

**GOVERNANCE ‘WITHOUT’ AND ‘BEYOND’ THE STATE LAW: A CLASSIC  
ILLUSTRATION OF STRUCTURAL VIOLENCE  
(WITH SPECIAL EMPHASIS ON CHILDREN OF INCARCERATED PARENTS)**

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**ABSTRACT**

Law and violence are at a conundrum with one another. They either work in antagonism or they may function hand in hand. Theoretically, law should have been the solution to violence, wherein, all its associated institutions must have counter-acted on any endless sequence of violence and counter-violence, but strangely and tragically, law in itself has become a perpetual site of violence. Thus it is rightly believed that, “Legal Interpretation takes place in the field of pain and death...[w]herein somebody loses his freedom, his property, his children, even his life”.<sup>1</sup> Often, it is this, paradox, that “Law is the opposite of violence” and “Law is itself a kind of violence”, which characterizes the relationship between law and violence. Law bears an instrumental, structural and ineliminable relation to violence.<sup>2</sup> Thus, violence seems to be structural condition of the law and therefore the question arises; will there be any exit option from such violence? Can it never be overcome but at best only be negotiated? This violence becomes even more traumatic when it is meted by governance structures ‘without’ and ‘beyond’ the law. This paper therefore cites relevant illustrations of such structural violence. One such illustration that the paper discusses in greater detail is that of the State’s unjust attitude towards the innocent children of incarcerated parents.

*Keywords: Governance, Violence, State, Law, Children.*

**I. The Interplay between Law and Governance**

**II. The ‘Structural violence’ that law inflicts**

**III. The Traditional and Non-traditional Models**

**IV. State and its atrocious negligence towards children of incarcerated parents [Special Emphasis]**

**V. Concluding Remarks**

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<sup>1</sup> R. Cover, “Violence and the Word”, in M. Minow, Michael Ryan, et. al. (eds.), *Narrative, Violence, and the Law* 200-253 (Ann Arbor, University of Michigan Press, 1992).

<sup>2</sup> C. Menke, “Law and Violence” 22(1) *Law and Literature* 1-17 (2010).

## I. The Interplay between Law and Governance

GOVERNANCE IS an institutionalized process of social coordination by which different types of actors/entities constantly engage and coordinate in rulemaking and implementation mainly for the purpose of collective good.<sup>3</sup> Governance constitutes not only the structural arrangements but the process as well. Governance can be understood in terms of four functions, namely: decision making, organization, management, and formulation of policies for the same. These are done to serve the interests of individuals, societies, groups, collective entities, associations, corporations, transnational bodies, and human relationships by and large.

Governance includes hierarchical steering by state actors and involvement of non-governmental actors (companies, civil society) in the provision of collective goods through non-hierarchical coordination. This coordination ranges from consultation, cooperation, delegation, and/or co-regulation/ co-production to private self-regulation inside and outside the control of governments.<sup>4</sup>

R.A.W. Rhodes noted that: “There are at least six separate uses of governance: as the minimal state, as corporate governance, as the new public management, as ‘good governance’, as a socio-cybernetic system, and as self-organizing networks.”<sup>5</sup>

Law, on the other hand, is understood as an embodiment of rules, commands and actions based upon reason, for the sustenance and functioning of society. Law may also be defined as a direction that is given to govern or regulate social conduct. The more successful the regulation of social conduct, the more legitimate is the law. Thus, in law there is habitual obedience, generally.

Law is therefore a mechanism of governance. It is a tool to help achieve what governance seeks to establish and maintain: order in society and the collective good. Thus, while examining the

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<sup>3</sup>R Mayntz, “Governance im modernen Staat”, in A. Benz A (ed.), *Governance – Regieren in Komplexen Regelsystemen: Eine Einführung* 65-76 (Verlag für Sozialwissenschaften, 2004).

<sup>4</sup>M. Zürn, “Societal Denationalization and Positive Governance’ in M. Ougaard and R.A. Higgott (eds.), *Towards a Global Polity* 78-104 (Routledge, London, 2002).

<sup>5</sup>R.A.W. Rhodes, “The New Governance: governing without Government’ 44 *Political Studies* 652-667 (1996).

relation between law and governance, one may always be riddled by a number of questions, such as,

- Whether law and governance are two separate and independent phenomena, or is there a similarity between the two? If yes, what is the extent of their overlap?
- Is governance possible without law? Or is law always embedded in governance arrangements?
- Is there any governance that does not follow the constraints of law, i.e., is illegal? What is its consequence?
- Is law a means of governance or is governance perhaps a way of making and obeying law?
- Is there any other mode of governance other than that of law?

The above questions contextualize two models- the traditional and the non-traditional one, which attempt to theorize the relationship between law and governance.

## **II. The ‘Structural violence’ that law inflicts**

There exist discourses around the legitimization of law and there also exists discourses around the critique of the law. The former discourse attempts to justify legal verdicts, even when they are harsh or unfair to some, while the latter discourse suggests that legal verdicts themselves are enforced by exerting or threatening violence, for example the post-sovereign law related to punishments and torture. Thereby saying, that Law is not the means to end violence, but also a way to continue violence, perhaps in an entirely different fashion. Violence might also seem to be the only way by which Law can be respected as the “sword” is fundamentally the only instrument which makes the law binding on people.<sup>6</sup>

Law draws its legitimacy from its ability to overcome or neutralize violence. But critiques do suggest that violence can be found in law’s own foundation. What grounds the normativity of the law, in other words, is what simultaneously denies it its legitimacy. Violence exists not only external to the law, that is, as a means of its enforcement and conservation, but also lies at the core of what the law is, at the ground of its own pre-supposition and legitimation.<sup>7</sup> It is this arbitrary power of law that has made us sympathetic with the victims of legal violence since the 1790s. Law is necessary to legitimize political power and to ensure the democratic character of

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<sup>6</sup> T. Hobbes (ed.), *Leviathan* (MacPherson, Penguin Classics, London, 1982).

<sup>7</sup> M. López, “Law after the Law: Contemporary Approaches to the Paradoxical Relationship between Law and Violence”, 14(2) *The New Centennial Review* 1-10 (2014).

our society. Violence, on the other hand, is frequently aimed to subvert democratic institutions, imposing an authoritarian conception of politics<sup>8</sup>. Any reflection on violence is always also a reflection on justice. Violence can always be critiqued while expounding its relation to law and justice.

Law is seen similar to revenge when a reference to the law cannot prevent it from being experienced as partisan in an exchange of acts of violent retribution<sup>9</sup>. Legal violence uses the general law to render legal judgment and punishment to end violence of revenge.

Notions on violence provide a medium of expression to the socio-legal experiences of people from impoverished communities<sup>10</sup> who are placed at the intersections of law and violence, as they suffer normative pain when their identities are removed, their experiences are unheard, and their history is subdued.<sup>11</sup>

Structural violence takes away the free agency of their individual actors and sees them in light of their social positions, like from their sex, gender, race, class, caste and religion. Law thus promotes and perpetuates structural violence which is a deeply embedded form of violence owing to hierarchical relations within and between societies, and this operates via penetration, stigmatization, marginalization, exploitation, segmentation, and fragmentation.<sup>12</sup>

### III. The Traditional and Non-traditional Models

#### **The Traditional Model: Governance ‘only’ through law**

Traditionalists attempt to answer all the above questions, by advocating a model that gives primacy to law as an important tool of decision making and policy formulation. Law functions

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<sup>8</sup> S. Cotta (ed.), *Why Violence? A Philosophical Interpretation* (University Press of Florida, Gainesville, 1985).

<sup>9</sup> *Supra* note 2 at 1.

<sup>10</sup> R. Cover, “The Bonds of Constitutional Interpretation: Of the Word, the Deed, and the Role” 20 *Ga. L. R.* 815-833 (1986).

<sup>11</sup> A. V. Alfieri, “The Ethics of Violence: Necessity, Excess, and Opposition (Book Review Essay)” 94 *Colum. L. Rev.* 1721 (1994).

<sup>12</sup> Johan Galtung, “Violence, Peace and Peace Research” 6(3) *Journal of Peace Research* 4-5 (1969).

here through the domain of governance. The State functions in ambit of the law and complies with all the restrictions mentioned thereto.

It focuses to test any given law, as an instrument of good governance on the parameters of fairness, accountability, democratic participation, representation, and efficiency. It tests the feasibility of any law on the grounds such as its ability to meet its parent policy objective, its serving of the public interest (if it promises to do any) and to what extent, the constraints, and limitations it carries with it. The model focuses upon the social effects of law and on the mandate for upholding constitutional values. It is a form of public regulation with no active involvement from private bodies, except a mere consultation, cooperation, compliance, participation, and concert.

The model is based on Max Weber's conceptualization of statehood as an "institutionalized authority structure with the capability of hierarchically steering and legitimately controlling the means of violence". It is also based on the black letter of law and the command-and-control theory. The State is the one who makes, implements, and enforces policy decisions for collective good. Thus, this model is centered on the Law and its officials, namely the State, the Parliament, and its representatives, who are the only ones that know the best for their people. This seemed like a colonial mindset wherein only the Law can govern, dictate, administer, and control.

## **The 'Non-traditional' model**

### **a. Governance 'without' the State Law**

From the 'Liberalization, privatization and globalization' era of the 1990s, there has arisen focus upon governance beyond the realm of State, beyond its formally constructed apparatus and outside the scope of law. The governance without a government became the new mode of governance as opposed to conventional or hierarchical top-down, command and control governances.<sup>13</sup> This governance model is based upon the idea of private self-regulation wherein there is a fracturing of power beyond the state actors, without the public law and its functionaries.<sup>14</sup> This model revolves around the idea of governance by the society of itself, about the "societal self-organization and policy-making. Here the private communities make their own constitutions. It is

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<sup>13</sup> J.N. Rosenau, E.O. Czempiel (eds.), *Governance Without Government: Order and Change in World Politics* (Cambridge University Press, Cambridge, 1992).

<sup>14</sup> José E Alvarez, *International Organizations as Law-Makers* 45-64 (Oxford University Press, 2005).

therefore in contrast to the privileged position of the State which is always the theoretical starting point for much discussion of law and governance.<sup>15</sup>

Herein also it is the State made law which is the center of authority<sup>16</sup> and it is the State only which gives formal recognition to such private actors<sup>17</sup>. Anything that they do is a means to create, interpret, apply, and enforce the State law only. They are subordinate to the State and are subject to its regulation.<sup>18</sup> The state may delegate its regulatory power to such private bodies because of the need for an all-inclusive interest representation, pluralism, flexibility and/or expertise. The State may delegate the functions of either rule making, rule enforcement or rule adjudication, to the private bodies in the governance arrangements.

Some of the most prominent governance done by non -state actors are illustrated here:

- Self-regulation of professionals (architects, journalists, medical doctors, lawyers, notaries etc.), by the Bar Council of India, the Medical Council of India, etc.
- Statutory corporations like Oil and Natural Gas Corporation, Life Insurance Corporation, Reserve Bank of India, Airport Authority of India, etc.
- Technical norms and standards, in product safety law, construction law, etc. for example, the quality certificates and sustainability labels issued by Wal-Mart<sup>19</sup> or car safety standards set by garage business associations in agreement with public agencies.
- Customary rules of International Commerce, like Lex Mercatoria etc.
- Internet Domain Names regulated by The Internet Corporation for Assigned Names and Numbers (ICANN).
- Voluntary Agreements, including partnership deeds, rent agreements, agreements between tenants' and landlords' associations in tenancy law, even the United Nations Global Compact, etc.
- Voluntary code of ethics by the Internet and the Mobile Association of India (IAMAI).

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<sup>15</sup> Larry Catá Backer, "Reifying Law: Understanding Law Beyond the State" 26 *PSILR* 521 (2008).

<sup>16</sup> Larry Catá Backer, "Theocratic Constitutionalism: An Introduction to a New Legal Global Ordering" 16(1) *Indiana Journal of Global Legal Studies* 85-172 (2009).

<sup>17</sup> J. Ruggie, "International Regimes, Transactions, and Change: Embedded Liberalism and the Postwar Economic Order" 36 *IO* 379-415 (1982).

<sup>18</sup> Jennifer L. Johnson, "Public Private-Public Convergence: How the Private Actor Can Shape Public International Labor Standards" 24 *BJIL* 291 (1998).

<sup>19</sup> Larry Catá Backer, On the Autonomous Regulatory Authority of Corporations in Global Private Markets, 'Law at the End of the Day', available at: <http://lcbackerblog.blogspot.com/2011/03/onthe-autonomousregulatory-authority.html> (last visited on April 29, 2023).

- Power given to police to apprehend, search and seizure and sanction public behaviour, without warrant on a ‘mere suspicion’ and on ‘good faith’<sup>20</sup>.
- Arrests by private persons<sup>21</sup>.
- Customs that regulate what we eat or the choice of clothes.
- Practices regulating tribal communities or the indigenous communities including traditional knowledge.
- Self-regulation of religious communities including maintenance of trusts.

It is because of such governance arrangements that non-State actors exert violence. Like in the case of standard contracts, where the parties stand at an unequal bargaining position and there exists unreasonableness of contractual terms, or where bodies such as the Board of Control for Cricket in India (BCCI) violate the principles of natural justice.<sup>22</sup> The Khap Panchayats also misuse their authority and operate outside the sphere of Law and without the backing of the State.<sup>23</sup> Marital rape is also one such example of structural violence that happens in the private sphere and the State till date has not been able to regulate, curb and prevent it.

But since the State law is paramount in this model, the State will interfere, when the delegation of the State power to a private entity is illegal or when the private body has exercised its conferred power improperly and caused *public* or *private* harm, especially to those, who did not consent for such harm. Like in the case of *Nikhil Soni v. Union of India*<sup>24</sup>, the court interfered with the functioning of a Jain Shwetambar Sangha, Tonk Road, Jaipur and held that Santhara is not an essential religious practice for Jains and it is violative of articles 25, 26 and 29 of the Constitution and amounts to ‘suicide’ punishable under section 309 of the IPC.

### **b. Governance ‘beyond’ the State Law**

The State becomes an absolutist in this model and operates in the outer spaces of Law. The State either functions without a sound legal basis (autocratic illegality), or it avertedly misuses/abuses

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<sup>20</sup> The Karnataka Prevention of Slaughter and Preservation of Cattle Act, 2020 (Act 1 of 2021), ss 8, 17.

<sup>21</sup> The Code of Criminal Procedure, 1973 (Act 2 of 1974), s. 43.

<sup>22</sup> (2016) 8 SCC 535.

<sup>23</sup> *Shakti Vahini v. Union of India*, (2018) 7 SCC 192.

<sup>24</sup> 2015 Cri LJ 4951.

the law or acts in excess of the powers bestowed upon it. The State wields undue and unruly power over powerless subjects to fulfill its own sadistic urge of being the most Supreme. As they find it a puerile excuse to indulge in rampant abuse of the laws and the powers vested in them. This abuse is destined to happen easily because most of the laws were framed in the colonial era with some 'greyness', with an intention of not giving any safeguards to its citizens so that the power of the State is indefeasible and unchallenged.

The State enjoys absolute control on the pretext that they were 'civilizing' their subjects, and cared the most for its subject and thus cannot do any wrong or would not have any ulterior motive. It justifies its governance methods by the plea of sovereignty immunity, based on old feudalistic notions of justice, namely the 'King can do no wrong'.<sup>25</sup> The State responds to the slightest challenge of its power to the extent of curbing dissent and emasculating the coveted fundamental rights of its citizens.

The most common illustrations of this model are as follows:

- Use of ordinances: It is a known phenomenon that Ordinance should be used in a limited manner and in exigencies, but in India it has become a tool of colourable legislation by which legislature does what it otherwise cannot do under the Constitutional scheme<sup>26</sup> or illegally continues the ordinance even after the expiry of the given period<sup>27</sup>.
- Judicial activism and overreach: There is a usurpation of the principle of separation of powers with the judicial intervention into the domains of the legislature and the executive.<sup>28</sup>
- Bye-passing the sanctified 'Due Process': Take for instance, the preventive detention laws, where there is a presumption of guilt rather than the most celebrated notion of 'presumption of innocence'.<sup>29</sup> The same is there in section 12<sup>30</sup> which reverses this burden of proof. Section 8<sup>31</sup> contradicts the principle of "protection from intrusive observation" within the domain of right to privacy. Intrusion can be justified on a mere suspicion which is subjective and vague. Even section 17 provides immunity to any person *acting in good*

<sup>25</sup> *State of Rajasthan v. Mst Vidhyawati*, (1962) Supp. 2 SCR 989.

<sup>26</sup> Farmers' Produce Trade and Commerce (Promotion and Facilitation) Ordinance, 2020; Banking Regulation (Amendment) Ordinance, 2020, etc.

<sup>27</sup> *Krishna Kumar Singh v. State of Bihar*, (2017) 3 SCC 1.

<sup>28</sup> Striking down NJAC Bill and the 99th Constitutional Amendment.

<sup>29</sup> National Security Act, 1980 (Act 65 of 1980), s. 3.

<sup>30</sup> The Uttar Pradesh Prohibition of Unlawful Conversion of Religion Act, 2021 (Act 3 of 2021).

<sup>31</sup> *Ibid.*



*faith* to prevent cow slaughter. What the good faith clause does is, that it gives legitimacy and authority to individuals and organizations to intimidate people and question these personal choices.<sup>32</sup> Various securities laws create ‘status offences’, such that once a group is banned, membership in and of itself constitutes a crime. For example, under the Unlawful Activities Prevention Act, membership in a terrorist organization or gang that is “involved in” a terrorist act can attract life imprisonment, regardless of whether the individual member was involved in any way with the terrorist act.<sup>33</sup>

- Encroachments of the right to privacy, through warrantless wiretapping<sup>34</sup>, or through the Surveillance Society created by the new Digital Protection of Person Data Bill, 2022, which fails to insert the additional safeguards of, “legitimate purpose” and, “proportionality” in the scope of non-consensual processing of personal data.
- Abuse of police power: Unscrupulous raids on the hotels under the pretext of “secret intelligence” about the presence of some mysterious terrorists or criminals, like in the case of Manish Gupta<sup>35</sup> or the so-called ‘domiciliary visits’ to the houses of criminals in the name of ‘surveillance’<sup>36 37</sup>. The infamous and unjustified police encounters such as that of Vikas Dubey in Uttar Pradesh or the four accused in the Hyderabad gang rape case<sup>38</sup> puts intense indignation over the functioning of police, the legitimacy of the use of force by them and in turn the credibility of rule of law.<sup>39</sup>
- Ban on Peaceful assemblies under the garb of article 19(1)(b) like the case of a peaceful protest denied in 2019 at Red Fort in Delhi against the Citizenship Amendment Act (CAA), 2019 without any reason or justification or under section 144, Code of Criminal Procedure, at the drop of the hat.<sup>40</sup>
- Sedition Law: Even holding a meeting or organizing and conducting a procession or holding an opinion that bred hatred towards the government, was considered sedition

<sup>32</sup> *Tehseen Poonawala v. Union of India* (2018) 9 SCC 501.

<sup>33</sup> Unlawful Activities (Prevention) Act, 1967 (Act No. 37 of 1967), s. 10.

<sup>34</sup> *People’s Union for Civil Liberties (PUCL) v. Union of India* (1997) 1 SCC 301.

<sup>35</sup> NC Asthana, Police Abuse the Laws Because the Laws Are Designed to be Abused *available at*: <https://thewire.in/government/police-abuse-the-laws-because-the-laws-are-designed-to-be-abused> (last visited on February 24, 2023).

<sup>36</sup> *Kharak Singh v. State of U. P.*, (1964) 1 SCR 332

<sup>37</sup> *Mohammed Shafi v. State of M.P.*, 1993 CriLJ 505.

<sup>38</sup> Alok Ranjan, Vikas Dubey, Hyderabad rape-murder: A look at stunning encounters in recent years *available at*: <https://www.indiatoday.in/india/story/vikas-dubey-hyderabad-rape-murder-a-look-at-stunning-encounters-in-recent-years-2352046-2023-03-27> (last visited on April 24, 2023).

<sup>39</sup> *PUCL v. State of Maharashtra*, 2014 10 SCC 635.

<sup>40</sup> Prabhaskar K Dutta, Violent protests against Citizenship Amendment Act: Who will pay for damages? *available at*: <https://www.indiatoday.in/india/story/violent-protests-citizenship-amendment-act-cao-section-144-crpc-1629779-2019-12-19> (last visited on February 24, 2023).

visible from the fact 96% of sedition cases filed till date were against 405 persons for criticizing politicians and governments and were registered after 2014.<sup>41</sup>

- Prohibition orders including Internet Ban: In 2019 and 2020 alone, Internet and allied services remained suspended in India for more than 13,000 hours, with as many as 164 instances of shutdowns being enforced, even without following the provisions under Indian Telegraph Act of 1885 and the Information Technology Act, 2000. Such an abuse was not even remedied by the courts.<sup>42</sup>

#### **IV. State and its atrocious negligence towards children of incarcerated parents**

##### **[Special Emphasis]**

Having a parent behind the bar is a prominent destabilizing event in a child's life for it can negatively hamper every aspect of his development; be it emotional, psychological, physical or educational. This may, nevertheless, be an obvious conclusion to infer, yet no concrete steps have been taken so far by the State to properly deconstruct the issue of effects of separation on the minds of the children of incarcerated parents and help further in the cause. When a family separates or is disturbed on account of death or illness of a particular member, it still does bring other members closer and a child in such an environment may be reared and looked upon in sympathy. But, where there is a loss of a family member because of incarceration, there is not only an absence of elicit sympathy from others in his family or social circle, even their child is perpetually ridiculed and is stigmatized.

For a child to feel safe and sound, it is thus his/her constitutional and more importantly an inalienable human right to have the chance of being able to establish a healthy attachment to their family and it is this loss of a right, that is a parent's greatest fear upon incarceration. Research has shown that infants and toddlers who do not develop secure attachments with their parents produce elevated levels of Cortisol (a stress hormone), which may alter the developing brain circuits and cause long term harm.<sup>43</sup> They are also at greater risk for delinquency, substance abuse and depression later in life. Having an incarcerated parent can traumatize a child in a same manner as

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<sup>41</sup> Kapil Sibal, Indiscriminate application of sedition law available at: <https://www.newindianexpress.com/opinions/2021/feb/26/indiscriminateapplication-of-sedition-law-2269140.html> (last visited on February 24, 2023).

<sup>42</sup> *Anuradha Bhasin v. Union of India*, AIR 2020 SC 1308.

<sup>43</sup> ABA Centre on Children and the Law Practice and Policy Brief, available at: [http://www2.americanbar.org/child\\_migrated/PublicDocuments/policy\\_brief2.pdf](http://www2.americanbar.org/child_migrated/PublicDocuments/policy_brief2.pdf) (last visited on March 23, 2021).

domestic abuse and violence does.<sup>44</sup> The incarceration of parent sets in an ugly cycle into motion ultimately harming the child. Scholars have termed such children as the *collateral damage*<sup>45</sup> or the *invisible victims*<sup>46</sup>. Apart from the mental health issues, children may have to take on more responsible and adult driven roles due to parental imprisonment and lack of guardian support. They also may have to dislocate because of their parent's imprisonment. This would result into a loss of innocence and deprivation from the thrills of childhood for such children.

Nevertheless these adverse impacts are either largely ignored or not duly acknowledged by the Law or the State in criminal justice systems all across the world, many of which even miserably fail in even recording any information about these prisoners' children, or even if there are any.<sup>47</sup> Any effort that has been made towards recognising this issue has not been because of any policy or a legal framework, rather, because of the diligent efforts of a group of individuals or by private bodies such as NGOs.

More than eighteen hundred children of the age bracket ranging from one month to six years languish mercilessly in Indian prisons and are growing up in the most horrific circumstances with their imprisoned mothers.<sup>48</sup> These children who should have deserved special treatment owing to their vulnerability, have instead been regarded on par with the convict parents.<sup>49</sup> Many of them have been brought up even without getting the attention that they needed, and thus have suffered a loss of health and of mental stability owing to the fact that they are living in isolation from the outside world. These children are not being sent to schools or to any educational institutions for their growth and development and thus are being heavily deprived of social, physical, and emotional security, not only because of the criminality of their parents but also by State's actions in not preserving their interests.

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<sup>44</sup> Amy B. Cyphert, Prisoners of Fate, "The Challenges of Creating Change for Children of Incarcerated Parents" 77 *MLR* 385 (2018).

<sup>45</sup> Dorothy E. Roberts, "Criminal Justice and Black Families: The Collateral Damage of Over-Enforcement" 34 *UCDLR* 1005-1015 (2001).

<sup>46</sup> Michal Gilad, Tal Gat, "U.S. v. My Mommy: Evaluation of Prison Nurseries as a Solution for Children of Incarcerated Women" 37 *NYUR* 371- 372 (2013).

<sup>47</sup> Quaker United Nations Office, "Report on Impact of parental imprisonment on children" (April 2007).

<sup>48</sup> Rajesh Trichur Venkiteswaran, India: guiltless children in prison" *The Interpreter* available at: <https://www.lowyinstitute.org/the-interpreter/india-guiltless-children-in-prison> (last visited on March 25, 2021).

<sup>49</sup> *Ibid.*

The policy guidelines set out in a judgement of the Supreme Court<sup>50</sup> make the obligations and duties of concerned authorities clear for such children.<sup>51</sup> But sadly, the reality is quite different, for there is hardly any provision for baby food or baby care items in jails, even the convict mothers are sceptical of sending their kids to shady nurseries and other facilities.”<sup>52</sup> Moreover, the National Plan of Action, 1992 by the Department of Women and Child Welfare, has till date not recognized and placed this particular group of vulnerable children in the category of “*Children in Especially Difficult Circumstances*”.<sup>53</sup> The question largely remains as to who is responsible for both the predicament and well-being of the children of incarcerated parents? Because if it is the State, it has failed miserably and proven that even Law can become a site of violence, where along with the guilty (parent), you do punish the innocent, *i.e.*, their children.

### V. Concluding Remarks

There exists troubling yet intriguing jurisprudential turmoil in ways that law denies or conceals the infliction of violence by legal agents upon legal subjects. This linkage between the two is visible in “the gun fired by the police, the sentence pronounced by the judge, the execution carried out behind prison walls”.<sup>54</sup> Both the physical and interpretive acts of these agents help shape the law's "violent constitution". The enactment, affirmation, and enforcement of the logic of a legal order, is thus an immediate manifestation of violence.

Violence which complies with the norms of any regime is presumed to be righteous, for instance, death penalty. And any violence which opposes the normative is construed illegitimate, for example mob lynching, communal riots, labour riots, race riots, patriarchy, domestic abuse, rape, and female infanticide or for that matter, growing poverty, the callous and negligent attitude to

<sup>50</sup> *R.D. Upadhyay v. State of A.P.*, 2006 (4) SCALE 336.

<sup>51</sup> Some of the guidelines are:

(a) Children below three years shall be allowed crèche and those between three and six years shall be looked after in the nursery. The prison authorities shall preferably run the said crèche and nursery outside the prison premises;  
 (b) authorities should ensure facilities for the proper biological, psychological, and social growth of children;  
 (c) the cases of female prisoners with children should be expedited.

<sup>52</sup> Asian Human Rights Commission, INDIA: Innocent Children Forced to Live in Prison with Convict *available at*: <http://www.humanrights.asia/news/ahrc-news/AHRC-STM-006-2014> (last visited on March 25, 2021).

<sup>53</sup> Prayas, “A Field action project of TISS on Forced Separation: Children of imprisoned mothers” (2002).

<sup>54</sup> A. Sarat and T. Kearns, (1992). “A Journey Through Forgetting: Toward a jurisprudence of Violence”, in A. Sarat and T. Kearns. (eds.). *The Fate of Law* 209-73 (University of Michigan Press, 1992).

the children of incarcerated parents and all other forms of 'invisible violence'. Thus, the Law and its agents need to stop exerting all forms of structural violences and must in all capacities and all given scenarios, protect us from any form of violence, meted to us, for the Law is our shield and not the sword.