

Introduction

One of the most difficult moments for the children whose parents are involved in a criminal justice process is their parents' arrest, when they are separated from their parents against their will.

Some practices that may mitigate the negative impact on children of parental detention are outlined below. These practices are based on the experiences that an Argentine Federal Court of Appeals has had as from the issue of a mandatory regulation aimed at ensuring immediate protection to children when their parents happen to be incarcerated.

1.- Questions of fact

Whenever a dwelling-house is searched and, as a result, adults who have children under their exclusive care are arrested, the children are usually left with the non-imprisoned family members who live in the same dwelling-house or vicinity or, otherwise, they are delivered by the police to a neighbor.

In general, children are left under the care of an adult with the consent of the arrested parents. However, parents are under the pressure of their own detention and their possibilities of adopting a decision or making a request are limited. The relatives or neighbors, on the other hand, cannot easily refuse to take care of the children, especially if the detention occurs during the night. The decision about who will take care of the children –if any such decision was made– will be affected by the violence suffered.

The persons who received the children in custody may later entrust them to another person. This possibility or decision would be within the “private” sphere and, thus, not subject to any framework whatsoever awarding protection to the children's rights. Parents would only be involved in any such decision if the persons at issue bother to ask them, whereas children have no say in the matter.

All the foregoing applies in the case children were present at the moment of the search of the dwelling-house. Otherwise, they would have to manage on their own when they come back home to find out that their parents have gone or when parents are arrested in a place other than the dwelling-house.

2.- Legal provisions (Court Regulation 40/97).

In 1997, the Federal Court of Appeals for San Martín introduced a mandatory regulation dictating all federal judges for San Martín and the police forces to verify whether the persons arrested have children under their exclusive care and take down notice of such situation in the records of the proceedings.

If the persons arrested have children under their exclusive care, judges shall take all the necessary measures to protect them. Particularly, children must be left under the custody of a responsible adult, which custody shall be accepted by both the arrested persons and those assuming the responsibility for the care of the children and subsequently ratified before the courts. Accordingly, the arrested parents will be able to review the decision they adopted pressured by their detention and the children will have the opportunity to be listened to, if they are in condition of stating their view.

Under this regulation, judges are also bound to charge the temporary guardians with duties towards the children under their custody and provide them with the necessary guidance and assistance until the children are derived to the competent child protection body. To this end, the Court of Appeals has a group of specialized psychologists and social workers.

When this regulation was issued, it was decided that the competent authorities that should deal with proceedings of this type were the family courts and not the juvenile courts. The rationale behind this is that the children and their new temporary guardians know where to resort to should they need any help and that the competent authorities be aware of the background of the case (in cases of this type, family courts act upon a party's request; whereas juvenile courts would place children under their surveillance based on the existence of an alleged risk).

Currently, in the light of the amendments introduced to the legislation on this matter, cases of this type are dealt with by the right protection service centers of the Executive Power.

All the aforementioned duties and obligations apply in the case of disabled persons under the exclusive care of arrested people.

In summary:

Detention → the person arrested should be asked whether he/she has children under their exclusive care → if the answer is yes, he/she should be asked with whom the children should be left → the children should be left under the care of the person so appointed → the person arrested and the temporary guardian of the children should sign the related document → the temporary guardian should be summoned to appear in court → a record must be kept of the whole proceedings.

Court → the temporary guardian should appear before the court → when possible, children should be listened to → both the person arrested and the temporary guardian should ratify the decisions adopted in relation with the children's custody → the case should be remanded to the competent authorities for the protection of the rights of the child.

3.- Aim

Court regulation No. 40/97 is aimed at dealing with the neglect suffered by children upon parental detention, even when a third party affords them protection.

We say children are neglected because their parents, who are legally not prevented from exercising their parental authority due to their detention, cannot in fact comply with their duty of protection; and even if children are entrusted to third parties, such third parties are under no obligation to provide children with protection or assume the underlying responsibilities. Thus, the children's right to protection is contingent upon the good will of a close adult.

4.- Grounds for adoption

Children may be separated from their parents for several reasons (death, illness, abandonment, etc.). In the event of children under the exclusive care of persons subject to detention, such separation results from a legitimate act of the Government, when by exercising its legitimate duties, the court orders the detention of an adult, thus infringing one of the fundamental rights of the child: having an adult take care of him/her. Therefore, the child must be at least guaranteed that another adult will assume such responsibility.

Although it is true that someone will often take care of the children following their parents' detention, the rights of the children must not be left to chance or depend upon the good will of a third party, let alone when their vulnerability was the result of a legitimate act of the Government.

5.- Scope

Children are **in no way** subject to the criminal court or any court proceedings whatsoever. It is not the criminal court or other court's responsibility to protect the children who are separated from their parents but of an adult from the children's environment appointed by their parents. The criminal court will only be responsible for ensuring that in the whirlpool of detention of their parents, children be left under the care of a third party. In other words, the criminal court only guarantees that children are effectively entrusted to the person appointed by their parents since they are unable to do so themselves.

This is the reason why the regulation enables its protection mechanisms only in case a person or a couple who has children under their exclusive care is arrested and **not** if only one of the members of the couple is arrested since in that case, the children would still have a responsible adult who can take care of them. If the adult requires assistance, other mechanisms will be used.

6.- Need for a specific rules and regulations:

Based on the existing rules and regulations governing children's rights and the duties of public officials, it may be construed that judges shall take all the necessary measures to

protect children that may not have a responsible adult to take care of them as a result of an order issued by such judges.

However, the plain facts show that these children and what happens with them is not taken into account when arresting adults. The point is that criminal judges with jurisdiction over adults are not obliged to adopt these measures, insofar as they are not obliged to learn about the existence of children in that situation.

Court regulation No. 40/97 impose on criminal judges hearing cases where adults are involved the obligation to **learn** if there are children who, as a result of their decisions, may no longer have a responsible person taking care of them (something very simple, yet strange to criminal procedures for adults). In that case, judges must use basic pre-judicial mechanisms just because they have become aware of the situation. **Court regulation No. 40/97 make these children visible because it makes judges see.**

The ideal scenario of the judicial system would be one where all levels and actions took children into account. In the context of judicial reality, Court Regulation 40/97 of the Federal Court of Appeals for San Martín must be understood as a positive action that should not be necessary, but facts show that it is.

Such obligation should be ideally incorporated to the Criminal Procedure Code, since it rules the different stages in the criminal process. The official who endorsed this statement, jointly with another official of the court of appeals, introduced a bill to include the obligation in the Code. The bill was not approved but gave rise to the regulation at issue.

7.- Based on experience, good practices include:

a.- Prevention:

Two factors make the legal system work easier:

- knowing in advance if children will be at the dwelling-house to be searched (so that the police and the court officials can be instructed properly and call social workers to be present at that time), and
- that the people taking care of the children report to the court at the first business hour (the incarcerated parents will appear in court to enter their voluntary, signed and unsworn declaration, which makes consultation easier).

For both factors, the correct performance of the staff in charge of prevention (intelligence and due notice tasks) is crucial. Consequently, the following practices have shown good results:

- Judges gather police authorities from the territory within its jurisdiction and personally inform them of the applicable rules and regulations.
- Judges require the officials who perform intelligence tasks prior to the search to find out whether children live in the dwelling-house to be searched.
- The search warrant includes basic guidelines on how to act (ask the arrested persons if they have children under their exclusive care, deliver the children,

- register this situation in the records, hold permanent communications with the court).
- A sample letter that may be uploaded to the computers is handed in including matters related to the regulations that cannot be left aside.

b.- Court officials:

At the time the regulation was issued, guidelines and models of delivery records (based on the rights envisaged in the Convention on the Rights of the Child) were prepared and judges and officials participated in person in discussions of the different situations and courses of action.

The practices of psychologists and social workers of the court of appeals were discussed with them and the coordination with protection agencies was also considered (first, family courts; now, right protection service centers).

Experience also allowed identifying the most common situations (children under exclusive care present at the dwelling-house, children under exclusive care temporarily away, third-party children temporarily in the dwelling-house, children under exclusive care of the incarcerated who are not their sons/daughters, children of very short age, etc.) and unusual situations both during the arrest (lack of people to deliver the children, objection by the children to remain with those people or clear unsuitability of the people to assume this responsibility, stay of the children with the mother until delivery is decided, etc.) and later, at judicial stage (failure by the person taking care of the children to appear in court, change of mind of the incarcerated parents in relation to the delivery, objection by the new responsible person to continue as such, etc.) and better manners and opportunities to assign the children.

A list of good practices in these situations was made so that officials can obtain better guidance and new judges or officials can be trained on such practices. In addition, the models of records suggested were improved and the psychosocial team is supervised on an ongoing basis to improve their involvement and the assignment mechanisms. These measures were adopted because in the whirlpool of arrest and upon the commencement of criminal proceedings, the temporary guardians and the judicial staff consider judges, officials and the psychosocial team as reference in relation to children.

8.- Control over procedures followed

- All actions are notified to the Counsel for Minors, thus the Attorney General acquires vast knowledge of the matter and its counselors can control compliance of the defendants they are representing.

- Judges must register in the records of all cases appealed the folio on which the relevant procedures followed were entered. As a result, all actions taken may be controlled by the court of appeals.

- All reports prepared by psychosocial professionals regarding an incarcerated person, irrespective of its purpose, must state the situation of his/ her children after the arrest, which leads to another means of control.

9.- Conclusion

Argentine law sets forth two protection mechanisms for children of incarcerated parents, both related to children living with their mother:

- Children may live with their mother in prison until they reach the age of 4 (at their mother's choice), and
- The mother may be confined to her residence if there are children, until they reach the age of 5 (at judge's faculty).

Other children of incarcerated people do not receive any special protection from the Government.

In any case, children have needs and are exposed to special risks arising from the incarceration of the adults taking care of them. Consequently, the Government must adopt special protection measures for them.

Court Regulation 40/97 of the Federal Court of Appeals for San Martín is only a small step in fulfilling the Government's obligation to these children.