreted the Act inasmuch as that these isolated Children are covered under this Act. The court further held that:

The definition of the expression “child in need of care and protection” under section 2(14) of the JJ Act should not be interpreted as an exhaustive definition. The benefits envisaged for children in need of care and protection should be extended to all such children in fact requiring State care and protection”. Consequently, we are of the view that since the JJ Act is intended for the benefit of children and is intended to protect and foster their rights, the definition of a child in need of care and protection must be

²⁷ King Hussein Foundation, *Kinship Care: Providing positive and safe care for children living away from home*, 4 (Kinship Care Publication, London, 2007).

²⁸ “Helping India’s Prison Children”, *BBC News* (Nov. 14, 2005), available at: http://news.bbc.co.uk/2/hi/south_asia/4354712.stm (last visited on March 23, 2023).

²⁹ Apoorva Mandhani, Kerala HC directs Government to Formulate Scheme For Children Of Jailed Parents” *Live Law* (July 19, 2014), available at: <https://www.livelaw.in/kerala-hc-directs-government-formulate-scheme-children-jailed-parents/> (last visited on March 23, 2023).

³⁰ (2017) 7 SCC 578.

given a broad interpretation. It would be unfortunate if certain categories of children are left out of the definition, even though they need as much care and protection as categories of children specifically enlisted in the definition. Beneficial legislations of the kind that we are dealing with demand an expansive view to be taken by the Courts and all concerned.

Apart from the JJ Act of 2000, few international provisions also mandate signatory states to take necessary precaution for child right protection. One amongst such provisions is article 9.4 of the UN Convention on the Rights of the Child (*hereinafter* referred as 'CRC'), which was ratified by India in 1992. This provision essentially states that:

When a parent is separated from a child from any action initiated by a State Party, such as detention, imprisonment, or death while the person is in the custody of the State, that State Party shall provide the parents, the child, or another member of the family with the essential information concerning the whereabouts of the absent member unless the information would be detrimental to the well-being of the child.

In addition to this, article 20 of the CRC summarises about those children who are deprived of family environment as "Children who cannot be looked after by their own family have a right to special care and, shall be entitled to special protection and assistance provided by the State."

With a bare reading of these two articles of CRC, it is glaring that these provisions are not exhaustive in nature, instead each and every provision of CRC, by and large, mandate the government to provide requisite attention towards the welfare of children of prisoners. While enacting legislations for this purpose, CRC also guides the state that the best interests of the child shall be given paramount consideration and the child shall be protected from all forms of neglect, cruelty and exploitation.³¹

The Indian Code of Criminal Procedure requires the police to inform the relatives of the accused about the crime committed by their family member, along with the location of imprisonment while making an arrest.³² However, this provision has barely any grassroots

³¹ P. Basu, "Laws Relating to Protection of Human Rights Under the Indian Constitution and Allied Laws" (Modern Law Publications, 2nd edn., 2012).

³² Code of Criminal Procedure, 1973 (Act No. 2 of 1974), s 50A.

level implementation. No Standard of Procedure (*hereinafter* referred as ‘SOP’), has been formulated for the arresting officer which could guide the police officers to be more sensitive enough while making the arrest at homes, if the accused lives with his children.

One of the reasons for the lack of updates and figures about these children of prisoners in jail data repository may probably be attributed to the fact that police officers, who make arrest in the first place, themselves do not keep track of these children while effecting arrest. It is a common phenomenon that the children are the most vulnerable stage of a human being which is most likely to get affected badly if something unusual encounters them. At the time of making arrests from home, the children of the accused watch their parent being dragged away by police personnel. This brings more traumatic and frightening experience for children, especially for those who have no other family members living in home or who were living with their parent all alone.³³

Police and other officials who are authorised by law to make arrest, quite frequently fail to inform the children of arrestee that where their parent is going and on what reason his/her parent are being arrested. Children are even not informed about the police station where his/her parent will be brought to or the jail in which his/her parent will be put in. Sometimes, in situations when the clandestine arrest is made by the police of some other districts or state, the child gets completely blank about the whereabouts of his/her parent.

Furthermore, the impact of illiteracy and the indifferent attitudes of peoples towards their own legal rights have deprived women of their rights to bring their child of age up to 6 years with them.³⁴ Police have no existing legal obligations to inform the accused women that she has the right to bring infants to jail with them, at the time of making her arrest. All this happens is due to the sole reason that, law enforcement agency does not have an official protocol to make arrangements for children after an arrest. Hence, it is the need of hour for state governments in India to devise a SOP guiding how the law officials should treat children of the arrested parent during and after the time of arrest.

Interestingly, the government is mandated under section 42 of JJ Act to formulate a policy on foster care, which in reality is different from what is the position on ground. Despite courts’ several interventions, the governments have always failed to fulfil the expectation of JJ Act’s foster home.³⁵ Even, it should also be realized that the governmental

³³ *Supra* note 23.

³⁴ Planning Commission, “Children of Women Prisoners in Jails: A Study in Uttar Pradesh” (New Delhi, 2004).

³⁵ *Sampurna Behura v. Union of India* (2018) 4 SCC 433; *Re: Exploitation of Children in Orphanages in the State of Tamil Nadu v. Union of India* (2017) 7 SCC 578; *Laxmikant Pandey v. Union of India*, AIR 1984 SC 469; *Bachpan Bachao Andolan v. Union of India*, AIR 2011 SC 3361.

institutions will forever keep failing in addressing this proliferating social problem until the whole-hearted voluntary participation from the end of public is made both in the prevention of crime and in the treatment and rehabilitation of the offender.

IV. Appraisal of Best Practices and Recommendations

As a major corrective measure, it is proposed, keeping in mind the interest of these neglected children: [A] That the governments should call for alternatives as opposed to incarceration for lesser serious offences; [B] That, at the same time, governments must make it easier and less traumatic for children to visit their incarcerated parents; [C] That the practices adopted across globe including by few state governments/courts/private organisations should have been adopted pan India to help ‘children of prisoners’; [D] That certain foundational changes should be introduced by governments; [E] That governments should adopt the Bill of Rights (*hereinafter* referred as ‘BoRs’) of the children of incarcerated parents.

Alternatives apart from incarceration

Irrespective of it being a criminal justice administration system of India or for that matter, of any other country, it is a unanimously accepted rule that the children (in India, up to the age of 16) should not be made contacted with adult criminal justice system, as it can be proved detrimental to the children’s growth. However, there is high doubt with respect to the adherence of such a rule.

In the interest of accused’s children, those who are booked for the violations of some minor offenses, the imprisonment of which may last up to 3 years, may be given some alternative punishments like community-based sentence, if he is not an habitual offender or so. Those under-trial offenders who are indigent and who have no one for looking after their children, should be kept out of jail as far as possible and they must be allowed to keep their jobs while awaiting trial. The Best Interest Principle of Child is not only recognised in India, but this also exists in other judicial systems. The sentencing policy of South Africa of 2007,³⁶ Finland’s of 2011³⁷ etc.- take due notice of the best interests of the child and assures that if parent’s sentence of imprisonment proves detrimental to the child’s care and nurturing, the court may consider granting of some non-custodial sentences. Similarly, Sweden also has a

³⁶ *S v. M*, CCT 53/06 36 (2007), *Constitutional Court of South Africa*.

³⁷ UN Human Rights Office of the High Commissioner, Committee on the Rights of the Child examines report of Finland (June, 2011).

compassionate policy towards incarcerated parents as it provides for an scope to avoid the imprisonment of parents whenever possible.³⁸

The penal code of Kyrgyzstan contains a provision allowing women who are pregnant or who have a child under 14 years of age to receive suspended sentences until their children reach the age of 14. Constitutional law in Colombia also adopts a child friendly policy as it provides that women who are mothers of minor children or children with disabilities may receive house arrest instead of being required to serve a custodial sentence in jail premises.³⁹

Community-based sentence

As briefly noted above, community-based sentence may be used as one of the alternative mode of punishment for those offenders who are the only dependants of their children. In the same vein, the Andhra Pradesh Community Service of Offenders Act, 2003 provides relaxation, to a certain extent, to those people who are convicted for minor offences punishable with imprisonment of either description for a term not exceeding two years or with fine, or with both. The kind of community services that are asked to undertake are—“work in a welfare institutions involved in care of old or disabled persons, work related to environmental improvements e.g. tree plantation, maintenance, Construction and renovation of buildings like that of schools, hospitals, etc.” A full-fledged law or policy on community based sentencing is yet to be passed in India, although a bill in this regard was tabled in Parliament few years ago, but nothing concrete happened.

Open-Jail based sentence

Those inmates who are having a good character subject to certain requirements of the prison rules, shall be permitted to live in a distinct kind of open homes- usually comprises of 1BHK cottage, where prisoners are not confined to four walls and are allowed to live with the family members yet with less security surveillance. In India currently, there are 69 Open Jails in

³⁸ The Law Library of Congress Report, “Laws on children residing with parents in prison” (The Law Library of Congress, August 2014), available at: <http://www.loc.gov/law/help/children-residing-with-parents-in-prison/children-residing-with-parents-in-prison.pdf> (last visited on March 23, 2023).

³⁹ Melanie Paurus, “International Report on the Conditions of Children of Incarcerated Parents: A Survey of Prison Nurseries” (2017), available at: <https://cicmn.org/wp-content/uploads/2017/03/Melanie-Report-Edited.pdf> (last visited on March 23, 2023).

total in several states like Rajasthan⁴⁰, Maharashtra⁴¹, Himachal Pradesh⁴², and Madhya Pradesh.⁴³

Easier and less traumatic for children to visit their incarcerated parents

Governments should increase the frequency of jail visitation for children of inmates, and must also pave the way for inclusion of video visitation. Various researches have proven that increasing in the frequency of visits could keep incarcerated parents connected with their children. Prisons should be made sensitive to incarcerated parents in maintaining them contact with their children.

Physical visitation changes

Looking at the existing situation in Indian jail, it is recommended that the visitor's waiting areas and visiting rooms in prison should be made more child-friendly. The number of visits by children to their parents must be made flexible. These children should be given private time with their incarcerated parents, in such a way that they can touch and talk to their parent in a room. Also, the visiting child should be passed with only limited and necessary security checks. Overnight visits for minor children living outside prison with their mothers must be allowed at least once every quarter for maintaining a cordial bond between them.

One best practice in this regard could be found in some of the prisons in the state of Maharashtra. The child-friendly environment may be seen in the Maharashtra Prison Department. Here, the prison department organises the programme called "Close Meet" (Gala-Bhet) for convicted prisoners. In this, prisoner can take close meet with their children below the age of 16 years in the prison. Furthermore, few jails in Maharashtra have removed the mandate of wearing Dress Code for prisoners while they meet with their children. Other than this, Maharashtra prison department places less security checks while conducting body cavity searches of children. All these child-friendly attitude of prison officers helps in preserving the dignity of children and in making the child comfortable while meeting with his/her jailed parent.

A United States' mid-western state called Michigan, had enacted a law under which the state allocates sufficient funds from the appropriation to develop a pilot children's

⁴⁰ Rajasthan Prisoners open-air camp Rules, 1972.

⁴¹ Maharashtra Open Prison Rules, 1971.

⁴² Himachal Open-Air Prisons Notification, 1977.

⁴³ National Crime Records Bureau, "Prison's Statics in India" (2015).

visitation program, which is to include parenting skills instruction.⁴⁴ Thus, after appreciating the above measures within and outside the country, India should also implement a similar scheme pan-India wherein the prison staff would be emotionally trained to deal with the children of inmates in a more amicable and sensitive tone. Also, jails should strive to meet the needs of the children by providing toys, music system, and eatable items to the children whenever they happen to wait in prison. It must also be agreed by the prison administration that during the time of religious & national festivals, children must be given freehand to meet their incarcerated parent until any special circumstances arises which forbids this meet.

Electronic visitation changes

The concept of video/telephonic visitation could be developed to let parents do age-appropriate schoolwork with their kids, or tackle some other problems that their child encounters- all this will let the child learn to work together even while their incarcerated parents remained in jail. Few years ago, the government in New York adopted a law to emphasize the lowest possible cost to the telephone user in jail, which essentially and diligently encourages a meaningful relationship between a child and a parent.⁴⁵ This innovative measure proved beneficial for the visitor, as it saves time in travelling to jail and waiting for the parents for his turn to solemnise such meet.

Taking a cue, the government of Bihar has recently installed a device called *Kiosks* at Bihar Prisons which is an advanced prison calling solution jointly operated by BSNL & Digispace (6 Spice). Further, the newly developed mechanism called 'Visitor Management System' (Work flow at online / Video-conferencing based system) has proven a much convenient method for the visitors (especially the children) to establish a meet with their relatives/parents locked in jail. With the help of this software, a visitor is able to book online visit receipts and can receive confirmation email along with the date and time of Video-conferencing once approved by the authorities. This kind of device should be adopted by other prisons of the country as well for facilitating a secured and electronic visitation of a child with his/her incarcerated parent.

Appraisal of state's endeavour to help 'Children of Prisoners'

⁴⁴ Mich. Pub. Acts, 2007 Act 124.

⁴⁵ N.Y. Laws, 2007, Chap. 240.

The Government of NCT of Delhi had approved a scheme on 26 May 2014 to provide a fixed amount of money on a monthly basis to the children of incarcerated parents till such a child attains the age of 18 or until the parents are released from prison, whichever is earlier.⁴⁶ In a move inspired from similar objective, the Delhi High Court,⁴⁷ while reviewing the redrafted scheme of “Protection Aid to the children of Incarcerated Parents and After Care Rehabilitation Grant, 2013” emphasized upon securing the interest of all the children of incarcerated parents in every possible manner.

The government of Andhra Pradesh, through its correctional departments, initiated a scheme in their state under which such children from the age of 3 and onward are transported to local schools for their education.⁴⁸ Financial support for the children of jailed parents is also arranged by various other jurisdictions.⁴⁹ The High Court of Gujarat ordered, in October 2011, that the State government must support the family of prisoners, because the imprisonment had caused them ‘untold misery and deprivation without any fault on their part’.⁵⁰ The government of Kerala has arranged a method by which the government pays a monthly fixed stipend to children of those prisoners who are serving at least a two-year sentence.⁵¹ In 2014, a Kerala High Court Division Bench of Justice Thottathil B. Radhakrishnan and Justice P. B. Suresh Kumar had “directed the State Government to devise a special scheme for the rehabilitation and protection of children whose parents are in jail, in conformation with child protective services in developed countries.”⁵²

Similarly, the West Bengal Government inserted a provision in one of its law, which requires that if a detained person has dependent children studying in school or college, then the state government is duty bound to help to pay for those child.⁵³

In 2015, the Punjab and Haryana High Court while appreciating the concept of ‘conjugal visitations’ in Indian jail, declared that inmates also have the right to reproduction despite

⁴⁶ Guidelines for Government of NCT of Delhi for the “Scheme for Financial Sustenance, Education & Welfare of Children of incarcerated Parents, 2014” (2015), *available at*: <http://dlslsa.org/wp-content/uploads/2015/12/Scheme-for-Financial-Sustenance-Education-Welfare-of-Children-2014.pdf> (last visited on March 23, 2023).

⁴⁷ *Brindavan Sharma v. State of NCT of Delhi*, CrI. A. No. 927/2002.

⁴⁸ Andhra Pradesh Prisons Department, “State Administrative Report” (2008), *available at*: <http://apprisons.gov.in/special-prisons.htm>. (last visited on March 23, 2023).

⁴⁹ Quaker United Nations Office, “Children Imprisoned by Circumstance” 11 (Apr. 2008).

⁵⁰ *Malabhai Bharatbhai Bhuriya v. State of Gujarat*, 2012 GLH (1) 818.

⁵¹ *Ibid.*

⁵² *Supra* note 29.

⁵³ The West Bengal Correctional Services Act 1992, s. 35(4); The Law Library of Congress Report, “Laws on children residing with parents in prison” (The Law Library of Congress, August 2014), *available at*: <http://www.loc.gov/law/help/children-residing-with-parents-in-prison/children-residing-with-parents-in-prison.pdf> (last visited on March 23, 2023).

being imprisoned.⁵⁴ This judgment portrays that there is no inherent conflict between the right to procreate or parental right for it being considered as one of the fundamental rights and the incarceration of such person. Other High Courts and the Supreme Court must also provide such wide recreational facilities to the prisoners who are having child outside the jail and are not being given enough time to share their respective feelings with their children living in society.

Appraisal of organizations making efforts for ‘Children of Prisoners’

Private players and civil organizations are also no longer absent in contributing their parts for the welfare of these children. The community participation can be witnessed from the commendable job done by the Prison Ministry India (PMI), an NGO which has 850 Branches and about 6000 volunteers across the 33 Rehabilitation centers pan India. Their Rehabilitation centers popularly known as ‘*Kolbe Homes*’, bring rehabilitation to the stigmatized children of prisoners who are in conflict and risk. These kinds of centers were started establishing since May, 2016, being first center in Bangalore. Rehabilitation center named ‘*Premodaya*’ is also established by PMI since 2001, as a kind of center for the female children of prisoners below 18 years of age, which could help child of prisoners in preventing them to become a potential criminal.

Similarly an NGO named ‘India Vision Foundation’ conducts various surveys along with its own initiative of running a well-received crèche and aftercare program for children of incarcerated caregivers within Tihar and Bhondsi Prisons.⁵⁵ Siddhartha Vashishta Charitable Trust (SVCT) is an NGO, headed by Manu Sharma, is working for approximately 1000 children of Prisoners⁵⁶. This NGO has initiated a Prisoner’s Child Education Programme which takes care of educational needs of children of prisoners. They ensure continuation of children’s studies in the same schools/colleges as they were attending earlier before their parents were arrested. Tuition fees, books, stationery and uniforms etc. are also provided to these children in addition to counselling, mentoring and motivational sessions.⁵⁷ Kumar Vishwas, a celebrated Hindi poet & social activist while addressing the seminar organised by this NGO has stated that “Mahatma Gandhi once said that children cannot be illegitimate,

⁵⁴ *Jasvir Singh v. State of Punjab*, 2015 CriLJ 2282.

⁵⁵ India Vision Foundation, “Tihar CECED Report on Glimpses of exploring childhood in Tihar” (2019), available at: <https://indiavisionfoundation.org/reports/TiharCECEDReport.pdf> (last visited on March 24, 2023).

⁵⁶ Siddhartha Vashishta Charitable Trust, “Unseen, Unheard – Innocent Prisoners of Conscience” (2016).

⁵⁷ “Siddhartha Vashishta Charitable Trust Comes Forward To Help Children Of Prisoners”, *Ten News* (Sept. 18, 2016), available at: <http://tennews.in/siddhartha-vashishta-charitable-trust-comes-forward-help-children-prisoners/> (last visited on March 24, 2023).

relationships can. Why should children be isolated for crimes committed by their parents? Also our view about the prisoners needs to be changed.”

Similarly, another NGO based in Andhra Pradesh by the name *Sri Venkateswar Charitable Trust (SVCT)* adopts the children of convicts and provides them all the basic necessities of human life in order to alleviate their destitution since 2008.⁵⁸ Socare Ind (Society's Care for the Indigent) is another NGO based in Bangalore, which gives shelter to the children of prisoners. It mostly takes care of those children whose parents are serving life terms in the Bangalore Central jail.⁵⁹ Some private and state funded schools in India have also shown their compassionate attitude by lowering down the tuition fees for those children who are staying in prisons or who belong to indigenous families having incarcerated parents.⁶⁰

Miscellaneous Suggestions

There must be a rigorous system of targeting, testing, and tracking of these children of prisoners which could determine their problems which are causing the most harm to them. This can be achieved by analysing the integrated administrative data from criminal justice system and from other social service agencies. Other than this, the special bodies as idealised in the JJ Act, *i.e.*, Special Juvenile Police Unit (*hereinafter* referred as ‘SJPU’) and Child welfare police officers (*hereinafter* referred as ‘CWPO’) of the concerned police stations/districts should be appointed to tackle those problems, and should be made duty-bound to assess these children’s progress timely.

As stated earlier, each state government should devise a pre-arrest and post-arrest Standard of Procedure (SoP) requiring Police Officers to show sensitivity towards children of the arrestee, at the time of making arrest. This can be achieved by developing a Child Development-Community Policing (CD-CP) program under which police personnel are trained to work with children at the scene of an arrest, and are trained to provide treatment and counselling for such children.⁶¹ Moreover, as discussed previously, the children of the arrestee must be kept at some other room by the officer while arresting the offender. It is ensure that the children are not be threatened by the guns of policeman. If the potential

⁵⁸ Priti Bharadwaj and Sanjay Joshi, “Community, Participation in Prisons: A Civil Society Perspective” 40 (CHRI, 2008).

⁵⁹ G. Belgaumkar. “Children of prisoners get admitted”, *The Hindu* (May 27, 2000). *available at*: <http://www.hindu.com/2000/05/28/stories/0428402n.htm> (last visited on March 24, 2023).

⁶⁰ *Supra* note 49 at 25.

⁶¹ Nell Bernstein, *All Alone in the World: Children of the Incarcerated* (The New Press, New York, 1st edn., 2005).

offender happens to be a woman, the police officer then, must inform that women about the available provision of bringing her child of age group less than 6 years with her to prison. Police should also make suitable arrangements for the children by asking the arrestee's choice of relative and if no one is available in relatives then by carefully handing over the child to the nearby social institution/juvenile home/foster home/child care institutions along with the details of the arrested parents so that both of them can easily trace each other at later point of time.

Though, unlike USA and UK, Indian judiciary has not adopted any sentencing policy so far. But for this sensitive issue, CrPC provision should be amended accordingly in order to require judges, especially at the time of passing sentence, to consider the effects of parent's incarceration on children. This factor must be given important consideration as must be treated as a mitigating factor while deciding the award of punishment.⁶²

The scheme of reservation in education and scholarship should be initiated by governments for the children of prisoners so that they could receive educational assistance from the state to pursue their education to the fullest. It is true that private organisation does work for this cause but it is also to be borne in mind that NGO's have limited financial resources. The state being the protector of children's rights needs to ensure that every such child is getting education.⁶³ Moreover, children's have the instinct cultural, economic and social human rights guaranteed by the state which include the right to education, access to appropriate information, recreation activities and right to a standard of living adequate to ensure proper development and protection from exploitation.⁶⁴ Hence, the government should come up with necessary plans and schemes to provide them all the minimum facilities and rights they deserve.

In the prison laws abroad, more specifically in the Prison regulations of California⁶⁵, Hawaii⁶⁶ and Colorado⁶⁷, the Correctional/Prison officials there inquire and include a column in their inmate profile forms which mandate the entry of the parental details of an inmate and, also the details of whereabouts of the child. This is done in order to ensure that their children can continue receiving the services and supports to which they are entitled to. A similar scheme can also be implement in India.

⁶² R.V. Kelkar, *Criminal Procedure*, K.N. Chandrasekharan Pillai, 500 (EBC, Lucknow 4th edn., 2003); *Edigma Anamma v. State of A.P.* (1974) 4 SCC 443.

⁶³ The Constitution of India, art. 21-A; *Pramati Educational & Cultural v. Union of India*, (2014) 8 SCC 1.

⁶⁴ W.S.K. Phillop, *Street Children in India* (Rawat Publications, Jaipur, 1st edn., 1994).

⁶⁵ California Code, Penal Code, s. 5068.

⁶⁶ Hawaii Sess. Laws Act, 2007, s. 250.

⁶⁷ Colo. Rev. Stat. §17-1-119.5.

In addition to this, the facility of inter-jail transfers of inmates should be encouraged keeping in view the nearest jail possible available from the home of the offender. This would reduce any geographical or financial burden in visitation of children with their parents. Review must be made of *R.D. Upadhaya v. State of Andhra Pradesh* judgment as far as its fixing the age of 6 years for the child to be remained in prison with the incarcerated parent, is concerned. This review must be made by the Apex Court of higher bench or, the legislature itself may be pleased to pass any legislation to increase the age of the child which could be allowed to be lived with his incarcerated parent. The circumstances in which the Child Welfare Officer of jail feels that the children's mental health and well-being may be affected adversely if he/she remains in jail anymore, in these circumstances, the child need not to be kept in prison till the age of 6, but immediately be sent to surrogate or to foster care centres. Under Singapore Prison regulation, child of incarcerated parents after attaining the age of 3 is no longer required to be retained in prison provided the medical officer reported that it is desirable or necessary for the child to be remained outside.⁶⁸

To appreciate the life in a Jail, Jail tourism must be promoted by the concerned state governments to let a citizen feel the life of a prisoner. This initiative will definitely help the volunteers and social groups to pay considerable attention towards the predicaments of those who are incarcerated inside the prison over the years and also of their dependent family members, who are subjected to taunts and tease. Prisons Department of Telangana Jail has initiated a similar scheme called 'Feel the Jail' at the rate of Rs 500. The visitors are provided with jail clothing and jail food and their phones are also not allowed. This concept became sensational and covered by National and International Media like History channel and National Geographic channel. The visitors in the jail are treated as the Prisoners and they have to perform the daily routine similar to the prisoners in other jails. Such concepts promote the awareness about the post crime stage.

V. Bill of Rights for Children of Incarcerated Parents

A city in United States named San Francisco had few years back enacted Bill of Rights for the children of incarcerated parents.⁶⁹ The concept of this bill of rights was based on the report submitted by a California based organization named 'Gretchen Newby of Friends

⁶⁸ Singapore Prisons Regulations 2002, G.N. No. S 99/1939, regulation no. 2.

⁶⁹ Government of San Francisco, "Children of Incarcerated Parents Partnership, Children of Incarcerated Parents: A Bill of Rights" (2005).

Outside' in the year 2003 for protecting the affected families of prisoners. The Bills of Rights are as categorised as follows:

- a. **The right to be kept safe and informed at the time of parent's arrest.** As widely discussed in the previous part of the paper, it is the need of the hour to sensitise police officials by providing suitable training and by formulating a uniformly accepted SOP.
- b. **The right to be heard of children's wishes should be taken into consideration regarding any decisions made concerning their welfare.** Thus, it is necessary to train prison staff and made them informed of the details of children's of prisoners.
- c. **The right to be considered when decisions are made about the child's parent.** This will facilitate the visits made by children of prisoners and will also facilitate family preservation.
- d. **The right to be well cared for of child in parent's absence.** In order to protect those children who are alone and who carry the potential to try to wind up fending for them, the caring clauses provided in the JJ Act must be invoked and subsequently monitored by the high-level committees continuously.
- e. **The right to communicate, see, touch and visit parents, where appropriate.** This right pertains to the electronic and physical visitation of a child with his/her parent. Previously, a discussion about the facilitation of visitations was made with a view of praiseworthy efforts by Maharashtra prison departments. In the similar fashion, other states' prison departments must also provide similar environment to the family members of the prisoners at the time of their visits.
- f. **The right to support the child who gets struggle with its parent's incarceration.** This right is usually protected if both the government and the voluntary organisations support them by providing the basic and essential need of any child.
- g. **The right not to be judged, blamed and labelled because of parent's incarceration.** As noted in the first part of this paper, our society always identifies the children with their parents, and therefore, people more often criticise prisoner's children and even treat them as a societal stigma. Justice Chandrachud while delivering the *Sabrimala Judgment*⁷⁰ gave a wider interpretation to the article 17 of the Constitution inasmuch as he observed that this article creates a negative obligation on every person to not ostracise any society member. More so, this Article can be enforced against both the state and non-state actors, and it not only limits its horizons to the untouchable practices, but also applies to the systemic humiliation, exclusion and subjugation faced by women. Similarly, the ambit of article 17 must also be

⁷⁰ *Indian Young Lawyers Association v. State of Kerala*, 2018 (8) SCJ 609.

increased by way of judicial activism so that it also covers the incident of discriminating the children of prisoners.

h. The right to maintain a lifelong relationship with the incarcerated parent(s).

These Bills of Rights may be treated as a guiding book for other countries. India must also take guidance of these rights while framing any policies and procedures so as to mitigate the trauma and resentment of children of jailed parents. In addition to this, the Government of India must also establish, a planning and advisory committee comprises of representation from prison and correction departments, Ministry of Women and Child Development, Ministry of Youth Affairs, Department of Education, BPRD, NGOs working on this cause, in order to make recommendations on how to increase family bonding for children of incarcerated parents. A somewhat similar step was taken by an American nation-state Oregon which is now considered as a national model for interagency collaboration and innovation.⁷¹ In the year 2008, another US nation-state Hawaii also enacted a legislation⁷² to articulate guiding principles for use by state agencies when dealing with children of incarcerated parents. Similarly, Washington D.C. in 2005⁷³, Virginia in 2007⁷⁴, Tennessee in 2008⁷⁵ were also got motivated to establish a committee to support and make suitable arrangements by incorporating appropriate principles to help the state achieve its goal like encouraging familial contacts between the two, reducing recidivism, and intergenerational incarceration for the children of their jailed parents.

VI. Conclusion

In the conclusion, it is advisable for central and states governments' to start working upon the issues of children of incarcerated parents and devise a formula which imbibes in itself all the entitlements of the children of jailed parents living outside the jail. If governments seem failing in addressing this issue in a reasonable timeframe, the informed and public-spirited citizens may resort to the alternative form of available remedies like approaching the court through Public Interest Litigations. The concept of Public Interest Litigation (PIL) as invented by Bhagwati, J. in 1980s has always come for a rescue of the marginalised

⁷¹ Government of Oregon, "Children of Incarcerated Parents Project, Report to the Oregon Legislature on Senate Bill 133" (December, 2002).

⁷² Hawaii Session Laws Act, 2008, Chapter 7.

⁷³ Washington Laws, 2005, Chapter 403.

⁷⁴ Virginia Acts of Assembly, 2007, Chapter 366.

⁷⁵ Tennessee Publications Acts, House Joint Resolution 116 (2008).

communities of society. PIL is sometimes also termed as the Krishna of BhagwadGita. One of the shloka⁷⁶ of Bhagwad Gita says:

“यदा यदा हि धर्मस्य ग्लानिर्भवति भारत। अभ्युत्थानमधर्मस्य तदाऽऽत्मानं सृजाम्यहम्”

This shlok means that “Whenever there is decline of Dharma, and rise of Adharma, then I body myself forth. For the protection of the good, for the destruction of the wicked, and for the establishment of Dharma I come into being in every age.” Time and again, with the filing of PIL, courts have rendered landmark judgments. Therefore, the time has now come for the activists to take an active interest in helping those children of incarcerated parents who lives in the society and this can be done by way of filing PIL in Supreme Court considering this class of children as its focal point. The division bench of Justice Deepak Gupta and Justice Madan B. Lokur in the recent landmark judgment⁷⁷ held that: “While there may be some other issues specifically concerning children in need of care and protection we leave these issues open for consideration and grant liberty to the learned Amicus to move an appropriate application in this regard.”

This statement of the apex court gives the research scholars and social activist a scope to file application before the court in the interest of children of prisoners who are living in society and are continuously experience trauma. Thus, this paper provides a preliminary framework for those who must deal with this critical policy issue.

⁷⁶ *Bhagavad Gita* Chapter 4, Verse 7-8.

⁷⁷ *Supra* note 30.