

LEGAL PROTECTION OF CHILDREN OF INCARCERATED PARENTS- A MODERN DAY NECESSITY

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ABSTRACT

Children of imprisoned parents are often considered as forgotten children and ignored victims of justice (Joan P., 20015). In India, children younger than 6 years are often brought to remain with mother inside the prison custody (Robertson O., 2008).According to Greenfield and Snell,approximately 7 in 10 women under correctional sanction in India have a child who is under the age of 18.These vulnerable children face tremendous difficulties and special needs demand attention. Therefore, in the present study, the authors have attempted to explore the phenomenon of parental incarceration and its impact on children of incarcerated parents in the light of the legal provisions made for protection of such children; and to devise legal solutions towards meeting the needs of these children and their families.The authors have used a doctrinal method of research and utilized material from secondary resources. The article traversesthe conceptualization of the issue, identifies the legal and social challenges involved and delves into a comparative study of the legal provisions made for children of incarcerated parents in various countries of the world, including Australia, Canada, China, England, France, Japan, Singapore, Sweden, and Switzerland. The article then orients itself at the legal provisions present in India for protection of such children. A constitutional perspective is also taken on the issue and exigency for a separate legislation for the protection of children of incarcerated parents in India is proposed. Certain provisions of the Juvenile Justice Act, 2015 are also proposed to be extended to such children. The ultimate goal is to reorient the approach of the legal justice system towards the families of incarcerated persons.

I. INTRODUCTION

Children of imprisoned parents are often considered as forgotten children and ignored victims of justice.¹ When a loved one is sentenced to prison, the emotional turmoil is difficult for everyone to handle. Perhaps those who are unintentional victims of crime – ‘children of incarcerated parents’, feel the heaviest burden.² A jail can never provide a family environment, which every child very much deserves.³ Therefore, children whose parents have been imprisoned (incarcerated) face unique difficulties.⁴

In India, children younger than 6 years are often brought to remain with mother inside the prison custody.⁵ According to Greenfield and Snell, approximately 7 in 10 women under correctional sanction in India have a child who is under the age of 18.⁶ When a woman is imprisoned, in the absence of better solutions for the care of their children, women also prefer that their children remain with them in custody.⁷ According to the National Crime Records Bureau’s Prison Statistics India Snapshots – 2012, 1,394 existing prisons housed 385,135 inmates in the country. There were a total of 344 women convicts with their 382 children and 1,226 women awaiting trial with their 1,397 children lodged in various prisons in the country.⁸ These vulnerable children face unique difficulties, and their growing numbers and special needs demand attention⁹.

The innocent children are living under the vulnerable circumstances of prison that might lead to future development of low self-esteem and problem behavior. Children are not only deprived of recreational facilities, and affection of father/ family members but also exposed to criminogenic influences of other prison inmates (as reflected in their abusive language and frequent fights) making them vulnerable to future development of problem behavior. There is no systematic way

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¹ Petersilia, Joan. *From Cell to Society: Who Is Returning Home?* In *Prisoner Reentry and Crime in America*, edited by Jeremy Travis and Christy Visser. New York, Cambridge University Press; 2005.

² E. Moseley. *Incarcerated- Children of Parents in Prison Impacted*, www.tdcj.state.tx.us, (20 Oct 2015).

³ Sarkar S. & Gupta S. *Life of Children in Prison: The Innocent Victims of Mother’s Imprisonment*, IOSR Journal of Nursing and Health Science; 2015

⁴ Simmons C.W. *Children of Incarcerated Parents*, California State Library; 2000

⁵ Oliver Robertson. *Children Imprisoned by Circumstance*. Quaker United Nations Office, Human Rights & Refugees Publications; 2008

⁶ Greenfield, Lawrence A., and Tracy L. Snell. *Bureau of Justice Statistics Special Report: Women Offenders*. Department of Justice, Office of Justice Programs. Washington, D.C: U.S. 1999.

⁷ Oliver Robertson. *Children Imprisoned by Circumstance*. Quaker United Nations Office, Human Rights & Refugees Publications. 2008.

⁸ National Crime Records Bureau, *Prison Statistics India – 2012: Snapshots*, (June 2012).

⁹ Sarkar S. & Gupta S. *Life of Children in Prison: The Innocent Victims of Mother’s Imprisonment*, IOSR Journal of Nursing and Health Science; 2015

of documenting the number of children with a parent in prison, let alone of confirming the accuracy of these figures. It is not required that prisoners release this type of information, and as of yet, there has been no attempt of direct measurement. Also, imprisoning parents is more likely to compound, than to mitigate, pre-existing family problems.¹⁰

As the country's most basic support for vulnerable children, the child welfare system must begin to address the needs of children with incarcerated parents in a thoughtful, systematic way with recognition of their legal rights. This is of immense relevance in the Indian scenario where the rights of the child have always been given priority¹¹.

Over the last decade, efforts have also escalated at the international level to create policies specifically geared towards addressing the situation of the young children of incarcerated parents¹². The UN Convention on the Rights of the Child (CRC) quotes in its Preamble the Declaration of the Rights of the Child, which stated, *“the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.”* The Preamble further recognizes *“that, in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration.”* Therefore, to identify the unique challenges involved, study the legal rights available to the children and devise solutions to the existing issues in this regard, the researchers have decided to choose this topic.

II. CONCEPTUALISATION OF THE ISSUE

There is a wide body of literature reviewing the emotional and psychological trauma faced by children of incarcerated parents. It also studies the rights of the child that have come into existence over the time. Scholars have expounded the vast corpus of laws and regulations governing the same in countries around the world. However, no definitive solutions have been proposed to collaborate the distributed efforts of various legal systems of the world and child welfare services to reduce emotional stress on children and reunify families.

¹⁰ Jackie Crawford (2003) “Alternative Sentencing Necessary for Female Inmates With Children” in *Corrections Today* June 2003.

¹¹ *ibid*

¹² *ibid*

According to a summary of the Asian Human Rights Commission the Court ordered that children up to the age of six can remain with their incarcerated mother and then should be placed with a surrogate, if the mother so wishes, or an institution maintained by the Social Welfare Department¹³; children living with their mother in a prison should not be treated as detainees or convicts; they “*should be provided with food, clothing, separate utensils, adequate sleeping facilities, and other necessary facilities*” necessary for the “*healthy development of a child;*” they are also “*entitled to medical care and vaccinations;*” and they must be “*provided with adequate educational and recreational facilities.*” Following the Supreme Court ruling, Indian prisons must also “*provide crèches for children under three and nurseries for children aged three to six.*” However, especially in India there exist a variety of legal discrepancies about contact with their parents, physical care and custody and the children’s Fundamental Rights.

One of the most comprehensive works in the existing scenario is *The Impact of Parental Imprisonment on Children*¹⁴ by Oliver Robertson. This report provides a clear understanding of the particular problems faced by women prisoners and children of imprisoned mothers and how these problems can be better addressed by governments and policy makers. According to Oliver Robertson¹⁵, children of imprisoned parents are often described as the forgotten victims of imprisonment. When a mother or father goes to prison, their children are affected, usually adversely. Yet these effects are rarely considered in criminal justice processes, which instead focus on determining individual guilt or innocence and punishing lawbreakers. However, the report also highlights that in order to deal with such issues, statistics and information is required and many of the studies that have been carried out are small-scale in time or number of participants; for this reason the conclusions they draw should be seen as neither authoritative nor universally applicable. Also, there is no definitive system of system of procuring consolidated information about children of incarcerated children and their circumstances.

Similarly, Steve Christian, in *Children of Incarcerated Parents*¹⁶ states that imprisonment disrupts positive, nurturing relationships between many parents—particularly mothers—and their children. In addition, many families with children suffer economic strain and instability when a

¹³ Law on Children Residing with Parents in Prison, Law Library of Congress

¹⁴ Oliver Robertson, *The Impact of Parental Imprisonment on Children*, Quaker United Nations Office, 8 (April 2007), http://penal-reform-azerbaijan.org/_ld/3/320_Impact_of_paren.pdf

¹⁶ Steve Christian, *Children of Incarcerated Parents*, Urban Inst., 8 (March 2009).

parent is imprisoned. It is suggested that intervening in the lives of incarcerated parents and their children to preserve and strengthen positive family connections can yield positive societal benefits in the form of reduced recidivism, less intergenerational criminal justice system involvement, and promotion of healthy child development. However, in order to do this, law enforcement alone is inadequate.

An interesting view is also presented by Katherine Gabel and Denise Johnston in the book *Children of Incarcerated Parents*¹⁷. The book states that, “*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.*” The authors, per se, are not against the idea of having definitive law enforcement but also is of the opinion that it still stands insufficient. These views produce issues like the dearth of data existing because no specific agency or system is charged with collecting data. The literature talks about the inadequacies of legal provisions and child welfare system but not of their collective efforts, *keeping the best interest of the child*, as the priority.

III. OBJECTIVE

The objective of this research paper is twofold:

- (i) To explore the phenomenon of parental incarceration and its impact on children of incarcerated parents in the light of the legal provisions made for protection of such children in India as well as other countries of the world.
- (ii) To devise legal solutions towards meeting the needs of these children and their families.

IV. RESEARCH METHODOLOGY

The researchers have primarily adopted a doctrinal method of research for this paper. The researchers have relied heavily on legal provisions for children of incarcerated parents as stated in the Constitution of India and other countries of the world to understand the legal standing of such children and their rights. The researchers have also relied on the reports of specialized agencies like the National Crime Records Bureau to procure statistics and establish the dearth of information available. Apart from these, the other sources are case laws, which the researchers

¹⁷ Katherine Gabel & Denise Jhonston, *Children of Incarcerated Parents*, Lexington Books, 72, 1995

have considered to understand the legal and social needs of children of incarcerated parents and devise solutions.

The secondary sources also include books and articles by several authors, Indian and foreign, whose works have contributed significantly in the development of child rights and their recognition. This helped the researchers have a wholesome understanding of views prevailing in regard to the topic chosen.

V. LEGAL & SOCIAL CHALLENGES INVOLVED

In order to systematically devise solutions in the light of legal provisions in India and other countries, it first becomes mandatory to identify the issues arising as a result of parental incarceration and their adverse impacts on children. The researchers have provided a wide analysis of the same as follows:

a) DEARTH OF DATA

Reed and Reed (1997) asserted, minor children of parents under some form of criminal justice control are among the most at-risk, yet least visible, populations of children. Though rising incarceration rates suggest an increasing number of children who have lost one or both of their parents to incarceration, very little is known about this vulnerable population.¹⁸ Although the children of incarcerated parents are at high risk for negative personal and social behaviors, their lack of visibility in the criminal justice and child welfare systems can inhibit positive intervention and may led to neglect. Most jurisdictions do not request or collect family information from prisoners. Very few require law enforcement officers to inquire at the time of arrest whether a prisoner has children.¹⁹ The lack of research and official information means that government programs do not target these children and their caregivers in order to design or provide needed services.²⁰

b) INDIFFERENCE BY THE COURTS

The courts generally do not routinely inquire whether a prisoner has children at the time of sentencing, missing another opportunity to identify the children and intervene if needed.²¹ Too

¹⁸ Council on Crime and Justice. Children of Incarcerated Parents; January 2006

¹⁹ Denise Johnston, p. 69

²⁰ Simmons C.W. Children of Incarcerated Parents, California State Library; 2000

²¹ *ibid*

often judges do not consider an offender's caring responsibilities when passing sentence.²² Prison buildings and regimes are created without considering the impact they have on young visitors, often resulting in remote and inaccessible facilities, which are inappropriate for children. The return of a parent to a family following imprisonment is challenging for all concerned, yet families and prisoners are rarely given the support they need during this major change, which may be as disruptive as the imprisonment itself.²³

c) LACK OF EDUCATION AND HEALTHCARE FACILITIES

In many jails, children do not get proper nutrition and affection, which is necessary for their physical & mental growth. Such children do not have access to medical care and education in prisons and if they do then they are not provided as they are supposed to be. Behind each parent in prison there is a string of children whose lives were depended on them solely for all the basic needs like food, clothes, housing, education, grooming and protection. Children of all ages are taught together and thus a child never moves ahead of learning "ABC". There is no systematic way of imparting proper formal education. Most health facilities are also not available and the worst hit are those children who need mental and psychological treatment after having gone through traumatic phases of life.²⁴

d) LACK OF FINANCIAL RESOURCES

Simmons (2000)²⁵ reported that the distance between a child's home and the prison once the child has crossed 6 years of age in India and is living in foster care is a key factor in whether or not the child will visit the parent. Many children do not have the resources to visit a parent in prison. In the event that a child has access to resources to permit visits, families may avoid visiting the incarcerated parent in prison because of "sterile, uncomfortable visiting rooms" or due to a sense that "prison is not the right place for a child" (Slavin, 2000; Scriven, 2000). Edin, Nelson, & Paranal (2004) observed that for offenders who had consistent contact with their child or their child's mother prior to incarceration, the event of incarceration yielded a pronounced negative effect on the incarcerated parent's relationship with the child and the child's mother. The authors noted that among offenders whose lifestyle choices had created a rift between

²² Although children are the obvious persons towards whom imprisoned adults have a caring responsibility and are the focus of this paper, there are other groups of people such as elderly or disabled adults, legal wards and those over whom the prisoner holds power of attorney for whom several of the issues raised here will be relevant.

²³ Oliver Robertson. Children Imprisoned by Circumstance. Quaker United Nations Office, Human Rights & Refugees Publications; 2008

²⁴ Yadav N. & Kumari A. Lightening the Load of 'Parental Conviction' on Children, Army Institute of Law. 2014

²⁵ Sanders E. & Dunifon R. Children of Incarcerated Parents, Cornell University, College of Human Ecology; 2011

themselves and their child or child's mother, incarceration was sometimes a turning point in the relationship that functioned as an opportunity to refocus the incarcerated parent's life. These factors can adversely disrupt child development (Johnston, 1995). Typically children have lived in poverty before, during and after their parent's incarceration and lack the resources to visit their parents (Reed & Reed, 1997).²⁶

e) PSYCHOLOGICAL TRAUMA, DEPRESSION, DRUG ADDICTION AND CRIMINAL TENDENCIES AMONG CHILDREN

Numerous studies have described the behaviors children exhibit following the incarceration of their parent, including crying and sadness, confusion and worry, anger, acting out (including aggression, drop in school-work, delinquent activities, drug use, sexual promiscuity, and the like) and developmental regression (such as wetting the bed). A study that was conducted on youth with incarcerated mothers reported that 75% of the children had symptoms characterized as trauma-related stress. These reactions included trouble sleeping, concentrating, and signs of depression (Kampfner, 1995). Youth can may also blame themselves for their parent's criminal behaviors, especially if their parent has been prosecuted for stealing or selling drugs for the benefit of the family (Miller, 2006). It is important for caregiver to assure the child that this is not the case. If this belief goes undisputed, the children may suffer from long-term psychological effects. "Some children are used to parents who were not around much before their incarceration. Some children have parents who are unpredictable because of depression or drugs or alcohol. Other children's parents were actively involved with them before they went to jail or prison."²⁷ Some children become withdrawn, are affected by "increased health problems and regressive behaviour such as bed-wetting",²⁸ suffer worsening performance and attendance rates at school or display increased aggression, antisocial or criminal tendencies.²⁹ The perceived extent and severity of the health impact varies between studies, but noted problems have included: changes in sleep patterns or eating behaviour; starting or increasing their use of drugs, alcohol and tobacco; stress; depression; and symptoms of post-traumatic stress disorder such as flashbacks about the crimes or arrests. The children often are coping with a rupture in the

²⁶ Council on Crime and Justice. Children of Incarcerated Parents; January 2006

²⁷ Children of Prisoners Library (2003) *What Do Children of Prisoners and their Caregivers Need?* (Families and Corrections Network).

²⁸ Ann Cunningham (2001) "Forgotten Families – the impacts of imprisonment" in *Family Matters* Winter 2001, p.37

²⁹ Dervla King (undated) *Parents, Children & Prison: Effects of Parental Imprisonment on Children* (Centre for Social & Educational Research, Dublin Institute of Technology), p.11

child/parent bond, enduring traumatic stress, and receiving inadequate quality of care. These factors can adversely disrupt child development (Johnston, 1995). Many caregivers and children understood that the incarcerated parent did the crime and that there should be consequences, but they thought the consequences in many of the cases were too harsh and the impact on the family was not considered. Without intervention, children's responses to trauma, like fear, anxiety, sadness and grief, can be manifested in reactive behaviors such as physical and verbal aggression, withdrawal, hyper vigilance, or sexualized behavior. Other patterns of trauma reactive behavior include fighting, substance abuse, gang activity, and antisocial behavior (Phillips & Harm, date unknown). Additionally, recent research has shown that "children of incarcerated parents are six times more likely than their peers to become criminally involved" (Bilchik, Seymour, & Kreisher, 2001, p.109). Overall, research generally shows that having a positive relationship with someone to look up to, a role model or mentor, is important for children to help them see a viable healthy path to adulthood (Scales & Leffert, 1999). It is noteworthy that for female inmates with children, the crèche facility is merely optional and cannot be made mandatory. In fact, many jailed mothers need intense counselling before they can be convinced of the benefits of their children being enrolled at such a facility.³⁰

f) SOCIAL STIGMA

All the families face social challenges, such as lack of financial support, social alienation, and stigma associated with having a parent in prison. Many of the children simply needed a place or an outlet to feel "normal," that is, some place where they fit in and could excel in some skill. Other children needed more direct support such as a person they could talk with, a support group, or some other form of social support.³¹ Often children of prisoners are discriminated against and stigmatised as a result of parental imprisonment³² and have suffered from trauma, fear, shame, guilt and low self-esteem.³³ Relationships with other family members frequently suffer.³⁴

VI. LEGAL PROVISIONS AROUND THE WORLD FOR CHILDREN OF

³⁰ Nigam R. A Childhood Lost Behind Bars, India Together. 2016

³¹ Council on Crime and Justice. Children of Incarcerated Parents; January 2006

³² Ann Cunningham (2001) "Forgotten Families – the impacts of imprisonment" in *Family Matters* Winter 2001, p.37

³³ Charlene Wear Simmons (2000) *Children of Incarcerated Parents* (California State Library), p.4

³⁴ Commission for Children and Young People and the Aboriginal and Torres Strait Islander Advisory Board (2001) *Discussion paper on the impact on Aboriginal & Torres Strait Islander children when their fathers are incarcerated*, p.15

INCARCERATED PARENTS

Different countries of the world have made different legal provisions and have chosen to deal with the issue of parental incarceration and its impact on children differently. While some countries are strictly against children living with parents in prison, others are of the opinion that the positive effects of the child staying with his incarcerated parents heavily outweigh the drawbacks. The laws vary from country to country, based on the social, cultural and economic circumstances in different parts of the world. India, taking cue from the developing and developed countries of the world, must reform its legal system to protect the children of incarcerated parents and enforce their rights.

a) AUSTRALIA

Each of Australia's six states and two mainland territories apply their own legislative frameworks in relation to the correctional facilities that they manage.³⁵ The Standard Guidelines for Corrections in Australia state that if provision is made for children and infants to reside with their primary caregiver in prison, "comprehensive and well structured policies and programmes should be developed where the interests of the children are paramount."³⁶ The other guidelines on this matter are: Assessment processes for determining the placement of a child in a custodial environment should include appropriate input from the relevant external agencies. Children and infants should be allowed to reside with their primary care giver in prison only after the Administering Department is satisfied that it is in the best interest of the children to do so and there is no mechanism for the primary care giver to complete her/his sentence in the community (for example via home detention). The accommodation for primary care givers and their children should, wherever possible be domestic rather than custodial. While prisoners are responsible for the care of their children living in the prison, the Administering Department should take reasonable steps to ensure a safe environment for children.³⁷ Information on the age limits and numbers of places available for children to reside with their mothers in prison in each state and territory is as follows:

The *Australian Capital Territory* has detailed rules and procedures related to children residing

³⁵ Law on Children Residing with Parents in Prison, Law Library of Congress

³⁶ Standard Guidelines for Corrections in Australia 29 (rev. 2012), available at http://www.correctional.services.nt.gov.au/Documents/useful_links/aust-stand_2012.pdf.

³⁷ Law on Children Residing with Parents in Prison, Law Library of Congress

with female detainees in a specified ACT prison.³⁸ Female detainees who are the caregivers of children up to the age of four years or who are pregnant may participate in the Women and Children Program.³⁹ Following approval, children are placed with their caregiver in a women's cottage at the prison. The cottage "consists of two five bedroom units with a shared living room, dining room, kitchen, laundry and courtyard."⁴⁰ In *New South Wales*, the New South Wales Mothers and Children's Program⁴¹ has three components: a full-time residency program, occasional residency program, and release of the mother to serve her sentence in an approved environment away from a correctional center. In order for a child to reside full-time with his or her mother, he or she must be aged under six years and not attending school.⁴² The two residency options are available in two correctional centers in the state. In one facility there are eight cottages that provide full-time accommodation for up to a total of forty women and sixteen children, and in the other there are full-time places for five women with preschool aged children.⁴³ In *Northern Territory*, the Northern Territory Prisons (Correctional Services) Act 1980 (NT) provides for a female prisoner who gives birth to a child or who has children under five years of age to obtain permission to have that child or those children accommodated with her in a prison.⁴⁴ In 2012, it was reported that "a new 24-bed cottage to meet the needs of women with children in custody has been constructed at the Alice Springs Correctional Centre."⁴⁵ In *Queensland*, approval may be granted for a child who is not eligible to start primary (i.e., elementary) school to reside full time with his or her mother in a correctional facility.⁴⁶ Detailed procedures apply to the consideration of an application, and to the management of the mother and child who reside together in a facility.⁴⁷ Three Queensland women's prisons have residential units that accommodate women who have a baby or young child residing with them in

³⁸ Corrections Management (Women and Children Program) Policy 2010 (ACT), <http://www.legislation.act.gov.au/ni/2010-449/default.asp>.

³⁹ For information on the history of some of the policies and the related facilities for inmate mothers and children see *Women Prisoners*, UNSW Comparative Youth Penalty Project.

⁴⁰ Standard Guidelines for Corrections in Australia 29 (rev. 2012).

⁴¹ For background on the program see Madeleine Loy, *A Study of the Mothers and Children's Program in the NSW Department of Corrective Services* (2000).

⁴² Corrective Services NSW, *The Mothers and Children's Program* (2011)

⁴³ *Women in Prison NSW 1970-2010*, UNSW Comparative Youth Penalty Project,

⁴⁴ Prisons (Correctional Services) Act 1980 (NT) s 53(1).

⁴⁵ Northern Territory Department of Children and Families, *Building on Our Strengths: A Framework for Action on Women in the Northern Territory*, Second Progress Report 2010–2012, at 28 (2012).

⁴⁶ Corrective Services Act 2006 (Qld) s 30, <https://www.legislation.qld.gov.au/LEGISLTN/CURRENT/C/CorServA06.pdf>.

⁴⁷ *Custodial Operations Standard Operating Procedure – Management of Women and Children*, Queensland Corrective Services.

prison. One prison has units that accommodate a total of eight inmates and their children; another regularly has “up to six children, sometimes ten, placed with their mothers;”⁴⁸ the third has a specialist unit that can accommodate up to eight mothers and babies, plus another eight places for mothers and babies in a double unit.⁴⁹ In *South Australia*, the South Australia Department of Correctional Services issued an instruction in 1993 stating that provision may be made for a child to live with a parent in prison.⁵⁰ According to the Department’s 2002–03 Annual Report, the Adelaide Women’s Prison has facilities to accommodate nine women with children under three years of age. The 2012–13 Annual Report stated that a goal for the following year was to establish a mothers and babies program at the prison.⁵¹ In *Tasmania*, a prisoner may request approval for a child to live with the prisoner in the prison.⁵² The women’s prison in Tasmania has a seven-bed mother and baby unit.⁵³ In *Victoria* “prisoners who are pregnant or who are the primary carers of young children may apply for the Mothers and Children Program.”⁵⁴ A child must be under school age in order to live in the prison with his/her mother.⁵⁵ The program is available in the state’s two women’s prisons where mothers and their children are housed in dedicated facilities.⁵⁶ According to a February 2013 news report, at that time nine children, aged two months to four years, were living in prison with their mothers in the state.⁵⁷ In *Western Australia*, a detailed policy directive sets out the rules and procedures related to children residing in prisons with their mothers.⁵⁸ For the residential programs in some prisons, the age at which a child’s residency must cease is twelve months.⁵⁹ However, in purpose-built facilities, the age

⁴⁸ Anti Discrimination Commission Queensland, *Women in Prison* ch 5 (Mar. 2006).

⁴⁹ *Townsville Correctional Centres*, Queensland Corrective Services, <http://www.correctiveservices>.

⁵⁰ *Women in Prison South Australia 1970–2010*, UNSW Comparative Youth Penalty Project, <http://cypp.unsw.edu.au/women-prison-south-australia-1970-2010> (last updated June 8, 2011).

⁵¹ South Australia Department for Correctional Services, 2002–2003 Annual Report 18 (2003).

⁵² Corrections Act 1997 (Tas) s 25(1), http://www.thelaw.tas.gov.au/tocview/index.w3p;cond=;doc_id=51%2B%2B1997%2BAT%40EN%2B2014073000000;histon=;prompt=;rec=;term.

⁵³ See *Prisons Infrastructure Redevelopment Program: Womens Prison*, Tasmania Department of Justice; *Women in Prison Tasmania 1970–2010*, UNSW Comparative Youth Penalty Project, <http://cypp.unsw.edu.au/women-prison-tasmania-1970-2010> (last updated June 8, 2011).

⁵⁴ *Corrections, Prisons & Parole: Pregnancy and Childcare*, Victoria Department of Justice, (last updated Feb. 2, 2014).

⁵⁵ Corrections Act 1986 (Vic) s 31,

⁵⁶ *Child Protection Practice Manual: Placement of Children with Mothers in Prison*, Victoria Department of Human Services.

⁵⁷ Christopher Gillet, *Push to Allow Dads to Have Their Kids in Prison With Them*, News.com.au (Feb. 16, 2013).

⁵⁸ Western Australia Department of Corrective Services, Policy Directive 10: Prisoner Mothers/Primary Carers and their Children (Apr. 2007).

⁵⁹ See, e.g., *Bandyup Women’s Prison*, Western Australia Department of Corrective Services, <https://www.correctiveservices.wa.gov.au/prisons/prison-locations/bandyup.aspx> (last updated Oct. 31, 2013).

limit is generally four years.⁶⁰ According to one report, in one prison with special facilities for mothers and children there were nine children residing with their mothers in 2010–11, although the facilities were designed to accommodate six.⁶¹

b) CANADA

In Canada, offenders who have been sentenced to imprisonment for two or more years are kept in federal corrections facilities, while those with a lower sentence remain in provincial correctional centers.⁶² Certain measures are in place to help incarcerated parents maintain parental relations with their children, including escorted temporary absence,⁶³ unescorted temporary absence,⁶⁴ and family visits without a physical barrier to personal contact.⁶⁵ For younger children, the Correctional Service of Canada established guidelines in 1995 to provide for a Mother-Child Program (MCP),⁶⁶ which is subject to the institutional head (or warden's) discretion and an institution's space availability.⁶⁷ The MCP provides a full-time cohabitation program for female offenders with children under four years old and a part-time program for children aged six and under.⁶⁸ The program was fully implemented in 2001 and was modified in 2008 by Public Safety Canada, after the media covered the *Whitford* case,⁶⁹ in which a mother accused of shooting her partner was allowed to temporarily keep her newborn child in prison.⁷⁰ As a result of the *Whitford* decision the eligibility criteria were modified by ministerial directive to exclude offenders convicted of serious crimes and to restrict the part-time

⁶⁰ Western Australia Department of Corrective Services, Policy Directive 10: Prisoner Mothers/Primary Carers and their Children.

⁶¹ *Custodial Operations Standard Operating Procedure – Management of Women and Children*, Queensland Corrective Services, http://www.correctiveservices.qld.gov.au/Resources/Procedures/Offender_Management/documents/ofmpromanwomenchild.shtml (last updated May 7, 2013).

⁶² Law No. 04-05 of 2005 on the Organization of Prisons and Social Reintegration of Prisoners, available on the website of the Algerian President, at <http://www.joradp.dz/TRV/FPeni.pdf> (in French).

⁶³ Northern Territory Department of Children and Families, *Building on Our Strengths: A Framework for Action on Women in the Northern Territory*, Second Progress Report 2010–2012.

⁶⁴ Corrections and Conditional Release Act § 116 & 117 loi; Corrections and Conditional Release Regulations § 155(e).

⁶⁵ Corrections and Conditional Release Regulations § 90.

⁶⁶ Correctional Service Canada, *Guidelines for Parenting Skills Programs for Federally Sentenced Women* (Jan. 1995), http://www.csc-scc.gc.ca/publications/fsw/parenting/guidelines_e.pdf.

⁶⁷ *Women's Correction: Mother-Child Program*, Correctional Service of Canada, <http://www.csc-scc.gc.ca/text/prgrm/fsw/pro02-5-eng.shtml> (last visited February 25, 2016).

⁶⁸ Law on Children Residing with Parents in Prison, Law Library of Congress

⁶⁹ *R. v. Whitford*, [2008] B.C.S.C. 1378 (Can., B.C.).

⁷⁰ Benjamin Shingle, *Canada Expanding Rarely Used Program that Lets Mothers Live with Children in Minimum Security Prisons*, National Post (May 19, 2014).

program.⁷¹In practice, the rate of participation for the MCP is very low, which is attributed to “correctional overcrowding,” a “more punitive institutional culture,” and a number of changes to “program’s eligibility criteria.”⁷²Since 2008, only fourteen children have participated at the federal level, eight of them on a full-time basis.⁷³There were three MCP participants among 261 federal female offenders in April 2003, four participants for 460 offenders in April 2007, and zero participants for 603 offenders in April 2012.⁷⁴These numbers illustrate that the rate of MCP participation has decreased even while the number of female prisoners has increased.⁷⁵ The Correctional Service of Canada recently announced the expansion of “special rooms” to facilitate the MCP but it has not been confirmed whether more women would actually participate, according to news reports.⁷⁶At the provincial level, most of the provinces, including Québec, Ontario and Alberta, do not provide a specific program allowing the cohabitation of children with their offender parents and programs that are in place are limited to familial visits, with the distinction that Alberta has implemented videoconference visits to allow for more visits, as well as longer visiting hours.⁷⁷British Columbia began to provide an MCP at provincial institutions in 1973 to permit “women who gave birth while serving sentences of provincial incarceration” to “keep their babies with them in their respective institutions.”⁷⁸In 2008, a mother-baby program was cancelled in a provincial correctional center but the Supreme Court of British Columbia reversed the decision by declaring it an unconstitutional violation of the principles of fundamental justice and the right to equality under sections 7 and 15 of the Canadian Charter of Rights and Freedoms.⁷⁹

c) CHINA

⁷¹ Sarah Brennan, *Canada’s Mother-Child Program: Examining Its Emergence, Usage and Current State*, 3(1) Can. Grad. J. Soc. & Crim. 18 (Spring 2014).

⁷² Law No. 04-05 of 2005 on the Organization of Prisons and Social Reintegration of Prisoners, available on the website of the Algerian President, at <http://www.joradp.dz/TRV/FPeni.pdf> (in French).

⁷³ The operation of prisons in England and Wales is regulated by the Prison Rules, which are set out in the Prison Service Instructions. These instructions regulate the operation of the Mother and Baby Units. Prison Service Order: Women Prisoners, 2008.

⁷⁴ South Australia Department for Correctional Services, 2002–2003 Annual Report 18 (2003), http://www.corrections.sa.gov.au/annual_report/2002-2003/content/print/Annual_Report_2002_2003.pdf.

⁷⁵ Law on Children Residing with Parents in Prison, Law Library of Congress

⁷⁶ *Visiting Inmates*, Alberta Justice and Solicitor General, http://www.solgps.alberta.ca/programs_and_services/correctional_services/adult_centre_operations/nerc/Pages/VisitingInmates.aspx (last visited July 25, 2014).

⁷⁷ Law on Children Residing with Parents in Prison, Law Library of Congress

⁷⁸ *Inglis v. British Columbia (Minister of Public Safety)*, [2013] B.C.S.C. 2309 (Can., B.C.).

⁷⁹ For information on the history of some of the policies and the related facilities for inmate mothers and children see *Women Prisoners*, UNSW Comparative Youth Penalty Project.

Chinese law does not appear to allow children to live in prisons with their prisoner mothers. Instead, the Criminal Procedure Law provides that a woman sentenced to imprisonment or criminal detention may be permitted to temporarily serve her sentence outside of prison when she is pregnant or breast-feeding her own baby.⁸⁰

d) ENGLAND AND WALES

England and Wales have specialized mother and baby units that are separate from the general population within women's prisons to allow babies to stay with their mothers if a number of factors are met.⁸¹ Admission into the unit is not automatic; it is decided by an admissions board chaired by a social worker. The capacity of these centers is very limited, with only seventy-seven places across the nation,⁸² while around 120 females in custody give birth each year.⁸³ The decision to admit the mother and baby takes into account a number of factors, including

a) Whether it is in the best interests of the child b) The necessity to maintain good order and discipline within the MBU c) The health and safety of other babies and mothers within the unit.⁸⁴

In the majority of cases, the child leaves the unit by the time the child is eighteen months, or earlier if it is in the best interests of the child to do so. There are exceptional cases where the child may be allowed to stay longer, but the general expectation is that the child will leave the unit by the age of eighteen months or earlier. The separation plan is agreed upon by a team as soon as the mother enters the unit, and the mother is involved in the process.⁸⁵

(e) FRANCE

French law allows incarcerated mothers to keep their child with them until the child reaches eighteen months of age. The interregional director of penitentiary services may allow a mother to

⁸⁰ Xingshi Susong Fa [Criminal Procedure Law] (adopted by the National People's Congress, July 1, 1979, last amended Mar. 14, 2012, effective Jan. 1, 2013), art. 254, 1996, Laws of China 63–88, amendment and English translation).

⁸¹ The operation of prisons in England and Wales is regulated by the Prison Rules, which are set out in the Prison Service Instructions. These instructions regulate the operation of the Mother and Baby Units. Prison Service Order: Women Prisoners, 2008, PSO 4800.

⁸² *Women Prisoners*, Ministry of Justice, <https://www.justice.gov.uk/offenders/types-of-offender/women> (last updated Sept. 4, 2012).

⁸³ As of December 2013, the French prison system had an operational capacity of 58,466 but held a total of 67,738 inmates (2,196 women and 65,542 men), which translated to a density of 117.9%. Direction de l'Administration Pénitentiaire [Penitentiary Administration Directorate], [Monthly Statistics of Committed and Detained Population in France] 12, 18 (Dec. 1, 2013).

⁸⁴ Mother and Baby Units, 2011, PSI 16/2011, <http://www.justice.gov.uk/downloads/offenders/psipso/psi-2011/psi-54-2011.doc>.

⁸⁵ Law on Children Residing with Parents in Prison, Law Library of Congress

keep her child beyond the first eighteen months, upon her request and after consulting a special commission. This commission includes, among others, a psychiatrist, a pediatrician, a psychologist, and a probation officer.⁸⁶

It is unclear exactly how many mothers live with their children in French jails and prisons, but it appears to be a very small number.⁸⁷ A 2013 report by the Comptroller General in charge of the French prison system stated that, out of 1,794 places for women in the French penitentiary system, sixteen (4.3%) were reserved for women keeping a child.⁸⁸ He added that there did not appear to be any general problems in finding places for mothers keeping a child, which would indicate that, in contrast with the overcrowding that currently exists in the French prison system generally,⁸⁹ the number of places is sufficient to meet this specific demand.⁹⁰

f) JAPAN

In Japan a mother who has been incarcerated may raise her infant in prison up to the infant's first birthday if the mother wishes. The term can be extended by up to six months if the incarcerated mother wishes and the head of the prison decides that this is necessary for the health and/or welfare of the mother and/or infant.⁹¹ These infants are entitled to medical care provided by the prison.⁹²

g) SINGAPORE

According to Singapore's Prisons Regulations, a child under three years of age may be admitted to prison with its mother. When any child has presumably attained the age of three, the medical officer must report whether it is desirable or necessary for the child to be retained longer. With special authority of the Minister for Home Affairs, a child may remain in prison with its mother after reaching the age of four.⁹³ In addition, should he know of no relatives who can receive the

⁸⁶ Code de procédure pénale (Code of Criminal Procedure) art. D401

⁸⁷ Law on Children Residing with Parents in Prison, Law Library of Congress

⁸⁸ Controleur général des Lieux de Privation de Liberté, Avis du 8 août 2013 du Controleur général des lieux de privation de liberté relatif aux jeunes enfants en prison et à leurs mères détenues [Opinion of August 8, 2013, of the Comptroller General of Places of Deprivation of Liberty Regarding Young Children in Prison and Their Detained Mothers] 4 (Aug. 8, 2013).

⁸⁹ As of December 2013, the French prison system had an operational capacity of 58,466 but held a total of 67,738 inmates (2,196 women and 65,542 men), which translated to a density of 117.9%. Direction de l'Administration Pénitentiaire [Penitentiary Administration Directorate], Statistique mensuelle de la population écrouée et détenue en France [Monthly Statistics of Committed and Detained Population in France] 12, 18 (Dec. 1, 2013).

⁹⁰ Controleur général des Lieux de Privation de Liberté.

⁹¹ Law on Children Residing with Parents in Prison, Law Library of Congress

⁹² Act on Penal Detention Facilities and Treatment of Inmates and Detainees, Act No. 50 of 2005, *amended by* Act No. 44 of 2013, art. 66.

⁹³ Law on Children Residing with Parents in Prison, Law Library of Congress

child, the Superintendent must ask the Commissioner of Prisons for instructions.⁹⁴

(h) SWEDEN

Under Swedish law “an inmate may be allowed to have [his/her] infant with [him/her], if it can be considered to be in the best interest of the child.”⁹⁵ However, an opinion from the local Social Services Committee is required. The legislative history of the provision explains when children should be allowed to reside with the parents as follows: Such permission can for instance be compatible with the best interest of the child when the inmate’s remaining time in the facility is short or where a deportation is imminent and there is no appropriate alternative placement of the child. An inmate who is granted the right to have [his/her] child with [him/her] in the facility must be granted access to equipment which is necessary to care for the child.⁹⁶ The provision, which entered into force in 2011, has two new aspects compared to previous legislation: the legislation is gender neutral, giving both mothers and fathers the legal right to have their children with them in prison; and the provision requires that cohabitation between a child and his/her incarcerated parent be considered in the best interest of the child.⁹⁷ The new wording of “infant” (*Spädbarn*) that now appears in the provision is also interpreted to mean the first few years of the child’s life, while it was previously limited to the first twelve months of a child’s life. This does not mean that Swedish legislation allows for a child to stay for several years in prison; rather, if a single parent is imprisoned for a few months his/her young child may accompany him/her to prison. Prior to the current legislation, special exceptions were made when young children above the age of one but under the age of three were so traumatized by being separated from their mothers that it was considered necessary for the welfare of the child for them to be reunited with the parent despite an explicit prohibition in the law.⁹⁸ Children who cannot be cared for by their incarcerated mothers or a relative are placed in foster care.⁹⁹ Sweden frequently uses alternative sentences, called “noncustodial care.” This includes probation, electronic monitoring, etc. Approximately 14,000 individuals are currently serving some form of noncustodial

⁹⁴ Prisons Regulations, Rg 2, G.N. No. S 99/1939 (Jan. 13, 1939; revised ed. 2002, 31st January 2002).

⁹⁵ Ch. 2:5 § Fängelselag [Prison Act] (Svensk Författningssamling [SFS] 2010:610).

⁹⁶ Proposition [Prop.] [Government Bill] 2009/2010:135 at 127, http://www.riksdagen.se/sv/Dokument-Lagar/Forslag/Propositioner-och-skrivelser/prop-200910135-En-ny-fangels_GX03135/ (translation by author).

⁹⁷ See actual text of the ch. 2:5 provision, *Fängelselagen and Prop. 2009/10:135* at 127.

⁹⁸ See Rebecka Holm, *Barn i fängelse – kan det vara en bra idé? En kvalitativ studie om barn som följer sin förälder i anstalt* at 4 (Göteborgs Universitet, Spring Semester 2009), <http://www.oru.se/pagefiles/34995/uppsatsholm.pdf>.

⁹⁹ Ch. 6:1 Socialtjänstlagen (SFS 2001:453), <http://www.notisum.se/rnp/sls/lag/20010453.htm>.

sentence.¹⁰⁰ Swedish law also allows for the postponement of a prison sentence when a female inmate is pregnant or nursing, the duration of which is determined on the basis of what can be considered reasonable.¹⁰¹

Pregnant women have the same right to health care and prenatal care in prison as that of an ordinary citizen. This includes prenatal, delivery, and postnatal care.¹⁰² There were 234 females imprisoned in Sweden in October of 2013, totaling 5.1% of the total imprisoned population.¹⁰³

i) SWITZERLAND

The Swiss Penal Code provides for special forms of imprisonment for pregnant women giving birth and for the immediate time after giving birth.¹⁰⁴ Likewise, the Code provides for special forms of imprisonment for mothers and their small children as long as these forms are in the interest of the child.¹⁰⁵ The federal law specifies neither the forms of imprisonment nor what constitutes the interest of the child.¹⁰⁶ Two proposals to set a minimum age of four and five, respectively, before separating the child from its imprisoned mother have been rejected by the Swiss Parliament.¹⁰⁷ In practice a child usually stays with its mother until the age of three. That is considered the time when a child needs a broader social environment for its development than a prison can provide.¹⁰⁸

The federal law entitles the cantons (states) to provide for the necessary forms of imprisonment of mothers with small children.¹⁰⁹ The cantons have introduced special mother-child prison locations with special services—for example, staff with experience in childcare, suitable rooms,

¹⁰⁰ *Non-custodial Care*, Kriminalvården, <https://www.kriminalvarden.se/en/Other-languages/Non-custodial-care/> (last visited Feb. 6, 2016).

¹⁰¹ § 12 SFS 1974:202 Beräkning av strafftid [Calculation of Sentence].

¹⁰² Although not specified in the text itself, the text encompasses all necessary treatment including hospital stays. Prop. 2009/2010:135 at 158 expressly states that all births must take place in a hospital but that this does not require a special provision, as it is commonly accepted that births take place in hospitals in Sweden.

¹⁰³ *Kvinnor i fängelse*, Kriminalvården. For a description of Hinseberg Female Prison, see Paddick, *supra* note 51, at 110–11.

¹⁰⁴ Schweizerisches Strafgesetzbuch [Swiss Penal Code], Dec. 21, 1937, *as amended through July 1, 2014*, Systematische Sammlung des Bundesrechts, art. 80(1)(b), <http://www.admin.ch/opc/de/classified-compilation/19370083/index.html>.

¹⁰⁵ *Ibid.* art. 80(1)(c).

¹⁰⁶ Law on Children Residing with Parents in Prison, Law Library of Congress

¹⁰⁷ Stefan Trechsel & Peter Aebersold, *Kommentar zu Art. 80 Strafgesetzbuch [Commentary on Art. 80 Swiss Penal Code]*, in *Schweizerisches Strafgesetzbuch: Praxiskommentar* 483, 484 (Stefan Trechsel & Mark Pieth eds., 2d ed. 2013).

¹⁰⁸ Law on Children Residing with Parents in Prison, Law Library of Congress

¹⁰⁹ Andrea Baechtold, *Kommentar zu Art. 80 Strafgesetzbuch [Commentary on Art. 80 Swiss Penal Code]*, in 1 *Strafrecht* 1542, 1546 (Marcel A. Niggli & Hans Wiprächtiger eds., 2d ed. 2007).

and external daycare facilities.¹¹⁰ Those services are available in all prisons for long term sentences and in some specialized prisons.¹¹¹ However, critics call attention to the fact that smaller prisons in particular have difficulties allocating the necessary services for mothers taking care of their children.¹¹²

Thus, while all countries have systems that revolve around the “best interests of the child” in matters of parental incarceration, the ways and means of determining the same, differ. Also, the age bars and arrangements made to enforce the rights of such children differ from country to country. In Australia, children and infants are allowed to reside with their primary care giver in prison only after the Administering Department is satisfied that it is in the best interest of the children to do so and there is no mechanism for the primary care giver to complete her/his sentence in the community (for example via home detention). The Administering Department in Australia makes sure the prison environment is safe for the children. On the other hand, in Canada, the Mother-Child Program (MCP), which is subject to the institutional head (or warden’s) discretion and an institution’s space availability, a full-time cohabitation program for female offenders with children under four years old and a part-time program for children aged six and under is provided. However, the eligibility criteria of this program now excludes offenders convicted of serious crimes and restricts the part-time program as it is not considered in the “best interests of the child”. While countries like England and Wales, have specialized mother and baby units that are separate from the general population within women’s prisons to allow babies to stay with their mothers if a number of factors are met, countries like China have a completely different purview of the subject and do not appear to allow children to live in prisons with their prisoner mothers. It is so because they consider the negative impacts of children residing in prison with their parents to outweigh the positives. This once again demarcates the complete difference in the outlook of different countries towards the subject of parental incarceration. French law allows incarcerated mothers to keep their child with them until

¹¹⁰ Strafvollzugskonkordat der Nordwest- und Innerschweiz, Standards für den Straf- und Massnahmenvollzug an Frauen [Concordat of the States of Northern and Central Switzerland on the Forms of Imprisonment, Standards for the Imprisonment and Sanctioning of Women] 15 (Dec. 2009).

¹¹¹ Law on Children Residing with Parents in Prison, Law Library of Congress

¹¹² Swiss Centre of Expertise in Human Rights (SCHR), *Die besonderen Bedürfnisse inhaftierter Frauen beachten: Einhaltung der UNO-Grundsätze für die Behandlung weiblicher Gefangener in der Schweiz* (Mar. 14, 2013), <http://www.skmr.ch/de/themenbereiche/justiz/artikel/bangkok-rules.html>.

the child reaches eighteen months of age, Japan does so upto the first birthday of the child and to an extended period of 6 months if the mother so wishes and the head of the prison decides that this is necessary for the health and/or welfare of the mother and/or infant, and in Singapore, a child under three years of age may be admitted to prison with its mother. Therefore, the age bars also differ. However, there are no set parameters upon which such age bars are decided, except for the average age of mental maturity among children. In Singapore, when any child has presumably attained the age of three, the medical officer must report whether it is desirable or necessary for the child to be retained longer. In Sweden, on the other hand, the local Social Services Committee gives its opinion on the question that whether an inmate may be allowed to have [his/her] infant with [him/her], if it is in the best interest of the child. The burden of deciding the best interest of the child is a heavy one and must be conferred on a competent authority. Switzerland has no set law on the issue. However, in practice a child usually stays with his/her mother until the age of three. That is considered the time when a child needs a broader social environment for its development than a prison can provide. Attempts are being made to increase this age to four or five years. Thus, different countries of the world have provided different legal frameworks for protection of children of incarcerated parents based on their outlook towards the subject of parental incarceration and what they consider to be “best interests of the child”. Laws differ to the extent of the prescribed age upto which a child can stay with his/her parents in prison (if at all the child is allowed to do so), the competent authority to decide the best interests of the child and the systems established in prison to enforce the rights of such children and protect them from all forms of exploitation.

VII. LEGAL PROVISIONS FOR CHILDREN OF INCARCERATED PARENTS IN INDIA

Today, the hottest issue in and out of law is the protection of children from all types of abuses and exploitation.¹¹³ As Justice Krishna Iyer said in *Sunil Batra (II) versus Delhi Administration*¹¹⁴, 1980 "Convicts are not by mere reason of the conviction denuded of all the fundamental rights which they otherwise possess. Imprisonment in itself is the punishment."

Upto the early 20th century, the functions of the State were regarded to be only (i) defence of the

¹¹³ 2001 Cri LJ, Journal Section 50 at p. 51

¹¹⁴ 1980 AIR 1579

country and (ii) maintenance of law and order inside the country. In other words, the State was regarded only as a “*Night Watchman Institution*”. However, subsequently, the concept of the ‘**Welfare State**’ arose, according to which the State has not only to look after defence and law and order but also after the welfare of the people.¹¹⁵

If the child is an asset, it is the duty of the State to look after the child with a view to ensuring full development of its personality. That is why all the statutes dealing with children provide that a child should not generally be kept in jail. Even apart from this statutory prescription, it is elementary that a jail is hardly a place where a child should be kept. In general, courts and child welfare systems implement laws that attempt to strike a balance between the rights of parents and the best interests of their children.¹¹⁶

In India, each jail is governed by the state's jail manual, and the Indian prison administration is collectively under the **Ministry of Home Affairs**. Children are permitted to accompany their imprisoned mothers (and in some cases, fathers) inside jails until they complete six years. According to the **NCRB Crime Report**¹¹⁷, a total of 344 convicted women with their 382 children and 1,226 undertrial women with their 1,397 children were lodged in various prisons across India at the end of 2012. In effect, therefore, nearly 1800 children are at the mercy of the prison system.

The **Model Prison Manual, 2003**¹¹⁸ suggests that a creche and nursery be made available for all children imprisoned, in a separate enclosure. However, guideline sets have not been addressed to their full potential in many cases, and in some cases not at all. Bhondsi prison, is one among just a handful of jails in India that conform to the Supreme Court directives on the treatment of children imprisoned with their parents (**Justice Iyer Committee 1986**).

In 2010, the Allahabad High Court in the case of *Bachchey Lal v. State of Uttar Pradesh & Ors.*¹¹⁹ took a bold step by directing the Secretary (Health) to ensure that fortnightly or weekly visits and visits whenever necessary are made by the female doctors employed in the State Health Services Schemes for addressing the medical and diet needs of female prisoners and their wards, (i.e. the minor children who are confined along with female prisoners) according to the

¹¹⁵ Basu P. *Laws Relating to Protection of Human Rights Under the Indian Constitution and Allied Laws*, Modern Law Publications, Second Edition; 2012

¹¹⁶ Pohelman J. et al. Children's Contact with Their Incarcerated Parents, *Am Psychol*; 2010

¹¹⁷ Available at: http://ncrb.nic.in/StatPublications/PSI/Prison2012/Snapshots_2012_ver_%206.pdf

¹¹⁸ Nigam R. *A Childhood Lost Behind Bars*, India Together. 2016

¹¹⁹ CRIMINAL WRIT-PUBLIC INTEREST LITIGATION No. - 2357 of 1997

aspect being emphasized by the Apex Court in *R.D. Upadhyay v. State of A.P.*¹²⁰ and others. The court also ordered the ADG (Prisons) and other jail authorities and the District Judges and DLSAs to send complete copies of the information regarding the convicted prisoners or under trial prisoners and their children, after getting the same cross checked and gaps filled in from the Courts concerned. The Registrar General, High Court and the Member Secretary, U.P. Legal Services Authority were directed to ensure compliance of the aforesaid directions and to submit a report. Thus, the Allahabad High Court set an example for the rest of the country to follow.

FUNDAMENTAL RIGHTS

The Indian Constitution guarantees to the people certain basic human rights and freedoms and these rights in substance, constitute inhibitions on the legislative and executive organs of the State. These rights protect the individual and grant him the freedom to live the life which he has been granted by God.¹²¹ These rights are available to all and also strive to protect children of incarcerated parents.

ARTICLE 21- RIGHT TO LIFE AND ALLIED RIGHTS

The expression 'life' used in **Article 21** of the Constitution of India does not connote mere animal existence or continued drudgery through life. It has a much wider meaning which includes **right to livelihood, better standard of living, hygienic conditions in the workplace and leisure.** Article 21 on the protection of life and personal liberty clearly lays down that "no person shall be deprived of his life or personal liberty except according to procedure established by law." In addition, **Article 45** of the Indian Constitution lays down that a State must "endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years." But there is very little constructive action or clear instruction on how children can still retain such very basic human rights.¹²²

As a result of the liberal interpretation of the words 'life' and 'liberty' used in Article 21, the meanings of the said words have been expanded.¹²³ The most remarkable feature of this expansion is that many of the non-judicial Directive Principles of State Policy enshrined in Part

¹²⁰ Writ Petition (civil) 559 of 1994

¹²¹ Jain M.P. Indian Constitutional Law, LexisNexis Butterworths Wadhwa, Volume 1. 6th Edition, 2010

¹²² *Consumer Education & Research Centre v. Union of India*, AIR 1995 SC 922

¹²³ *ibid*

IV of the Constitution have now been resurrected as enforceable Fundamental Rights by the magic wand of judicial activism playing on the said Article. Eg.- **right of a decent environment.**¹²⁴ Article 21 in its expanded horizon confers medley of rights on the person including the following rights:

- 1) **A Life of Dignity**
- 2) **A Life which ensures freedom from arbitrary and despotic control, terror and torture.**
- 3) **Life protected against cruelty, physical or mental violence, injury or abuse, exploitation, including sexual abuse.**¹²⁵

All these rights are available to the child and he cannot be deprived of the same just because he is small.¹²⁶

In *Puttappa Hommappa Talevar v. Deputy Commissioner, Dhanwad*¹²⁷, it was held that Article 21 means more than survival or animal existence. It would include the **right to live with human dignity** and it includes all those aspects of life which go to make a man's life meaningful, complete and worth living. **The right to live with human dignity** and all that goes along with it, **viz. the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and co-mingling with fellow human beings.**¹²⁸

Dignity means 'honour and authority reputation'¹²⁹. The human dignity consists in man's ability to experience self-awareness and to think rationally.¹³⁰ Dignity is mentioned in the **Preamble to Indian Constitution** and the Indian Supreme Court has held that the right to dignity is guaranteed by Article 21 read with Articles 39(e) and (f), 41 and 42 of the Indian Constitution.¹³¹ In the same case, it was also held the **right to education** to be implicit in the right to life because of its inherent fundamental importance. It was said that the court referred to **Articles 41, 35 and 46**, merely to determine the parameters of the said right.¹³²

¹²⁴ *Ramveer Upadhaya v. State of Uttar Pradesh*, AIR 1996 All 131 at p. 133,134

¹²⁵ Basu P. *Laws Relating to Protection of Human Rights Under the Indian Constitution and Allied Laws*, Modern Law Publications, Second Edition; 2012

¹²⁶ *ibid*

¹²⁷ AIR 1998 Kant 10 at p. 11

¹²⁸ *Francis C. Mullin v. Administrator, Union Territory of Delhi*, AIR 1996 SC 1051

¹²⁹ Ramatha Aiyer, Law Lexicon, p. 551 (1997), referred in AIR 2000 Journal Section 199 at p. 200.

¹³⁰ S.K. Singh, Bonded Labour and the Law, 156 (1994), referred in AIR 2000 Journal Section 199 at p. 200

¹³¹ *Bandhua Mukti Morcha v. Union of India*, AIR 1984 SC 802 (Per Bhagwati J.)

¹³² *ibid*

In *F.C. Mullin v. Administrator, Union Territory of Delhi*¹³³, the Supreme Court held that every limb or faculty through which life is enjoyed is protected by Article 21. This would include the faculties of thinking and feeling. Freedom of Life and Liberty guaranteed by Article 21 is not only violated when physical punishment scars the body, but also when it scars the mind of the child and robs him of his dignity. **Any act, which traumatises, terrorizes a child, or adversely affects his faculties falls foul of Article 21 of the Constitution.**¹³⁴

Again, relying on the Francis Coralie case, in *Bandhua Mukti Morcha v. Union of India*¹³⁵, Bhagwati J. held:

“It is the Fundamental Right of everyone in this country to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly clauses (e) and (f) of Article 39 and Articles 41 and 42 and at least, therefore, it must include protection of the health and strength of workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and human conditions of work and maternity relief... No state.. has the right to take any action to deprive a person of the enjoyment of these basic essentials.”

In *Chameli Singh v. State of Uttar Pradesh*¹³⁶, it was held that in an organized society, right to live as a human being is not ensured by meeting only the animal needs of man. It is secured only when he is assured of all facilities to develop himself and is freed from restrictions which inhibit his growth. All human beings are designed to achieve this subject. It was said that the Right to Life guaranteed in a civilized society implies the **right to food, water, decent environment, education, medical care and shelter.**

ARTICLE 14- RIGHT TO EQUALITY

Article 14 of the Constitution ensures equal opportunities for development of all children during the period of growth should be our aim, for this would serve our larger purpose of reducing inequality and social justice.¹³⁷ Towards the end of 1973, Bhagwati J., speaking for himself, Chandrachud and Krishna Iyer J.J. in a concurrent opinion in *E.P. Royappa v. State of Tamil*

¹³³ 1981 AIR 746

¹³⁴ *Parents Forum for Meaningful Education v. Union of India*, AIR 2001 Del 212 at p. 217

¹³⁵ 1984 AIR 802

¹³⁶ 1995 Supp(6) SCR 827

¹³⁷ *Sathayavan Kottarakhara v. State*, AIR 1997 Ker 133 at p. 137

*Nadu*¹³⁸ propounded a new approach to Article 14 in the following words:

“Equality is a dynamic concept with many aspects and dimensions and it cannot be ‘cribbed, cabined and confined’ within traditional and doctrinal limits. From a positivistic point of view, equality is antithetic to arbitrariness”.

The expression “equal protection of the laws” is now being read as a positive obligation on the State to ensure equal protection of the laws by bringing necessary social and economic changes, so that everyone may enjoy equal protection of the laws and nobody is denied such protection.¹³⁹

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

ARTICLE 15- PROHIBITION OF DISCRIMINATION ON GROUNDS OF RELIGION, RACE, CASTE, SEX OR PLACE OF BIRTH

Article 15(3) provides that this shall not prevent the State from making any special provision for women and children. So, special provisions are to be made by the state for the upliftment of the children of convicted parents.¹⁴⁰

ARTICLE 19- RIGHT TO FREEDOM

The rights enumerated in Article 19(1) are those great and basic rights which are recognized as the natural rights inherent in the status of a citizen.¹⁴¹ In the case of *Himachal Pradesh v. Unud Ram Sharma*¹⁴², it was held that every person has a right under Article 19(1)(d) **to move freely throughout the territory of India** and he also has the right under Article 21 to his life and that right under Article 21 embraces not only physical existence of life but the **quality of life**.

From the very beginning, starting with *A.K. Gopalan v. State of Madras*¹⁴³, this question has repeatedly arisen if deprivation of liberty by detention or incarceration is merely a denial of the right to personal liberty under Article 21 or also **the right to movement** under Article 19(1)(d). In Constitutions, which do not have a bill of rights but provide only for liberty without specific mention of movement, as in the US, the question of difference between the two rights does not arise as it arises under our Constitution.¹⁴⁴ After a good deal of controversy it has been settled that a citizen may rely on any or all of his Fundamental Rights and the court will examine if any

¹³⁸ (1974) 4 SCC 3

¹³⁹ Singh M.P. *V.N. Shukla's Constitution of India*, Eastern Book Company. 12th Edition; 2013

¹⁴⁰ *ibid*

¹⁴¹ *State of West Bengal v. Subodh Gopal Bose*, AIR 1954 SC 92

¹⁴² AIR 1986 SC 847

¹⁴³ AIR 1950 SC 27

¹⁴⁴ Singh M.P. *V.N. Shukla's Constitution of India*, Eastern Book Company. 12th Edition; 2013

of the claimed Fundamental Rights is violated.¹⁴⁵ Article 19(1)(e) grants the **right to residence** and this freedom is subject only to reasonable restrictions in the interest of general public or for the protection of the interests of any Scheduled Tribe.¹⁴⁶

DIRECTIVE PRINCIPLES OF STATE POLICY

While rights conferred under Part III are fundamental in the governance of the country, Part III and IV are complementary and supplementary to each other.¹⁴⁷ The purpose of the Directive Principles is to fix certain socio-economic goals for immediate attainment by bringing about a non-violent social revolution.¹⁴⁸

ARTICLE 38- STATE TO SECURE A SOCIAL ORDER FOR THE PROMOTION OF WELFARE OF THE PEOPLE

The Preamble and Article 38 of the Constitution of India, the Supreme law envisions **social justice** as its arch to ensure life to be meaningful and livable with human dignity.¹⁴⁹ Originally Article 38 was what is contained in clause (1). It incorporates part of the Preamble within it concerning “justice, social, economic and political”.¹⁵⁰ This clause has been relied upon to sustain and demand social welfare measures and to remind the State about the kind of society the Constitution expects it to create. The Constitution commands justice, liberty, equality and fraternity as supreme values to usher egalitarian social, economic and political democracy. **Social justice, equality and dignity of person are cornerstones of social democracy.**¹⁵¹

ARTICLE 39- CERTAIN PRINCIPLES OF POLICY TO BE FOLLOWED BY THE STATE

Government of India, in pursuance of the Constitutional provisions of clauses (c) and (f) of Article 39 of the Constitution evolved a national policy for the welfare of children. The government recognized that children are a *‘supremely important national asset and the future well being of the nation depends on how its children grow and develop.’* Article 39(e) directs the

¹⁴⁵ *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248

¹⁴⁶ Singh M.P. *V.N. Shukla's Constitution of India*, Eastern Book Company. 12th Edition; 2013

¹⁴⁷ *Chandra Bhawan Boarding and Lodgin, Bangalore v. State of Mysore*, AIR 1970 SC 2042 at p. 2050

¹⁴⁸ *Pathumma v. State of Kerala*, AIR 1978 SC 771

¹⁴⁹ Singh M.P. *V.N. Shukla's Constitution of India*, Eastern Book Company. 12th Edition; 2013

¹⁵⁰ *Air India Statutory Corp. v. United Labour Union*, (1997) 9 SCC 377

¹⁵¹ Basu P. *Laws Relating to Protection of Human Rights Under the Indian Constitution and Allied Laws*, Modern Law Publications, Second Edition; 2012

State to ensure that the health and strength of workers, men and women, and the **tender age of children** are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength.” Under this such children should not be harassed. **Article 39(f) provides that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.**¹⁵² The **right to education** implicit in the right to life and personal liberty under Article 21 must be considered in the light of the Directive Principles of State Policy enshrined in Part IV of the Constitution.¹⁵³ In fact, the **Welfare State** is to develop and build a strong nation in all spheres with careful grooming of human resources by proper education.¹⁵⁴

ARTICLE 41- RIGHT TO WORK, TO EDUCATION AND TO PUBLIC ASSISTANCE IN CERTAIN CASES

The State is directed by this Article to ensure to the people within the limits of its economic capacity and development 1) employment, 2) **education**, and 3) public assistance in cases of unemployment, old age, sickness and disablement and in other cases of undeserved want.¹⁵⁵ The duty to take effective steps to provide education has acquired special significance in view of the recognition of a **fundamental right to education partly in terms of this Article.**¹⁵⁶ Now a citizen has a right to call upon the State to provide educational facilities to him within the limits of its economic capacity and development.

ARTICLE 45-PROVISION FOR EARLY CHILDHOOD CARE AND EDUCATION TO CHILDREN BELOW THE AGE OF SIX

Article 45 stipulates that the State shall Endeavour to provide early childhood care and **education for all children until they complete the age of six years.** Unfortunately, the goal embedded in this Article continues to remain very far from the ground realities. In 1993, **the court read this article into Article 21 and in effect converted it into a Fundamental Right.**¹⁵⁷

¹⁵² Singh M.P. *V.N. Shukla's Constitution of India*, Eastern Book Company. 12th Edition; 2013

¹⁵³ *Unni Krishnan, J.P. v. State of Andhra Pradesh*, AIR 1993 SC 228

¹⁵⁴ *Debopriya Ganguly v. State of West Bengal*, AIR 2005 Cal 6

¹⁵⁵ Singh M.P. *V.N. Shukla's Constitution of India*, Eastern Book Company. 12th Edition; 2013

¹⁵⁶ *Unni Krishnan, J.P. v. State of A.P.*, (1993) 1 SCC 645

¹⁵⁷ Singh M.P. *V.N. Shukla's Constitution of India*, Eastern Book Company. 12th Edition; 2013

SUPREME COURT OF INDIA GUIDELINES

More recently, in response to a public interest litigation –*R.D.Upadhyay Vs State of A.P., 2006*¹⁵⁸, the Supreme Court has emphasised the upholding of fundamental rights and formulated guidelines regarding pregnancy, child-birth, antenatal and post-natal care, and childcare in prisons. The Apex court has clearly stated the following, specifically with regard to childcare:

- Female prisoners shall be allowed to keep their children with them in jail until they attain the age of six years.
- After six years, the child shall be handed over to a suitable surrogate as per the wishes of the female prisoner.
- Expenses of food, clothing, medical care and shelter shall be borne by the respective state.
- There shall be a creche and a nursery attached to the prison for women where the children of women prisoners will be looked after. Children below three years of age shall be allowed in the creche and those between three and six years shall be looked after in the nursery. The prison authorities shall preferably run the said creche and nursery outside the prison premises.
- A dietary scale prepared by the National Institute of Nutrition, Council of Medical Research, Hyderabad, provides guidelines for a balanced diet for infants and children up to the age of six.
- In this case, the state legal services authorities were directed to periodically inspect and see that the directions regarding mothers and children in jail were being followed. The court also directed that the central government, state governments and union territories file affidavits with respect to the judgment's implementation, within four months. Courts, however, do not have an independent machinery to crosscheck implementation. Only the time will tell whether this judgment has had any true impact on the condition of the children of women prisoners who are in jail with their mothers.¹⁵⁹
- Jail manual and/or other relevant rules, regulations, instructions etc. were to be amended within three months of these directives in order to comply with the above directions.

¹⁵⁸ Writ Petition (civil) 559 of 1994

¹⁵⁹ Yadav N. & Kumari A. Lightening the Load of 'Parental Conviction' on Children, Army Institute of Law. 2014

NATIONAL EXPERT COMMITTEE ON WOMEN PRISONERS

In 1986, the Government of India constituted the National Expert Committee on Women Prisoners headed by Justice Krishna Iyer to examine the situation of women in jails. The committee submitted a report examining all possible issues regarding care and support for imprisoned women and children, including the treatment and care of pregnant or lactating mothers.¹⁶⁰

STATE LAWS

According to the Constitution of India¹⁶¹, prisons are under the jurisdiction of states.

Various jurisdictions in India strive to provide financial support for the children of incarcerated parents. Prisons in **Karnataka state**, India, have set up crèches and nursery schools attended by children imprisoned with their parents, children of prison officials and children living close to the prison. These joint facilities prevent duplication of provision (one crèche for prisoners' children, another for everyone else) or the creation of crèches with very small numbers of users (there were just 29 children living with their mothers in Karnataka's prisons in 2006). The scheme helps to mitigate the problem of children living in prison becoming socially isolated by allowing them to mix with children from the surrounding area. However, crèche supervisors (who include imprisoned mothers) will need to ensure that children from one group (e.g. prisoners' children) are not stigmatised by those from another.¹⁶²

West Bengal has a law providing "that if a detained person has dependent children studying in school or college, the state government will help to pay for the child to continue attending school."¹⁶³ In addition, "some schools in India have lowered their tuition fees for children who are staying in prisons."¹⁶⁴

In the case of *Sheela Barse v. Union of India*¹⁶⁵, it was held that the State Government must set up necessary remand homes and observation homes where children accused of an offence can be lodged pending investigation and trial. In the case of *Gaurav Jain v. Union of India*¹⁶⁶, it was held that the special police authorities should be established to coordinate with the social welfare

¹⁶⁰ Jain M.P. Indian Constitutional Law, LexisNexis Butterworths Wadhwa, Volume 1. 6th Edition, 2010.

¹⁶¹ India Const., 7th sched., Art. 246.

¹⁶² S. Rajendran (2007) "Nursery schools set up in all jails in the State" in *The Hindu*

¹⁶³ *Bandyup Women's Prison*, Western Australia Department of Corrective Services, <https://www.correctiveservices.wa.gov.au/prisons/prison-locations/bandyup.aspx> (last updated Oct. 31, 2013).

¹⁶⁴ South Australia Department for Correctional Services, Annual Report 2012–13, at 87 (2013).

¹⁶⁵ AIR 1986 SC 1773 at p. 1777

¹⁶⁶ AIR 1997 SC 3021

officers of the State Government and public spirited persons, NGOs locally available and see that the juvenile homes are entrusted to efficient and effective management and are properly protected and psychologically treated, education imparted and rehabilitation succeeded. They should also be provided with proper accommodation, maintenance facilities for education and other rehabilitation facilities.

VIII. UNITED NATIONS' PROVISIONS FOR THE RIGHTS OF THE CHILD

DECLARATION OF THE RIGHTS OF THE CHILD

There has been great concern for the welfare of the child at the international level culminating in the Declaration of the Rights of the Child adopted by the General Assembly of the United Nations. The Declaration in its Preamble points out that the child by reason of his physical and mental immaturity needs special safeguards and care including appropriate legal protection, before as well as after birth that mankind owes to the child. It provided that the child shall enjoy special protection and shall be given opportunities and facilities by law and by other means to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of law for this purpose, the best interests of the child shall be given paramount consideration and the child shall also be protected from all forms of neglect, cruelty and exploitation.¹⁶⁷

UNITED NATIONS CONVENTION ON CHILD RIGHTS

India being ratified to UNCRC which is the UN Convention on the Rights of the Child is bound to abide by its recommendations and the provisions adopted by it which says under¹⁶⁸-

Article 2- No child should be discriminated against because of the situation or status of their parents.

Article 3- Protection of the best interest of the child.

Article 9- The right to have direct and frequent contact with parents from whom the child is separated.

¹⁶⁷ Basu P. *Laws Relating to Protection of Human Rights Under the Indian Constitution and Allied Laws*, Modern Law Publications, Second Edition; 2012

¹⁶⁸ Yadav N. & Kumari A. Lightening the Load of 'Parental Conviction' on Children, Army Institute of Law. 2014

IX. HUMAN RIGHTS OF CHILDREN

Children are considered as the nation's supremely important asset and its living malleable potential. The future of any nation is largely dependent on how its children grow and develop. The issues relating to the rights of the child have been constantly engaging the world. Children need special protection because of their tender age and physique, mental immaturity and incapacity to look after themselves. There is a growing realization in every part of the world that children must be brought up in an atmosphere of love and attain full emotional, intellectual and spiritual stability and maturity and acquire self confidence and self respect and a balanced view of life with full appreciation and realization of the role which they leave to play in the nation-building process, without which the nation cannot develop and attain real prosperity because a large segment of the society would then be left out of the developmental process.¹⁶⁹ In India, this conscience is reflected in the provisions enacted in the Constitution.¹⁷⁰ **The social human rights of children** include the right to the highest attainable standard of health and access to medical services, the right to special care for handicapped children.¹⁷¹ **The economic human rights of the child** include the right to benefit from social security, the right to a standard of living adequate to ensure proper development and protection from exploitation. **The cultural human rights of children** include the right to education, access to appropriate information, recreation and leisure, and participation in artistic and cultural activities.¹⁷²

X. THE JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2015

The Juvenile Justice (Care and Protection of Children) Act, 2015, though does not deal with children of incarcerated parents, does lay down the law for protection of children. It is the relating to children alleged and found to be in conflict with law and children in need of care and protection by catering to their basic needs through proper care, protection, development, treatment, social re-integration, by adopting a child-friendly approach in the adjudication and disposal of matters in the best interest of children and for their rehabilitation. This act, in Chapter II, contains General Principles of Care and Protection of Children, which are fundamental principles for enforcement of child rights. These principles include: *principle of presumption of*

¹⁶⁹ Basu P. *Laws Relating to Protection of Human Rights Under the Indian Constitution and Allied Laws*, Modern Law Publications, Second Edition; 2012

¹⁷⁰ *Sathayavan Kottarakhara v. State*, AIR 1997 Ker 133 at p. 137

¹⁷¹ Phillop W.S.K. *Street Children in India*, Rawat Publications. 1994

¹⁷² *ibid*

innocence, principle of dignity and worth, principle of participation, principle of best interest, principle of family responsibility, principle of safety, positive measures, principle of non-stigmatising semantics, principle of non-waiver of rights, principle of equality and non-discrimination, principle of right to privacy and confidentiality, principle of institutionalisation as a measure of last resort, principle of repatriation and restoration, principle of fresh start, principle of diversion and principles of natural justice. All of these principles are paramount in protection of the best interests of the child. In Chapter III, the act establishes a Juvenile Justice Board, the functions and responsibilities of which (as contained in 8.(3)) revolve around protecting the child and enforcing his/her rights in accordance with law. Chapter V of the act directs the State Government, by notification in the Official Gazette, to constitute for every district, one or more Child Welfare Committees for exercising the powers and to discharge the duties conferred on such Committees in relation to children in need of care and protection under this act. Most importantly, Chapter VI of the act, deals with Procedure in Relation to Children in Need of Care and Protection. It provides that,

31. (1) Any child in need of care and protection may be produced before the Committee by any of the following persons, namely:—

(i) any police officer or special juvenile police unit or a designated Child Welfare Police Officer or any officer of District Child Protection Unit or inspector appointed under any labour law for the time being in force;

(ii) any public servant;

(iii) Childline Services or any voluntary or non-governmental organisation or any agency as may be recognised by the State Government;

(iv) Child Welfare Officer or probation officer;

(v) any social worker or a public spirited citizen;

(vi) by the child himself; or

(vii) any nurse, doctor or management of a nursing home, hospital or maternity home:

(2) The State Government may make rules consistent with this Act, to provide for the manner of submitting the report to the Committee and the manner of sending and entrusting the child to children's home or fit facility or fit person, as the case may be, during the period of the inquiry.

Chapter VII of the act deals with Rehabilitation and Social Integration and lays down the primary responsibility of the State governments to rehabilitate children and restore to them, an ordinary well being. The provisions include:

39. (1) The process of rehabilitation and social integration of children under this Act shall be undertaken, based on the individual care plan of the child, preferably through family based care such as by restoration to family or guardian with or without supervision or sponsorship, or adoption or foster care:

Provided that all efforts shall be made to keep siblings placed in institutional or non- institutional care, together, unless it is in their best interest not to be kept together.

Though the act deals with juveniles, it does lay down the law tantamount in protecting child interests in general.

XI. A CONCLUSIVE COMPARATIVE ANALYSIS OF PROVISIONS FOR CHILDREN OF INCARCERATED PARENTS

In India, unlike other countries of the world, children are permitted to accompany their imprisoned mothers (and in some cases, fathers) inside jails until they complete six years. The Model Prison Manual, 2003 suggests that a creche and nursery be made available for all children imprisoned, in a separate enclosure. The Supreme Court has elaborately given set guidelines in regard to children of incarcerated parents. However, the guideline sets have not been addressed to their full potential in many cases, and in some cases not at all. While in countries like Australia, children and infants are allowed to reside with their primary care giver in prison only after the Administering Department is satisfied that it is in the best interest of the children to do so and there is no mechanism for the primary care giver to complete her/his sentence in the community (for example via home detention), in India, the age is set and no such attempts are generally made to ascertain the “best interests of the child”. Unlike Australia, in India no attempts are made to make sure the prison environment is safe for the children but the same is assumed. India could also take cue from Canada, where the Mother-Child Program (MCP), which is a full-time cohabitation program for female offenders with children under four years old and a part-time program for children aged six and under is provided. While countries like

England and Wales, have specialized mother and baby units that are separate from the general population within women's prisons to allow babies to stay with their mothers if a number of factors are met, India, keeping in mind its economic and social scenario, does not have any such units. While these are slight deviations from the standard protocol, India entirely differs from China, which does not appear to allow children to live in prisons with their prisoner mothers. While the age bar in India for the children of incarcerated parents to reside in prison is set at 6 in India, French law allows incarcerated mothers to keep their child with them until the child reaches eighteen months of age, Japan does so up to the first birthday of the child and to an extended period of 6 months if the mother so wishes and the head of the prison decides that this is necessary for the health and/or welfare of the mother and/or infant, and Singapore law states that a child under three years of age may be admitted to prison with his/her mother. India could also take cue from Singapore, where when any child has presumably attained the age of three, the medical officer must report whether it is desirable or necessary for the child to be retained longer. India should also decide the competent authority that should decide the best interests of the child. For example, in Sweden, the local Social Services Committee gives its opinion on the question of whether an inmate may be allowed to have [his/her] infant with [him/her]. While several countries of the world have separate legislations on the subject, India lacks a separate legislation aimed at protecting the rights of children of incarcerated parents. In India, the Fundamental Rights and Directive Principles of State Policy, forming a part of the Indian Constitution ("the Supreme Law") are applicable to all citizens and protect such children as well. The most essential is the Right to Life (Article 21) which entitles children to a right to life of dignity, right to life free from exploitation, right to leisure, right to education, right to health care among other basic rights. The Supreme Court guidelines on this subject have proven to be one step away from a legislation in providing a holistic framework for protection of incarcerated children. Also, in India, prisons are under the jurisdiction of states and different states have also made their own laws on this subject. However, the need of the hour remains to be a comprehensive legal reform that should strike at protecting and enforcing the rights of children of incarcerated parents in a meticulous and coherent manner.

A study of the Juvenile Justice (Care and Protection of Children) Act, 2015 also indicates that there are certain provisions in the said act while are tantamount in protecting the vested interests of children. These principles, if extended to children of incarcerated parents, could go a good

mile in enforcing their rights and laying down a framework for their protection.

X. RECOMMENDATIONS

The need of the hour is a strong legislation by the Parliament specifically considering children of imprisoned parents. Certain provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015 should also be extended to children of incarcerated parents. These include:

- Chapter II- General Principles of Care and Protection of Children
- Chapter V- Provisions for a Child Welfare Committee
- Chapter VI (Procedure in Relation to Children in Need of Care and Protection), clause 31(1) and (2).
- Chapter VII (Rehabilitation and Social Integration), sub-clause 39(1).

Other provisions, which should be implemented across the territory of India on priority basis, include the following:

- A separate agency should be established to collect and analyse data regarding the children of incarcerated parents and keep a track on them till they attain the age of majority.
- Following England and Wales, India should take the decision to admit the parent and child by taking into account a number of factors, including: Whether it is in the *best interests of the child*. For this purpose, children should be consulted in determining the extent and type of relationship they want with an imprisoned parent and it should be remembered that one child's wants and best interests may differ from another's, even within the same family.
- Following Singapore, when any child has presumably attained the age of three, the medical officer of the prison must report whether it is desirable for the child to be retained longer. If it is proving to be injurious to the child's mental or physical health and well being, the child need not be kept in prison till the age of 6, but immediately sent to foster care. An opinion from the Child Welfare Services should also be required.
- **The child should have the right be kept safe and informed at the time of the parent's arrest.** Thus, there must be developed arrest protocols that support and protect children and offer children and/or their caregivers basic information about the post-arrest

process.

- In the arrest phase, the police should inquire if the person is a parent or a guardian. If so, immediate arrangements should be made for the care and protection of the child while the parent is in the pre-trial phase. Guidance should be produced for police officers or others conducting arrests about appropriate language and behavior to use around children.
- **The child should have the right not to be judged, blamed or labeled because his/her parent is incarcerated.** Guidance should be produced about appropriate media reporting of arrests, so as not to stigmatize the children directly or indirectly.
- **The child should have the right to be heard when decisions are made about him/her.**
Thus, it is necessary to train staff at institutions whose constituency includes children of incarcerated parents to recognize and address these children's needs and concerns.
- **The child should have the right to be considered when decisions are made about his/her parent.** This will turn arrest into an opportunity for family preservation.
- It should be made mandatory to include a family impact statement in pre-sentence investigation reports
- Law should explicitly require judges, at sentencing, to inquire about arrangements for care of the child when considering the effects of a parent's incarceration on the children.
- **The child should have the right to support as he/she faces his/her parent's incarceration.** For this purpose, adults should be trained, who work with young people to recognize the needs and concerns of children whose parents are incarcerated.
Children must also be provided access to specially trained therapists, counselors, and/or mentors.
- Following California law, appropriate authority should be directed to examine newly committed inmates to determine the existence of any strong community and family ties, the maintenance of which could aid in the inmate's rehabilitation, and, when reasonable, to assign a prisoner to the appropriate facility nearest his or her home.
- Children should be sent to schools outside of prison to be imparted proper formal education. Schools are a key place to establish a support system for children of incarcerated parents both directly through support groups or school counselors, and indirectly by educating other students about the realities of having a parent in prison.
- Support groups could be tremendously helpful in bringing together caregivers and/or

children in a safe environment where they can be honest and open. These groups would additionally provide parents with an opportunity to network (for instance, to help each other locate agencies that may help with material and counseling needs). Such a group only requires a person or agency to initiate it, some advertising, and a space to meet and does not consume much in the way of resources and expense, especially if it is caregiver-led.

- Programmes allowing imprisoned parents to produce an audio recording of a book for their children to listen to should be implemented for strengthening the parent-child relationship, raising the self-esteem of prisoners and improving literacy among both children and prisoners.
- **The child should have the right to a lifelong relationship with his/her parent.**

Hawaii law could be implemented in India for re-establishing the parent-child relationship upon release of parent from prison. In Hawaii, the Department of Public Safety has been directed to “institute policies that support family cohesion and family participation in offenders’ transition to the community.” A Transformational Justice Interagency Task Force should be constituted to, among other things, develop and establish a parenting skills program for inmates who are within one year of release.
- The eligibility criteria for certain forms of state support should be drawn after considering the impact that such criteria has on the families of prisoners who are often economically marginalised before imprisonment.
- Lastly, it must be remembered that an avenue to address social stigma is expanded community education. The more aware the community is the more likely families with an incarcerated parent will be supported. For example, articles, stories, or workshops on the needs of these families could both inform and bring together key players including schools, churches, and local service providers. Education may also spark movement toward legislative advocacy to change policies, specifically those that concern prison visitation, in order to improve the experiences of these families.