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# IMPACT OF PARENTAL INCARCERATION ON CHILDREN: A SPECIAL FOCUS ON THE REPRODUCTIVE RIGHTS OF PRISONERS

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## ABSTRACT

When a crime is committed, it affects the whole society. Besides the victim and the accused/convict, their family/dependents are also affected. Children of incarcerated parents are often termed as ‘victims of justice’. In a country like India, where children are considered as embodiment of God, not much heed is given to the well-being of those children who live with their mothers in prisons or those who live outside without any parental care. They go through a lot of physical, mental, emotional, educational, and financial hurdles. This paper shall deal with the legal provisions and the judicial approach towards the well-being of children of incarcerated persons in India. After analyzing them, the authors aims to draw some solutions and suggestions.

It is pertinent to explore the demands of the prisoners in respect of their reproductive rights including right to procreate and parenthood. The authors aims to determine whether such a right can be made absolute and what effect will it have on their children. An attempt shall be made to analyze the fate of such right and to balance it with the future prospects of such an unborn child.

**Keywords:** Incarcerated parents, rights of child, legislative provisions, judicial guidelines, reproductive rights.

## INTRODUCTION

*Safety and security don't just happen, they are the result of collective consensus and public investment. We owe our children, the most vulnerable citizens in our society, a life free of violence and fear.” -Nelson Mandela.<sup>1</sup>*

Parental incarceration refers to the confinement of a parent in a jail, prison, or detention facility. This phenomenon is increasingly recognised as a pressing social concern with deep and long-lasting effects on families, particularly on children. The imprisonment of a parent frequently disrupts the family's stability, triggering emotional, psychological, and social challenges for the child.

Under Indian prison regulations, women inmates are permitted to keep their children below six years of age with them in custody. However, male prisoners do not have this privilege. Consequently, once a child turns six, they must reside outside prison premises if either or both parents are serving a sentence.

Children of incarcerated parents generally fall into two categories:

1. Children living inside prison with a parent – In India, a woman prisoner may lawfully keep her children with her until they reach the age of six.
2. Children living outside while a parent is imprisoned – These children may live with extended family members, neighbours, friends, or in government-run or NGO-managed child care institutions. Such children are often described as “left-behind children in the community.”

The absence of parental care and emotional support can impair a child's coping capacity, hinder normal social development, and cause marked behavioural changes. In a sense, these children are “double victims”: they endure the loss of a parent and, at the same time, confront stigma, neglect, and social exclusion, all of which undermine their emotional, mental, and physical well-being. The trauma is especially severe when one parent kills the other, sometimes in the presence of the child, leaving the child without either parent in deeply distressing circumstances.

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<sup>1</sup> Former President of South Africa, anti-apartheid activist

## EFFECT OF PARENTAL INCARCERATION ON CHILDREN

Every child's circumstances are distinct. They are not interchangeable members of a group, and each experiences adversity in their own way. The damaging effects of prison life on children who live in such environments are shaped by factors outside their control. Children possess unique talents and developmental potential, but negative environmental influences — especially prolonged exposure to prison settings — can harm their psychological growth.

In line with Supreme Court guidelines<sup>2</sup>, children are allowed to stay with their mothers until they turn six, recognising that separation during the formative years should be avoided. Some children are born inside prison; others enter custody alongside their mothers. However, the prison environment is far from ideal for healthy development.

### 1. Physical and Social Growth

Prisons, often overcrowded and lacking in adequate nutrition, clean water, and sanitation, pose serious risks to children's health. They provide minimal opportunities for play, education, and social interaction, all of which are crucial for motor and cognitive development. The absence of a "home" setting can distort their socialisation patterns. In women's wards, boys may even adopt speech patterns associated with females due to constant exposure to women. Limited exposure to the outside world means everyday sights — such as animals on roads — can frighten them.

### 2. Psychological Impact

The mental health repercussions of having an incarcerated parent vary with the child's age, personality, and support network, but common effects include:

- Emotional Distress and Trauma – Feelings of grief, anger, confusion, and shame are common. Sudden separation may create a deep sense of abandonment.
- Heightened Anxiety and Depression – Research indicates higher rates of anxiety and depression among children with imprisoned parents, often linked to concerns about the

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<sup>2</sup> *R.D. Upadhyay v. State of Andhra Pradesh*, AIR 2006 SC 1946

parent's safety or the stigma of incarceration.

- Behavioural Issues – Aggression, defiance, and withdrawal are frequent responses, hampering social and academic growth.
- Attachment Problems – Especially in younger children, abrupt separation from the primary caregiver can impair the ability to form secure relationships in the future.
- Stigma and Isolation – Social rejection or discrimination can leave these children feeling alienated and reluctant to discuss their experiences.

### **3. Financial Strain**

When the imprisoned parent is the primary earner, families face acute financial hardship. Legal expenses and basic living costs can overwhelm the remaining caregivers, who are often grandparents or other relatives. Children's education may be disrupted due to inability to pay for tuition, uniforms, and books, increasing the risk of school dropout.

A 2002 study by Prayas<sup>3</sup> highlighted common consequences of parental arrest for children: lack of supervision before school, trouble securing re-admission, academic setbacks, inability to afford school requirements, irregular attendance, missed examinations, and ultimately, withdrawal from school.

### **Factors That Influence Impact**

The severity of the impact of parental incarceration on a child depends on:

1. Age – Younger children may not grasp the situation but still experience intense emotional disruption; older children may struggle with shame, resentment, or identity issues.
2. Quality of Caregiving – A reliable and caring guardian can significantly reduce negative effects; instability worsens them.
3. Length and Conditions of Incarceration – The sentence's duration, prison conditions, and opportunities for parent-child contact shape the child's experience and coping ability.

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<sup>3</sup> Prayas (2002) Project of TISS, Mumbai study titled "Forced Separation: Children of Imprisoned Mothers"

## LEGISLATIVE PROVISIONS

In India, the welfare of children with incarcerated parents is addressed through a combination of constitutional provisions, legislative enactments, and specific guidelines aimed at safeguarding their rights and well-being.

### 1. Constitutional Provisions

The Constitution of India, though not containing provisions exclusively devoted to the welfare of children of incarcerated parents, lays down a strong rights-based foundation for their protection and development:

- Article 14 – Equality before the Law: Guarantees that the State shall not deny equality before the law or equal protection of the laws to any person within the territory of India.
- Article 15(1) – Prohibition of Discrimination: Restricts the State from discriminating against any citizen on the grounds of religion, race, caste, sex, or place of birth.
- Article 15(3) – Special Provisions for Women and Children: Empowers the State to make special provisions for the welfare of women and children.
- Article 21 – Right to Life and Personal Liberty: Provides that no person shall be deprived of life or personal liberty except according to the procedure established by law.
- Article 21A – Right to Education: Mandates the State to provide free and compulsory education to all children between the ages of six and fourteen years.
- Article 39(f) – Directive Principle on Child Development: Directs the State to ensure that children grow in healthy conditions, in an environment of freedom and dignity, and are protected from exploitation and abandonment.
- Article 45 – Early Childhood Care and Education: Requires the State to provide early childhood care and education to all children until they complete the age of six years.
- Article 47 – Public Health and Nutrition: Obligates the State to raise nutrition levels, improve the standard of living, and enhance public health.

## **2. National Policy for Children, 1974**

In line with constitutional principles, the National Policy for Children, 1974 was formulated, recognising children as a “supremely important asset” and affirming the State’s commitment to their welfare. Key commitments under the policy include:

- Provision of adequate services for children both before and after birth, ensuring physical, mental, and social development.
- Comprehensive healthcare programmes and supplementary nutrition for mothers and children.
- Promotion of physical education and recreational activities.
- Special consideration for children from weaker sections of society and measures to prevent child exploitation.

## **3. Juvenile Justice (Care and Protection of Children) Act, 2015**

The Juvenile Justice (Care and Protection of Children) Act, 2015 (JJ Act) is the primary statute for the care, protection, and rehabilitation of children in India. Under Section 2(14)(vi), a child in need of care and protection includes one who has no parent or guardian willing to care for them, or whose parents have abandoned or surrendered them. This definition can extend to children of incarcerated parents when no adequate care arrangements exist.

## **4. Right of Children to Free and Compulsory Education Act, 2009**

The RTE Act, 2009 operationalises Article 21A<sup>4</sup> by ensuring that all children, including those with parents in prison, have access to free and compulsory elementary education.

## **5. Protection of Children from Sexual Offences (POCSO) Act, 2012**

The POCSO Act, 2012 provides a robust legal framework to protect children from sexual offences, ensuring a secure environment essential for their physical and emotional

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<sup>4</sup> The Constitution of India, art.21A- “The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.”

development.

## 6. Model Prison Manual, 2016

Prepared by the Bureau of Police Research and Development, Ministry of Home Affairs, the Model Prison Manual, 2016 serves as a guideline for states to adapt within their local contexts. Provisions relevant to children of prisoners include:

- Establishment of crèches and nursery schools in every prison housing children.
- Transfer of children above six years of age to the care of family members or to appropriate children's homes.
- Sensitive handling of the separation process, ensuring that alternative arrangements for the child's care are in place before removal from the mother's custody.

## JUDICIAL APPROACH

The landmark matter of *R.D. Upadhyay v. State of Andhra Pradesh*<sup>5</sup> arose when a non-governmental organisation approached the court through a writ petition, urging the establishment of clear protocols for meeting the developmental requirements of children residing in prison with their mothers—whether those mothers were awaiting trial or serving sentences. The petition also pressed for better living conditions for such children.

The court emphasised that no pregnant woman should be admitted to a prison unless it is confirmed that the facility can provide the minimum essentials for safe childbirth, along with proper care before and after delivery for both mother and infant. If pregnancy is suspected or detected during incarceration, the lady medical officer must notify the Superintendent without delay. The prisoner is then to be sent to the women's section of the District Government Hospital for a full medical assessment—covering her health status, pregnancy term, expected delivery date, and related particulars. This information, together with details such as sentence length and anticipated release date, must be forwarded to the Inspector General of Prisons.

All gynaecological check-ups should occur in the District Government Hospital, and the prescribed pre- and postnatal care must be strictly followed. Where practical, and in cases not

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<sup>5</sup> AIR 2006 SC 1946

involving grave charges or high security risks, arrangements should be made for temporary release or parole—especially for minor offences—so that childbirth may take place outside the prison.

If delivery occurs inside prison, the birth must be officially recorded at the local registration office, but without any reference to the prison in the certificate; only the local address is to be stated. Children are permitted to remain with their mothers until they reach six years of age, after which they should be placed with a guardian named by the mother or in an appropriate Social Welfare Department institution, preferably within the same locality to avoid undue hardship. Should the mother pass away while serving her sentence, the Superintendent must inform the District Magistrate so that proper arrangements for the child's care can be made.

A similar focus on child welfare arose in *Smt. Rekha v. State of U.P.*<sup>6</sup>, where the Allahabad High Court examined a bail application from a mother living in prison with her young son. Justice Ajay Bhanot underscored that the constitutional protections of Article 21 extend to children, remarking that “Prison walls cannot obstruct the onrush of the fruits of Article 21 for children.”

The applicant's five-year-old had been in custody with her since her arrest. She argued that his fundamental rights, including the right to education under Article 21-A, were being infringed by his confinement. While the State maintained that it was working to create a supportive prison environment, the Court acknowledged the inevitable collateral harm to children whose parents are incarcerated.

The bench held that safeguarding such children is a duty shared by both parents and the State. Referring to Rule 339(f) of the Uttar Pradesh Jail Manual, 2022, the Right of Children to Free and Compulsory Education Act, 2009, and Article 21-A, the Court affirmed that children in such circumstances cannot be denied access to schooling. Under the Legal Services Authorities Act, 1987, District Legal Services Authorities were directed to inform inmates about their children's educational rights.

Justice Bhanot observed that each child's needs vary, requiring individualised care plans. The State Government was instructed to implement structured programmes covering health, education, wellness, and holistic growth, and to ensure that children were housed apart from

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<sup>6</sup> Criminal misc. bail application no. - 25993 of 2024

other prisoners, enrolled in external schools, and provided with recreational spaces such as playgrounds and crèches.

Further directives required the Jail Authorities to immediately inform the Child Welfare Committee when a child enters prison with a parent, establish protective barriers between children and other inmates, and coordinate with District Probation Officers to prepare personalised development plans. The Court criticised the lack of coordination among State departments, warning that this delay in upholding children's rights in prisons must be resolved promptly.

## REPRODUCTIVE RIGHTS OF PRISONERS

The Supreme Court in *Sunil Batra v. Delhi Administration*<sup>7</sup> underscored that a prisoner's Fundamental Rights “do not part company at the prison gates.” Over the years, this principle has been reaffirmed, extending constitutional protection to diverse aspects of prisoners' lives. In recent times, the reproductive rights of incarcerated individuals—particularly women—have received heightened judicial attention, raising complex legal and human rights questions.

### 1. Medical Termination of Pregnancy (MTP)

The Medical Termination of Pregnancy Act, 1971 applies to all women, including those in custody. However, incarcerated women often face procedural and institutional barriers to accessing abortion services.

In *Hallo Bi v. State of Madhya Pradesh*<sup>8</sup>, an undertrial prisoner sought permission to terminate her pregnancy, which she alleged resulted from forced prostitution. Although judicial approval is not required under the MTP Act, prison authorities referred her request to the Chief Judicial Magistrate, who rejected it. The High Court, relying on *Suchita Srivastava v. Chandigarh Administration*<sup>9</sup>, recognised a woman's right to reproductive autonomy under Article 21. It held that “forced prostitution” amounted to rape, falling within the statutory grounds for termination under Section 3 of the Act

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<sup>7</sup> AIR 1978 SC 1976

<sup>8</sup> 2013 Cri LJ 2868 (M.P.).

<sup>9</sup> AIR 2010 SC 235

Similarly, in *High Court on its own motion v. State of Maharashtra*<sup>10</sup>, the Bombay High Court addressed systemic hurdles faced by pregnant prisoners seeking abortion. Declaring reproductive choice a facet of the right to life under Article 21, the Court issued detailed directions: pregnancy tests for all newly admitted women prisoners, counselling on MTP options, and immediate medical referral upon the prisoner's request for termination.

## 2. Special Provisions for Pregnant Women in Prisons

In *R. D. Upadhyay v. State of Andhra Pradesh*<sup>11</sup>, the Supreme Court framed guidelines on the treatment of pregnant prisoners, covering prenatal care, diet, childbirth arrangements (preferably outside prison through bail), and conditions for keeping children in prison.

These guidelines were operationalised in *State of Gujarat v. Jadav @ Jatin Bhagvanbhai Prajapati*<sup>12</sup>, where the Gujarat High Court suspended a convicted woman's sentence for eleven months upon learning of her pregnancy, allowing her to deliver and care for her child outside prison. It also permitted the child to remain with the mother in prison until the age limit prescribed in the Jail Manual.

## 3. Right to Procreation and Conjugal Visits

Courts have increasingly examined whether prisoners retain the right to procreate during incarceration.

In *Jasvir Singh v. State of Punjab*<sup>13</sup>, the Punjab and Haryana High Court held that the right to procreation and conjugal visits is an aspect of human dignity under Article 21, surviving incarceration but subject to reasonable restrictions. The Court directed the State to develop a policy on conjugal visits.

In *Mrs. Meharaj v. State*<sup>14</sup>, the Madras High Court allowed temporary leave for a life convict's spouse to undergo fertility treatment, affirming that the right to have children is not extinguished by imprisonment.

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<sup>10</sup> 2017 Cri LJ 218 (Bom).

<sup>11</sup> AIR 2006 SC 1946

<sup>12</sup> Criminal Appeal No. 652/2008, decided on Feb. 01, 2016 (High Court of Gujarat).

<sup>13</sup> 2015 Cri LJ 2282 (P&H).

<sup>14</sup> 2018 SCC OnLine Mad 278.

In *Kundan Singh v. State Govt. of NCT Delhi*<sup>15</sup>, the Delhi High Court considered a parole plea for IVF treatment from a life convict and his wife. The Court acknowledged that denying them the opportunity to conceive due to their advancing age could permanently extinguish their procreative rights. Granting four weeks' parole, the Court reaffirmed that Article 21 encompasses procreation, though subject to limitations based on the nature of the offence, conduct of the prisoner, and prison administration needs.

Recently, in the case of gangster Kala Jathedi, a Delhi court permitted IVF procedures within prison premises, declining parole but allowing medical teams to collect samples inside Tihar Jail, recognising the couple's wish to continue their family lineage.<sup>16</sup>

### **Consequences and Effects on the Child**

If a prisoner is granted parole to exercise the right of procreation and a child is later born, several social, psychological, and legal consequences may follow, affecting the child's life and development. Here's an analysis of the potential outcomes:

#### **1. Emotional and Psychological Impact**

- **Absence of a Parent:** If the parent returns to incarceration after parole, the child may experience the emotional impact of separation from birth.
- **Identity Issues:** The child might grapple with questions about their parent's imprisonment and societal perceptions.
- **Stigmatization:** There may be societal stigma or judgment associated with having an incarcerated parent.

#### **2. Social Effects**

- **Bullying or Social Isolation:** The child might face discrimination or bullying from peers who learn about their parent's incarceration.

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<sup>15</sup> W.P.(Crl.) 2700/2023

<sup>16</sup> [https://www.hindustantimes.com/cities/delhi-news/delhi-ivf-sample-collection-allowed-for-kala-jathedi-inside-tihar-101750098606532.html?utm\\_source=ht\\_site\\_copyURL&utm\\_medium=social&utm\\_campaign=ht\\_site](https://www.hindustantimes.com/cities/delhi-news/delhi-ivf-sample-collection-allowed-for-kala-jathedi-inside-tihar-101750098606532.html?utm_source=ht_site_copyURL&utm_medium=social&utm_campaign=ht_site)

- Challenges in Community Integration: Society's biases toward incarcerated parents can extend to their children, affecting social acceptance.

### **3. Legal and Custodial Concerns**

- Parental Custody and Rights: The incarcerated parent may face challenges in maintaining legal custody or participating in the child's upbringing.
- Child Support: The financial support for the child may be limited due to the parent's inability to work while incarcerated.

### **4. Family Dynamics**

- Impact on the Spouse or Caregiver: The burden of raising the child may fall solely on the non-incarcerated parent or extended family.
- Bonding Issues: Limited opportunities for physical contact and bonding with the incarcerated parent can affect the child's emotional development.

### **5. Educational and Economic Challenges**

- Financial Instability: The absence of one parent may lead to economic hardship, affecting the child's education and well-being.
- Access to Opportunities: Socioeconomic challenges may limit access to extracurricular activities or quality education.

### **Mitigation Strategies**

1. Maintaining Parent-Child Relationships: Regular communication through visits, calls, and letters can help maintain a bond.

2. Counseling and Emotional Support: Psychological counseling can help children cope with the emotional impact of their parent's incarceration.

3. Community Support Programs: Involvement in mentorship and community programs can provide positive role models and social integration.

4. Legal Framework for Child Welfare: Ensuring that legal systems facilitate reasonable opportunities for parental involvement can help stabilize the child's development.

## **CONCLUSION**

Children of incarcerated parents—whether residing with their mothers inside prison or living outside under alternative care—are subjected to a dual disadvantage. They not only lose direct parental care and support but also bear the weight of societal stigma. Such children frequently face social exclusion, emotional neglect, and economic deprivation. Common challenges include lack of parental affection, exposure to abuse from relatives or the community, educational discontinuation, financial hardship, limited understanding of legal proceedings, and the psychological trauma arising from a parent's arrest and imprisonment.

When a parent is granted parole for procreation but subsequently returns to prison, the child's situation becomes even more complex, often intensifying emotional and developmental challenges. However, timely and coordinated interventions—through family support, community-based initiatives, and responsive legal frameworks—can significantly reduce the negative impacts. With adequate care, protection, and social acceptance, these children can be given the opportunity to develop in a secure, nurturing, and dignified environment.