

RIGHTS OF CHILDREN OF INCARCERATED PARENTS: AN ANALYTICAL STUDY

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ABSTRACT

The recognition of the inherent dignity of the children is the foundation of freedom and justice which is protected by the rule of law. The Protection of Human of Human Rights Act, 1993 defines Human rights as the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International covenants and enforceable by the Courts in India. The Universal Declaration of Human Rights provides that motherhood and childhood are entitled to special care and protection which includes the right to a standard of living adequate for the health and well-being. It also provides right to free education at least in the elementary and fundamental stage and the parents shall have choice of the kind of education given to the children. We are welfare State, having constitutional obligation to provide early childhood care and education for all children until they complete the age of six years. The fundamental rights provide for right to life and personal liberty to such children. There are certain rights of the arrestee as well as convicted person which have been, well recognized as a fundamental right. They have right to take care of their children while under incarceration and they shall not be deprived of parenting right of their children. The children of incarcerated persons shall enjoy all human rights and other rights which are enforceable by courts in India. They shall be treated with equal social protection like other children. The children of incarcerated parents are being neglected and victimized. Our legal framework confers rights on such children to be protected from such neglect and victimization which is required to be enforced in true letter and spirit. In this research paper the author's scheme is to analyze human rights, constitutional and other rights of children of incarcerated parents which are guaranteed

by the Constitution or embodied in the International covenants as well as in various statutes and are enforceable by courts in India.

INTRODUCTION

Children are the future human resource of any country. They must be nurtured with great care and precision. They must be nourished, educated and cared by best available resources as far as possible. No one care children in best manner than their parents. Parents are the role models for the children as they nurture their children through best possible means and resources. *“Parents are the ultimate role models for children. Every word, movement and action have an effect. No other person or outside force has a greater influence on a child than parent.”*ⁱ The commission of crime is breach of peace and stability of society and the State is under legal obligation to initiate the criminal procedure against the suspects or accused and consequently, they may be incarcerated. By commission of crime individual or the society at large may be ‘apparent or visible victim’ but children of incarcerated children are ‘non-apparent or invisible victims’ of the crime, as they have been deprived of the parental care. If the State is under legal obligation to redress the breach of peace and stability of the society due to commission of crime at the same time the State has constitutional obligation to protect the interest of children. The State has to fulfil the international commitments made in international conventions and declarations. International political community has recognized the inherent dignity and equal and inalienable human rights of the children and also made proclamation of entitlement of the children’s special care and assistance in family as well as in the society.ⁱⁱ In order to fulfill the constitutional obligation as well international commitments, the government of India has notifiedⁱⁱⁱ National Charter for Children, 2003 containing a resolution with *“intent to secure for every child its inherent right to be a child and enjoy a healthy and happy childhood, to address the root causes that negate the healthy growth and development of children, and to awaken the conscience of the community in the wider societal context to protect children from all forms of abuse, while strengthening the family, society and the Nation”*.^{iv} The root causes that negate the healthy growth and development of children is neglect of the children by the family, society and the Nation as well as non- implementation of law and policies relating to addressing the

cause of children. In India as per estimated figure approximately, more than 2.5 Lakh children have been deprived of their parental care due to incarceration of the parents. There is infringement of human rights as well as other rights of the children of the incarcerated parents. In this paper we have to identify and analyze such rights which have been recognized by various international and municipal laws on children.

UNIVERSAL DECLARATION OF HUMAN RIGHTS, 1948

Human beings are natural creature. Human rights are inherent and inalienable rights by virtue of human being itself. The existence of human rights is not dependent upon the existence of community, society and the State. When man was in state of nature, he was in the state of absolute liberty in respect of enjoyment of his own physical potential and natural resources in order to develop his full personality. Human rights are natural. The community, society and the State simply recognized such rights by giving full respect to the inherent dignity and inherent and inalienable rights of all members of human community. The children of incarcerated person are equally entitled to enjoy the human rights. The international community has recognized the human rights of children through various declarations and conventions. The children of incarcerated parents as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation.^v The children are also entitled to economic, social and cultural rights vital for their augustness and free development of their persona.^{vi} Children of incarcerated parents have the right to a quality of living suitable for the health and of his family, including all means for subsistence of life.^{vii} Childhood are entitled to particular care and support and all children whether born out of lawful wedlock or not are entitled to the enjoyment of same social protection.^{viii} Children of incarcerated parents have the right to education which should be free at least in the rudimentary stages and should be aimed to the full evolution of human persona.^{ix} The parents of incarcerated parents have right to choose the form of education provided to their children.^x The children of incarcerated parents are entitled to enjoy all the aforesaid human right under Universal Declarations.

CONVENTION ON THE RIGHTS OF THE CHILD, 1989

By recognizing the declaration made by United Nations under Universal Declaration of Human Rights a Convention on the rights of the Child was adopted by General assembly of the United Nations in November 1989. For the purpose of this convention a child connote all human being below the age of eighteen years unless otherwise provided in municipal law.^{xi} The State Parties to the convention shall not discriminate children on the basis of sex, colour, sex language, religion political or other opinion, national ethnic or social origin etc. for availing the rights incorporated in the convention.^{xii} The best interest of the children shall be given primary consideration by such of the institutions of state responsible for care or protection of children and the institutions shall maintain established standards.^{xiii} The State parties to the convention are under obligation to take administrative, legislative and other suitable steps which would facilitate the execution of the rights of the children.^{xiv} The Children are entitled to be live in company of their parents and the arrangements shall be made by the State that the children of incarcerated parents must be in regular contact with their parents.^{xv} The children of incarcerated person are entitled to the right to privacy and the State shall protect them from illegal assault which may injure their reputation.^{xvi} The parents who are incarcerated are under obligation to share liability of their children relating bringing up of their children and the State shall provide necessary assistance in this regard.^{xvii} The children of incarcerated parents are entitled to be protected against violence, abuse and neglect and governments must do all the needful arrangements for their protection.^{xviii} The children of the incarcerated parents are entitled to seek remarkable protection and help from the government of the State.^{xix} The children of incarcerated parents are entitled to best achievable health and governments of the State parties are under obligation to do all needful for the same.^{xx} The children of incarcerated person are entitled to attain free education up to elementary level and compulsory education for remaining education and the richer State must provide necessary assistance for the same.^{xxi} The children of the incarcerated parents are entitled seek protection from the State against all firm of exploitation and government of the concerned state is bound to protect such children.^{xxii}

HUMAN RIGHTS AND OTHER RIGHTS IN INDIA

Human rights are the rights relating to life, liberty, equality and dignity of the individual (including the same for children of incarcerated parents) which are guaranteed by the Indian Constitution or provided under International conventions and enforceable by courts in India.^{xxiii}

Human rights of the children of incarcerated parents are supported by very important attributes of the Human rights Jurisprudence. These are: Right to life and Personal Liberty, Equality before Law or Equal Protection of Law and Right to dignity. These rights are guaranteed under part III of the Constitution related with Fundamental Rights. No children of incarcerated parent shall be deprived of right to life and personal liberty except according to procedure established by law.^{xxiv} The State shall not deny any children of incarcerated person equality before the law or the equal protection of laws within the territory of India.^{xxv} Right to dignity embraces the wider connotation means right to live human dignity and all that goes along with it are: the bare necessity of life such as adequate nutrition, clothing and shelter over their head.^{xxvi} Right to life does not imply merely an animal existence but something having widest possible amplitude. It includes the protection of health and strength of the children of incarcerated parents and all those rights which are essential for exploring the full potential of dignified life. The right to live with human dignity means and includes within its ambit all the facets of human civilization which makes the life worth living.^{xxvii} The children of incarcerated parents are entitled to all those rights which are essential for a dignified life and the State is under bounden duty to honour such rights. The Supreme Court and High Courts are empowered under the Constitution to enforce the aforesaid rights.

RIGHTS OF CHILDREN UNDER CONSTITUTION OF INDIA

The children of incarcerated parents are entitled to be protected under the Constitution of India. These may be summarized as follows. Under Article 15(3), there is state enabling provision and by virtue of its state may make special provisions for children. According to Article 21A, the state shall provide free and compulsory education to all children who are within the age of six to fourteen years. According to Article 24, the State shall protect the children against

exploitation by ensuring that no child below the age of 14 years shall be employed to work in a factory, mine or in other hazardous activities. According to Article 39(e), the Constitution directs the State to ensure that tender age of the children should not be abused and that they are not forced due to economic necessity, to engage themselves in the avocations, which may not be suited to their age and strength. According to Article 39(f), the State is directed to ensure that children are given opportunities and facilities to develop in healthy manner. Article 39(e) and (f) together directs the State to direct its policy towards securing that childhood and youth are protected against exploitation and against moral and material abandonment. In short, we can say that the State shall direct its policy towards safeguarding and protecting the interest and welfare of the children. According to Article 45, the state is directed to provide for early childhood care and education for all children until they complete the age of six years. Article 51A cast duty on every parent to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years and thereby, children of incarcerated parents derive right to seek opportunities for education.

NATIONAL CHARTER FOR CHILDREN, 2003

In a view to restate its commitment to the cause of the children in order to see that no child should continue to exist hungry, illiterate or sick, the Government of India adopted the National Charter for Children, 2003, hereinafter referred as charter.^{xxviii} The salient features of the charter may be summarized as follows:

1. There are provisions regarding protection of survival, life and liberty of the children. The liability to protect the aforesaid lies with the State and community both. The State as well as community should take appropriate measures to address the issue of infanticide and foeticide, in particular of girl child.^{xxix}
2. There are provisions regarding promotion of high standards of health and nutrition of the children. The State shall take measures for immunization and prevention of micronutrient deficiencies, primary health facilities to all children below poverty line,

pre-natal and post-natal care for mothers, mental health of children, provision for safe drinking water, environmental sanitation and hygiene etc.^{xxx}

3. There are provisions regarding assurance of basic minimum needs and security to the children. The State should in cooperation with community ensure social security consisting of infrastructural and material support, in particular for abandoned and street children with an objective to develop full faculties of the children.^{xxxii}
4. There are provisions regarding early childhood care for survival, growth and development of children. The State in cooperation with community should promote programmes in every village where infants and children of working mother may be cared properly, in particular the children of marginalized sections of society.^{xxxiii}
5. There are provisions regarding free and compulsory Primary education to the children and protection from economic exploitation and all forms of abuse against children.^{xxxiii}

These provisions of the charter are the bases on which the children of the incarcerated parents are entitled to be get redressed against victimization due to neglect and social insecurity.

SUPREME COURT GUIDELINES FOR WELFARE OF CHILDREN WHO ARE IN JAIL

The Supreme Court of India in *R. D. Upadhyay v. State of Andhra Pradesh*^{xxxiv} issued certain directions in the form of guidelines, for the development of children, who are in jail accompanying their convicted or undertrial mothers due to tender age of child, which may be summarized as follows:

1. The children in jail accompanying their mother shall not be treated as an undertrial or convict. They are entitled to all basic human needs like food, shelter, clothing, education etc.
2. The convicted or undertrial women, who are pregnant, shall be provided with all basic facilities for child delivery and also for pre-natal and post- natal caring.

3. There shall be proper arrangement for regular medical examination of the convicted or undertrial women, who are suspected to be pregnant in the jail by the female doctor of the district hospital and detail report stating the duration of pregnancy, possible date of delivery etc. shall be reported to the Inspector General of Prison. Such prisoner may be temporarily released on parole for enabling her to have her delivery outside the prison.
4. If any child is born in the prison, in the birth records of the child, the place of birth should be the name of the locality where prison is situated but not to mention that he/she is born in the prison.
5. The female prisoner shall not be allowed to accompany her child who has completed the age of six years. Such child shall be under care and protection of any surrogate or institution as per wishes of the mother of the child.
6. There shall be separate arrangement in jail for nutritional foods to such children on permanent basis whose mothers are imprisoned.
7. Such children shall be regularly examined by the lady medical officer of the jail for ensuring their good health and vaccination shall also be done on regular basis.
8. If the mother of such child is sick then alternative arrangement shall be made for care and protection of the child.
9. The children of prisoner shall be entitled to have regular visit in the jail for meeting with their parents.
10. The children of the female prisoners shall be entitled to educational facilities and crèches while their prisoner mother is under work.

CONCLUSION AND SUGGESTIONS

The children are the future of our country. The children of the incarcerated parents must be protected from all forms of victimization and neglect. We have plethora of laws as well as policies both nationally and internationally, for the protection of the interest of the children of the incarcerated parents, only requirement is to have effective enforcement and implementation of the aforesaid laws and policies. The human rights and other rights of the children of incarcerated parents should be enforced in true letter and spirit. The children of the incarcerated

parents have not committed any offence and they are not sinister. It would be great injustice against those children whose parents are under trial prisoners and may be acquitted. In case of conviction also, the children of the incarcerated are innocent and shall not be victimized under any circumstances. We must pledge to support the cause of the children of incarcerated parents. We shall make a legal, social, political and economic system by which justice may be done in favour of the children of incarcerated parents, by enforcement of human rights and other rights of such children.

ENDNOTES

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- ⁱ Bob Keeshan, an American Entertainer (1927-2004); <https://www.brainyquote.com>.
- ⁱⁱ Preamble of the UN Convention on the Rights of the child, 1989.
- ⁱⁱⁱ Published in the Extraordinary Gazette of India, Part-I, Section-, NO. F. 6-15/98CW, Government of India, Ministry of Human Resource Development, Department of Women and Child Development, New Delhi, the 9th February, 2004.
- ^{iv} Preamble to the National Charter for Children, 2003.
- ^v Universal Declaration of Human Rights, 1948; Article 22.
- ^{vi} Ibid.
- ^{vii} Ibid. Article 25.
- ^{viii} Ibid.
- ^{ix} Ibid. Article 26.
- ^x Ibid.
- ^{xi} Convention on the Rights of Child, 1989; Article 1.
- ^{xii} Ibid. Article 2.
- ^{xiii} Ibid. Article 3.
- ^{xiv} Ibid. Article 4.
- ^{xv} Ibid. Article 9.
- ^{xvi} Ibid. Article 16.
- ^{xvii} Ibid. Article 18.
- ^{xviii} Ibid. Article 19.
- ^{xix} Ibid. Article 20.
- ^{xx} Ibid. Article 24.
- ^{xxi} Ibid. Article 28.
- ^{xxii} Ibid. Article 36.
- ^{xxiii} The Protection of Human Rights Act, 1993, No. 10, Act of Parliament, 1994 (India), Section 2 (d).
- ^{xxiv} INDIA CONST. art. 21.
- ^{xxv} Ibid. art. 14.
- ^{xxvi} *Francis Coralie v. Delhi*, AIR 1981 SC 746.
- ^{xxvii} *CERC V. Union of India* AIR 1995 SC 922.
- ^{xxviii} *Supra* note 3.
- ^{xxix} National Charter for Children, 2003, Article 1.
- ^{xxx} Ibid. Article 2 & 3.
- ^{xxxi} Ibid. Article 4.
- ^{xxxii} Ibid. Article 6.
- ^{xxxiii} Ibid. Article 8, 9 & 10.

xxxiv (1996) 3 SCC 422.

