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Human rights of children of incarcerated parents

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Abstract

The subject of parental incarceration is as complex as it is sensitive. Losing a parent to incarceration significantly affects the various developmental aspects of their children which often lasts a lifetime and even shows intergenerational mobility. The major concern pertaining to parental incarceration remains the indiscriminate abuse and violation of the basic human rights of the incarcerated parent and their children, making them a vulnerable category. In this context, a number of legislations have been introduced over time at the international and national levels to protect the interest of this vulnerable section and prioritize their best interest in further policy formulation. In this paper, the subject of parental incarceration has been explored from a human rights perspective. The relevant challenges and issues that were derived from the existing studies have been discussed in detail. It is concluded in this paper that the effectiveness of the implementation of these legislative provisions is reflected in the developmental outcomes of the children of incarcerated parents and requires further exploration for developing a more comprehensive understanding.

Keywords: Human rights, parental incarceration, right to health, right to education, Indian prisons, and care facilities.

Introduction

The subject of parental incarceration is a complex issue and it is described as any form of confinement of either or both parents within the facilities of the criminal justice system of the concerned states. A notable exception here is the confinement of the individual in any police custody, and its scope excludes the children of the prisoners of war, or any family member other than a parent [1]. Parental incarceration inevitably involves a major violation of the basic human rights of the incarcerated parent and their children. Hence, it requires effective policymaking and implementation to ensure the basic entitlements of this vulnerable category are not violated.

LITERATURE REVIEW

An overview of Parental incarceration

The subject of parental incarceration is a complex and sensitive subject, that is prevalent across the globe. Even though the causes of parental incarceration vary over a broad range, however, its

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consequence of exploding their children to disadvantageous positions is similar across different cultures. Parental incarceration often determines the future incarceration of their children [2]. While the increased incarceration rates lead to a prison boom, especially in developing countries, however, its consequence is borne by their children in the form of homelessness. This in turn contributes to another major challenge pertaining to the lack of data and the quantification and documentation of the children of incarcerated parents [3]. The consequence of parental incarceration transcends the incarcerated individual and is simultaneously borne by their families. These consequences are reflected in their disadvantageous socio-economic conditions, high levels of family instability, and unemployment. Interestingly, it is observed that the incarceration of parents is majorly concentrated amongst those sections of society that are significantly marginalized [4]. In most cases of incarceration it is observed that the incarcerated parents are taking forward a legacy of incarceration of one and more family members who were previously incarcerated. The incarceration of mothers, on the other hand, is often attributed to their homelessness or any prior experience of physical and sexual abuse along with their mental health history [5]. Although the number of incarcerated women remains relatively lower than the number of incarcerated men, it has been observed that a major portion of these incarcerated women is mothers who were the primary caregivers to their children prior to their incarceration. This parent-child separation not only impacts the child but also generates a significant level of parental stress and frustration [6]. When one or both parents are incarcerated, their children are often referred to as the “orphans of justice” or “collateral damage” [7] caused as a consequence of incarceration that exposes these children to a broad range of social and psychological challenges. Since most of the incarcerated individuals are responsible for emotionally and financially contributing to their families, their absence creates a significant financial challenge which includes the additional burden of incarceration expenses [8]. Apart from the financial challenges experienced by the family, or more specifically, by the children, the incarceration of parents also impacts their social, economic, and even emotional and psychological well-being. The psychological challenges are observed in the form of prolonged agony and trauma, social stigma, and subsequently, social marginalization of the children of incarcerated parents [9]. With respect to the criminal justice system of India, it has been observed that the accused individuals and the convicted individuals are often subjected to similar treatment. This leaves their children vulnerable to unjust treatment in the prisons, despite their innocence. Recently, it was also reported that India remains in the list of top 15 countries, out of a total of 217 countries in terms of the highest population of undertrial prisoners [10]. Moreover Indian prisons have been experiencing a significant increase in prison suicide rates. This is a challenge for the Indian criminal justice system, and incomprehensible for the families of these prisoners, especially their children who run the risk of becoming orphans altogether, adding to their existing miseries [11]. Such incidences can be avoided by taking cognizance of the miseries of the incarcerated parents and providing them with a safe environment for maintaining parent-child communication. This will not only help them feel connected with their children but also relieve them of their parenting frustration and stress [12]. With parental incarceration, there is an increased

interaction of their children with the criminal justice system. Moore often than ever, this exposure leaves a long-term impact on the children which is also found to be transmitted intergenerationally [13]. However, the consequences of parental incarceration in it itself is a much more complex subject that requires deeper exploration.

Impact of parental incarceration on the developmental aspects of children

The subject of parental incarceration has been explored extensively and it has been observed that the impact of parental incarceration is multi-dimensional. However, the most concerning aspect of this parental incarceration remains the consequences that are detrimental to the physical, social, and psychological development of the children whose parents have been incarcerated [14]. The result of the incarceration of a parent on their children can be traced back to their indulgence in offensive and illegal activities which significantly compromises the stability of the family. The holistic development of the child is thus hindered, considering that a healthy home environment is the most basic prerequisite for the development of the child which ensures the child's accessibility and exercise of his basic entitlements [15]. From the perspective of the incarcerated parent, the main issues of concern remain the health and safety of their children. While they strive to maintain parent-child communication when often concerned about their increased exposure to the perils of the criminal justice system and try to keep them shielded from the pervasive incarceration cycle [16]. Parental incarceration significantly influences the different developmental aspects of their children, which are observed in the various developmental outcomes such as their behavioral outcomes, social outcomes, and even academic outcomes. However, an interesting aspect to note here is that the incarceration of parents, especially those from a lower-income background significantly increased the educational attainment of their children [17]. The impact of parental incarceration can further be categorized on the basis of the incarceration of a father or a mother. In this context, it has been observed that paternal incarceration has a significantly detrimental impact on the well-being of their child compared to the impact of maternal incarceration [18]. The behavioral outcomes of the children whose parents have been incarcerated are often expressed in terms of behavioral problems, mental health issues, and the development of delinquency. The development of externalizing behavioral problems in younger children is often attributed to the incarceration of their father, even though it has no significant impact on their internalizing behavior [19]. The impact of parental incarceration on a child, further varies with their developmental age. As a child attains middle childhood, it is observed that they exhibit serious externalizing problems such as aggressive and violent actions reported by their caregivers and teachers, along with internalizing behaviors such as antisocial behavior and delinquency [20]. In the case of adolescents, the impact of parental incarceration is more prominently exhibited in psychiatric disorders, namely, conduct disorders, attention deficit hyperactivity disorder (ADHD), depressive disorders, and disorders that are oppositional defiant. However, there is no significant relationship between parental incarceration is adolescent anxiety or substance disorders. Dealing with adolescents is much more complex as they are vulnerable to risk factors like adolescent delinquency and suicidal

tendencies, thus constituting the high-risk group [21]. This makes them susceptible to involvement in illegal activities, and subsequently increases their chances of incarceration as well. An interesting aspect in this regard is the moderating role of the maltreatment of the child by the incarcerated parent that determines the development of mental health challenges in them. The gender specificity of the impact further highlighted the development of significantly high levels of depression in female children in instances of paternal incarceration [22]. In their early adulthood, it is, however, observed that instances of paternal incarceration significantly lower their academic outcomes which result in an increased rate of dropping out of these children. In terms of their social outcomes, parental incarceration generates a number of physical and mental problems which further contribute to challenges such as their early parenthood, felony charges, and social isolation [23]. Even though paternal incarceration has been observed to have a significant impact on the development of negative externalizing behavior in their children, however, it is the instances of maternal incarceration that induced the tendencies of violent crimes and prison violence, irrespective of the presence of the father. Moreover, maternal incarceration also has a significant influence on the detrimental outcomes on their daughters, although paternal incarceration has a more emotional impact on them [24]. The consequence of parental incarceration on the generation of criminal behavior in their children has been established in previous studies. Along with the development of antisocial behavior, paternal incarceration in particular often facilitated drug abuse by their children. However, in the case of abusive or absentee fathers, paternal incarceration is often perceived to have a positive influence on the well-being of their children by eliminating the risk factors [25]. The impact of maternal incarceration however is observed in the long-term psychological aspects of their children. This is most prominently observed in a significantly lower level of self-perception, reduced levels of cognitive empathy, and high levels of internalizing behavioral aspects. It can be said that the impact of maternal incarceration is much more prolonged than the impact of paternal incarceration [26]. While dealing with the consequences of parental incarceration on the psychological development of their children, the prominent risk factors have been identified to be negative familial emotions, rejection by their teachers, social isolation along with hostility. The protective factors in this context, however, are a positive family environment, familial cohesion, academic support, social support, and positive interpersonal relationships [27]. These factors help in the development of resilience that cushions these children from the negative impacts of parental incarceration and social marginalization.

Human rights approach to Parental incarceration

The subject of parental incarceration is highly sensitive not just for their children but also for the incarcerated parents. This complexity is addressed by taking into consideration their basic entitlement and their basic human rights which come under the scope of the legal aspect of incarceration. In India, Article 21 of the constitution of India, guarantees the right to life and dignity for all citizens and this inevitably includes incarcerated parents in Indian jails [28]. In cases of maternal incarceration, the women inmates face a multitude of challenges, especially in terms of

their safety, security, and hygiene. The infrastructure inadequacies that are unable to provide proper health facilities significantly breach the right to health, which is an integral aspect of the right to life of incarcerated parent and their children [29]. Life in prison confinements is an umbrella that harbors a multitude of human rights violations for the incarcerated individual as well as their families. This further gets worse in the case of incarcerated mothers who face multiple challenges in their social, cultural, economic, psychological, and environmental aspects which are violative of the principle of human dignity enunciated in the Universal Declaration of Human Rights (1948) [30]. An concerning aspect of parental incarceration is observed in the behavior of the incarcerated women and their children where it has been reported that they are visibly afraid of the prison authority. This fear is usually the result of inhuman treatment and torture by the prison authorities that significantly lowers their self-worth thus impeding the rehabilitative objective of the prisons [31]. Life in prison also significantly affects mental health, which is an integral part of the right to health of the incarcerated parents which often contributed to the development of mental health issues like depression, anxiety, and stress in their children [32]. The right to health of the incarcerated parents especially the incarcerated mothers have been repeatedly violated and unfortunately, it continues even today. The inhospitable prison environment gives rise to challenges such as obesity, distress, depression, anxiety, and somatization, which affects incarcerated parent and their children alike [33]. In the absence of gender-sensitive prison norms the violation of basic entitlements of the incarcerated parents primarily involves the violation of their dignity through their inhumane treatment and torture inside the prison facilities by their fellow inmates or even by the prison authorities [34]. Despite the Supreme court guidelines on the strict prohibition of any form of custodial violence and access to free legal aid, as enunciated by Justice Bhagwati in *Hussainara Khatoon & Ors vs Home Secretary, State Of Bihar 1979* [35] and *Smt. Nilabati Behera Alias Lalit vs State Of Orissa And Ors* [36], there remains a major gap in the implementation of these provisions.

Human rights of the children of incarcerated parents

Parental incarceration not only results in the violation of the basic human rights of the incarcerated parents, but it evidently causes a series of deprivation for the children. Children of incarcerated parents can be categorized as those who are allowed to accompany their mothers inside the prisons and are below six years of age, and those who are left outside as a result of incarceration [37]. The most basic deprivation in this context is observed in as they become unable to enjoy their basic right to a healthy developmental environment. In India, a Supreme court judgment [38] highlighted the right of protection and care of the children of incarcerated parents by stating that the best interest of the children must be prioritized to address the challenges pertaining to the non-congenial jail environment for their overall. It further provided for the living arrangement for the younger children, who are below 6 years of age, with their mothers inside the prison facilities and simultaneously provided them with caregiving facilities including a healthy and hygienic diet, sanitary conditions, and adequate healthcare facilities for the children and the mothers [39].

Provisions for creches and nurseries were also highlighted by the honorable Supreme court of India inside the judicial facilities along with the involvement of more teachers to ensure a healthy and unhindered developmental environment for the children of incarcerated mothers [40]. Further, in the absence of adequate healthcare facilities, the children living with their mothers inside prison facilities are unable to exercise their right to physical and mental healthcare and thus remain vulnerable to diseases and psychological disorders like anxiety, schizophrenia, and even post-traumatic stress disorder (PTSD) [41]. For the children who are left outside as a result of the incarceration of their parents, the challenges are significantly different. While they experience trauma caused by separation from their parents, they are often robbed of their dignity by being subjected to social marginalization, stigmatization, and even social exclusion [42]. While the other consequences of parental incarceration can still be conquered, however, the violation of the dignity and the psychological well-being of these children often lasts a lifetime, and in some cases even exhibits intergenerational mobility.

Legislative provisions dealing with the human rights of the children of incarcerated parents

In India, the legislative provisions meant for safeguarding the basic human rights of the Prisoners, especially the incarcerated parents and their children, are predominantly based on the all-encompassing Right to life and dignity enunciated in Article 21 of the Indian constitution [43]. This forms the basis for all the legislations in India that highlight the rights and entitlements of the individuals in Indian prisons, namely. the Indian Penal Code (1860), the Prison Act (1894), the Prisoner's Act (1900), the Identification of Prisoner's Act (1920), the Exchange of Prisoner's Act (1948), the Transfer of Prisoner's Act (1950), the Prisoner (Attendance in Court) Act (1955), the Probation of Offenders Act (1958), the Code of Criminal Procedure (1973), the Repatriation of Prisoner's Act (2003), and the Model Prison Manual (2016) [44]. This spirit of Article 21 aligns with the provisions in ICCPR (1966), which enunciate the right to humanity and dignity of the prisoners and the right to access separate treatments as per the different phases of their incarceration. The ICCPR also enunciates the basic human right of an incarcerated individual pertaining to free legal aid and fair hearing [45]. The incarcerated mothers and their children constitute a highly vulnerable section. For their protection and well-being several legislative provisions such as the Bangkok Rules on Women Offenders (2010), Kyiv Declaration on Women's Health in Prison (2008) Beijing convention Sep (1995), etc, have been adopted and implemented over the course of time [46]. When it comes to the protection of the children of incarcerated mothers, there are several other international instruments namely, the African Charter on the Rights and Welfare of the Child (1990), The United Nations Committee on the Rights of the Child (1989), the Salvador Declaration of the 12th UN Crime Congress (2010), the United Nations Model Strategies and Practical Measures on the Elimination of Violence against Children (2010) [47]. In India, several legislative provisions highlight the basic rights of children to protect them from the negative impact of parental incarceration. These are the PCMA, RTE act, POCSO act, Criminal law amendment act,

Juvenile Justice Act, and the 93rd constitutional amendment which enunciate the importance of education and training of the children in need of care and protection including the children of incarcerated parents [48]. In the recent context the most important piece of legislation that enunciated the protection of these children is the Juvenile Justice (Care and Protection of Children) Act, of 2015, although it doesn't explicitly mention the children of incarcerated parents. It provides an integrated intervention by the Child Protection Committee, led by a district judge, and the Child Welfare Committee. To ensure the care and protection of these children it highlights the importance of privacy, confidentiality, non-discrimination, dignity, and safety. It simultaneously provides for Observation Homes, Special Homes, Children's homes, Shelter Homes, Foster Care, Adoption, sponsorship, and Special Juvenile Police to ensure the care facilities of the children of incarcerated parents [49]. Despite the availability of a number of legislations, the human rights of the children of incarcerated parents remain largely neglected, especially in developing countries.

RESEARCH GAP

Many studies have been conducted to explore the various aspects of parental incarceration from the perspective of the parent as well their children. After reviewing a number of these studies, it was observed in the present paper that there is a significant dearth of studies focused exclusively on the human rights perspective of parental incarceration. There is also a significant gap in individually exploring the different human rights aspects of the incarcerated parent and the same for their children. Since the subject of parental incarceration is significantly complex, and the challenges faced by incarcerated fathers and mothers are different, hence there is also a gap in exploring the different entitlements of incarcerated mothers and incarcerated mothers from a human rights perspective. Further, there is also a need to understand and explore the entitlements of the children of incarcerated parents from a human right perspective, especially in the cultural context. There is also a gap in the exploration of the human rights entitlements of the children of incarcerated parents at their different developmental stages. Finally, there is also a need to analyze the effectiveness of the various legislative instruments that provide for the protection of the different human rights aspects of incarcerated parents and their children. Further, an integrated analysis of this subject can help develop a comprehensive understanding of the inextricable human rights of incarcerated parents and their children, especially in the Indian context, where there is a significant dearth of studies.

CONCLUSION

It has been previously established that the incarceration of either or both parents has a significant influence on the various developmental aspects of their children. From the present paper, it can be concluded that parental incarceration is a global phenomenon and the impact of the same remains consistent across cultures in terms of the abuse of basic rights and entitlements of the children of incarcerated parents. The basic human rights entitlements for the incarcerated parent and their children are mostly similar, with slight differences in terms of developmental aspects. There are a

number of legislations present at the international and national levels that highlight the different provisions for the protection of incarcerated parents and their children who are in need of care and protection. However, the effectiveness of these legislations remains subject to the positive developmental outcomes of these children and requires a much deeper analysis to ensure the exercise of their basic entitlements. By ensuring the effective implementation of these legislations not only will the spirit of human rights be highlighted and protected but also ensure holistic development of the children of incarcerated parents facilitating their social acceptance.

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