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ORPHANS OF JUSTICE: ANALYSIS OF THE JUDICIAL SYSTEM FOR CHILDREN OF INCARCERATED PARENTS IN INDIA WITH COMPARATIVE ANALYSIS

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INTRODUCTION

Imprisonment is not only an individual experience for the inmate but has very serious implications for all the members of the family, and the most affected are the children. According to estimates in India, nearly 800,000 to 900,000 children go through the experience of imprisonment of their parents each year, experiencing deprivation of emotions, society, and economy, which remains largely overlooked by legal systems and society.¹ The term used for such children is that of 'orphans of justice', not delinquent children nor even formally recognised victims, but among the most vulnerable populations in the country.²

Parental imprisonment is not a transient issue within a family but one that causes multiple hardships to the inmates' children. They get deprived of their parents, get removed from schools and neighbourhoods, become impoverished, and face extreme social stigma despite not doing anything wrong. These children, staying inside prisons along with their mothers till six years of age as per Indian laws, have very serious developmental challenges in the most important period of their lives. Those children who are left behind suffer from economic crunch, academic disturbances and psychological difficulties due to the absence of the breadwinner.

Even when there are provisions made in the constitution, Supreme Court orders and child welfare legislations, the legal regime concerning these children in India is still lacking and non-functional. In the case of *R.D. Upadhyay vs. State of Andhra Pradesh and Others*,³ the Supreme

¹ Neelam Sukhramani & Shivangi Gupta, Children of Incarcerated Parents, 57 Indian Pediatrics 199, 199 (2020); Samana Kaur Sethi, The Unknown Struggles of Children with Incarcerated Parents, 3(12) Int'l J. Modern Sci. & Rsch. Tech. 376, 376 (2025).

² Penal Reform Int'l, Children of Imprisoned Parents, <https://www.penalreform.org/issues/children/what-were-doing/children-incarcerated-parents/> (last visited June 20, 2026).

³ *R.D. Upadhyay v. State of A.P. & Ors.*, W.P. (C) No. 559 of 1994 (Supreme Court of India 2006), AIR 2006 SC 1946.

Court made elaborate guidelines about the care of children accompanying their mother in prison. There are numerous instances found in the literature where there is always a difference between the law and its enforcement. Model Prison Manual of 2016 and the Juvenile Justice (Care and Protection of Children) Act, 2015 also provide a legislative framework for these children, but due to some structural issues, these laws remain wishful thinking.

This research paper analyses the law concerning children of prisoners in India, considering it against constitutional rights and international law. It goes on to compare with laws in the United Kingdom, the United States, and Australia. It concludes by noting that even though India has made some early steps towards legislating in the area and making judicial pronouncements, the protection of children of prisoners calls for legislation and implementation of an entirely different approach in the criminal justice system.

CHILDREN OF INCARCERATED PARENTS: UNDERSTANDING THE DEMOGRAPHIC CONCERN

Children of prisoners can be categorised into two main groups. The first group entails those children of prisoners living with their incarcerated mothers in prison premises till the age of six years old. In 2016, 1,942 children were living with their mothers in Indian prisons and up to 2021, the number of imprisoned women accompanied by children was about 1,537 women and 1,764 children.⁴ There are around 34 women's prisons in India, and the country's total jail population, which is projected to be 573,220 in 2024, reflects a severely overcrowded system where children's needs are not adequately met.⁵

The second and much more numerous category comprises the children who are left behind in the community. These children are highly invisible because there is no national registry documenting their presence, there is no compulsory reporting upon parental arrest, and there is no mandated child welfare assessment that occurs on account of the parent being jailed.⁶ It is estimated from data on fertility and prison population numbers that there are more than 8 lakh

⁴ Nat'l Crime Records Bureau, Ministry of Home Affairs, Prison Statistics India 2022, at 41 (2023); Stuti Shah, 2024 India Prison Nursery Report 1, Children in Immigration Custody – Minn. Network (2024), <https://cicmn.org/wp-content/uploads/2024/05/India-Report-Finalized-Version.docx.pdf>.

⁵ World Prison Brief, India, <https://www.prisonstudies.org/country/india> (last visited June 20, 2026); Shah, supra note 4, at 1.

⁶ Randhir Singh Ranta, Rights of Children of Incarcerated Parents: A Constitutional Perspective, 5(3) J. Emerging Tech. & Innovative Rsch. 618, 620 (2018).

children belonging to this category in India.⁷ The socio-economic status of incarcerated individuals in India adds another dimension to the vulnerability of their children. Almost 77 per cent of India's prison inmates are undertrials, that means individuals who have committed no crime but are still awaiting trial. Prison inmate populations consist mainly of individuals from poor socio-economic backgrounds.⁸ Arrest of the main breadwinner therefore leads to economic crisis for the family, they are forced to borrow money to meet their needs, mortgaging whatever possessions they may have, withdrawing children from school and, in extreme cases, stealing to feed the family.⁹

Compounding deprivation is an issue of concern in many research studies. Children born within prison premises or who have been kept there since an early age show signs of inability to recognise letters and numbers, inability to pronounce words, and inability to follow age-appropriate instructions due to a lack of proper stimulation.¹⁰ A school readiness study conducted at Tihar Jail discovered that children were able to acquire lower-order thinking skills like pre-number concepts, but could not perform sequential thinking, classify objects, prepare for reading, and compare numerals.¹¹ Children were always afraid of men, including their own male relatives and did not understand what 'going out' meant except for court appearances in a police van.¹²

THE CONSTITUTIONAL FRAMEWORK

A. Fundamental Rights Applicable to Children of Incarcerated Parents

The Constitution of India grants a cluster of fundamental rights which, when interpreted in the right perspective, provide a comprehensive safeguard to the children of imprisoned parents even without any specific legislation. Article 14 grants equality before the law and equal protection of laws.¹³ Children of incarcerated parents are placed in a situation of systemic disadvantage, not because of any fault of theirs, but only because their parents are associated

⁷ Sukhramani & Gupta, supra note 1, at 199.

⁸ Nat'l Crime Records Bureau, Prison Statistics India 2022, at 83.

⁹ PRAYAS, Tata Inst. of Soc. Scis., Forced Separation: Children of Imprisoned Mothers (An Exploration in Two Cities) (2002), <https://www.tiss.edu/uploads/files/Dharmadikari.pdf> [hereinafter PRAYAS Report], cited in Sukhramani & Gupta, supra note 1, at 201

¹⁰ G. Sharma, Being a Prisoner's Child: Effects of Parents' Imprisonment on the Child (M.Phil. dissertation, Dep't of Soc. Work, Univ. of Delhi 2013), cited in Sukhramani & Gupta, supra note 1, at 200.

¹¹ Ctr. for Early Childhood Educ. & Dev., Ambedkar Univ., Glimpses of 'Exploring Childhood' in Tihar (2012), <https://indiavisionfoundation.org/reports/TiharCECEDReport.pdf> cited in Sukhramani & Gupta, supra note 1, at 200.

¹² Sharma, supra note 10; Sukhramani & Gupta, supra note 1, at 200.

¹³ INDIA CONST. art. 14.

with the criminal justice process. The denial of equal access to education, healthcare, nutrition and social services can be regarded as a matter falling under the ambit of Article 14 where such discrimination arises due to an arbitrary decision of the state.

The most extensive provision of the Indian Constitution, Article 21, guarantees the right to life and individual freedom. The right to health, education, and several other facets of human existence have been added to the right to life under Article 21.¹⁴ In the case of *Francis Coralie Mullin v. Union Territory of Delhi*¹⁵, the court determined that the right to life under Article 21 included the right to live with fundamental human dignity. The above-mentioned right fully applies to the children living in prison along with their mothers. Clause 21-A,¹⁶ added through The Constitution (Eighty-sixth Amendment) Act, 2002, ensures that education shall be free and compulsory for all children aged between six and fourteen¹⁷. Children of prisoners who are compelled to quit schooling due to the change of address or lack of funds due to incarceration cannot enjoy their basic right to quality education.

Articles 39(e) and 39(f) of the Directive Principles of State Policy provide that children should be allowed to have such facilities as would ensure that their childhood is healthy. Article 39(e) assures that children should not be exploited or abused in vocations inappropriate to their age group¹⁸. Article 45 provides free and compulsory education for all children up to six years. It is precisely the age when Indian prison children need it most.

B. India's International Obligations

India is required to base all choices about children on what is best for them as a result of ratifying the United Nations Convention on the Rights of the Child (UNCRC).¹⁹ According to Articles 9 and 10 of the UNCRC, it is not possible to separate children from their parents without the consent of the latter, except when separation is considered to be in the best interests of the child and family reunification is encouraged if one of the parents is incarcerated.²⁰

Nevertheless, the needs of the prisoner parents and their children are catered to through the UN Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (Bangkok Rules, 2010) and the UN Standard Minimum Rules for the Treatment of

¹⁴ INDIA CONST. art. 21.

¹⁵ *Francis Coralie Mullin v. Union Territory of Delhi*, (1981) 1 SCC 608, 618.

¹⁶ INDIA CONST. art. 21A.

¹⁷ The Constitution (Eighty-Sixth Amendment) Act, No. 86 of 2002, India.

¹⁸ INDIA CONST. art. 39(e).

¹⁹ United Nations Convention on the Rights of the Child, art. 3, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter UNCRC]; India ratified the UNCRC on December 11, 1992.

²⁰ Convention on the Rights of the Child arts. 9–10, Nov. 20, 1989, 1577 U.N.T.S. 3.

Prisoners (Nelson Mandela Rules, 2015).²¹ It is important to note that according to the Bangkok Rules, non-custodial measures are to be preferred for women offenders in cases where the crime committed by them is non-violent, and their children will be adversely impacted due to their imprisonment.

THE STATUTORY FRAMEWORK

A. The Prisons Act, 1894

The Prisons Act, 1894, which was enacted during the colonial era to regulate colonial subjects rather than to safeguard the rights of convicts' families, still governs India's jail system.²² Regarding the situation and requirements of children whose mothers are jailed, the Act is completely silent. Its continuous use as the main piece of law controlling prisons is a reflection of institutional inertia that is resistant to repeated pleas for legislative modernisation.

B. Supreme Court Judgments

(i) *Sheela Barse & Anr. v. Union of India & Ors.*²³: This important judgment was delivered by a Bench presided over by Chief Justice P.N. Bhagwati on 5 August 1986. It emanated from a petition filed under Article 32 by Sheela Barse, journalist and social worker. The Court ordered District Judges in all the States to visit their district jails and determine the number, condition, and legal representation of children below the age of sixteen years imprisoned in them. The Court unequivocally denounced the system whereby children are housed in jail along with adults, as contrary to Article 21 in conjunction with Article 39(f) of the Constitution. The Court held that no child could be lodged in jail for any reason whatsoever; where there was a lack of space for the children in remand homes of the State, then the children must be released on bail and not sent to jail. The Court directed that all inquiries regarding crimes committed by children must be completed in three months and trials conducted before juvenile courts within six months.

The Court upheld the State's constitutional duty to provide children with an environment that promotes their holistic development and pronounced children to be "a supremely important national asset." The ruling's larger constitutional rationale regarding the necessity of removing

²¹ U.N. General Assembly Res. 65/229, United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (Bangkok Rules), Rules 57–58 (Dec. 21, 2010); U.N. General Assembly Res. 70/175, United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules) (Dec. 17, 2015).

²² The Prisons Act, 1894, No. 9, Acts of Parliament, 1894 (India)

²³ *Sheela Barse & Anr. v. Union of India & Ors.* AIR 1986 SC 1773;

children from prison conditions and guaranteeing their well-being has been regularly used in later instances involving children living with jailed mothers, even though it primarily concerned juvenile accused individuals.

(ii) *R.D. Upadhyay v. State of Andhra Pradesh & Ors.*²⁴: This is the landmark judgment which specifically deals with children whose mothers are in jail. Filing of the writ petition under Article 32 by the Supreme Court in 2006 resulted in laying down certain guidelines on the basis of the recommendations made by the All India Committee on Jail Reforms. These included: the acceptance of the fact that the children staying with their mothers in prison are neither undertrial nor convict prisoners and need to be treated as children and not prisoners; the right of each such child to be provided with age-appropriate food, lodging, health care, education and recreation; compulsory availability of crèche facility for children from 0–3 years and nursery facility for children from 3–6 years, preferably out of jail premises; periodic monitoring of physical development and proper implementation of immunization schedule of children; special diet arrangements for pregnant and lactating women; temporary release for child delivery at government hospitals with suspension of sentence for casual offenders; and safeguarding the identity of the child by keeping the prison out of the birth certificate of the child. Within three months, the Court ordered complete compliance. Despite this, surveys carried out years later show widespread and ongoing non-compliance, highlighting the enforcement gap that afflicts this industry.

(iii) *In Re: Inhuman Conditions in 1382 Prisons*²⁵: In this continuing case, filed as a writ petition in 2013 based on a letter by retired Chief Justice R.C. Lahoti to the then Chief Justice of India, there have been several orders and judgments passed since 2016 regarding shortcomings concerning prison conditions in India. Speaking for the Court, Justice Madan B. Lokur has directly addressed the conditions in which women prisoners and their children were being kept and told the states to give particular priority to the welfare of these people, provide them with good food, medical facilities and access to crèches, and submit affidavits about the same. The Court held that prisoners, including children, continue to be persons entitled to fundamental rights under Article 21 even in prison, and that the states have to follow the Model Prison Manual, 2016 as a standard. This is especially pertinent to children with parents who are imprisoned, because it places the obligation to provide certain living conditions to the children of such prisoners under judicial supervision.

²⁴ *R.D. Upadhyay v. State of A.P. & Ors.*, AIR 2006 SC 1946.

²⁵ *In Re: Inhuman Conditions in 1382 Prisons* 2018 INSC 463

C. The Model Prison Manual, 2016

The 2016 Model Prison Manual of the Ministry of Home Affairs implements the guidelines of the Upadhyay case and elaborates further, providing for specific rules regarding women's prisons that include nutrition, health services, education and recreation facilities for children. This manual also includes the special dietary needs of pregnant prisoners and particular procedures concerning antenatal and postnatal care. However, the manual is not binding for the state since the prison system is included in Entry 4 of the State List of the Seventh Schedule of the Constitution of India.²⁶ By 2022, only 11 of the 36 states and union territories of India had adopted the model prison manual in any form.²⁷

D. Juvenile Justice (Care and Protection of Children) Act, 2015

Juvenile Justice Act 2015 is considered the best legislative protection available to children of prison inmates apart from the prisons. Under the Act, 'Children in Need of Care and Protection' form a distinct category of law, and measures relating to the welfare, rehabilitation, and social reintegration of such children have been prescribed.²⁸ Children of incarcerated parents who lack the care of any parent face abuse/neglect or exploitation, and become part of such categories. Under the Act, Child Welfare Committees (CWCs) form the nodal agency, and individual care plans are made mandatory. Monitors are Juvenile Justice Boards, CWCs, and NCPCR.

However, the protection of the JJ Act does not extend in full measure to children of incarcerated parents. There is no institutionalised process through which children of incarcerated parents can be referred to CWCs after the parents' arrest. Inter-agency coordination between the criminal justice system and child welfare mechanisms being absent, thousands of children slip through the cracks.

E. Right of Children to Free and Compulsory Education Act, 2009

The RTE Act provides for free and compulsory education to all children aged between 6-14 years and also prevents any form of expulsion or denial of admission to the children on any grounds at all. Children whose parents are incarcerated and relocate because of the arrest of their parents are eligible for admission in nearby schools without a transfer certificate.²⁹

²⁶ India Const. art. 246, Seventh Schedule, List II, Entry 4; Ministry of Home Affairs, Gov't of India, Model Prison Manual (2016)

²⁷ Shah, supra note 4, at 3.

²⁸ The Juvenile Justice (Care and Protection of Children) Act, 2015, No. 2 of 2016, §§ 2(14), 8, 14, 109 (India)

²⁹ The Right of Children to Free and Compulsory Education Act, 2009, No. 35 of 2009, § 15 (India).

Awareness of such a right, nevertheless, remains extremely low among both caregivers and teachers.

COMPARATIVE ANALYSIS

A. The United Kingdom

While there is no legislative act that is aimed at protecting children of incarcerated parents in the UK, a well-developed policy base in respect of this category of children can be traced. In Scotland, the Children and Young People (Scotland) Act of 2014 has been passed, whereby a statutory duty is placed on public authorities, including prisons, to report on children who are potentially in need of services according to the GIRFEC (Getting it Right for Every Child). This means that a statutory welfare system will be engaged in as soon as the parent is sentenced in Scotland. The Scottish Prison Service's Child Contact Strategy involves identifying incarcerated parents in all prisons and facilitating parental contact.³⁰

England and Wales have sentencing guidelines by the Sentencing Council, where the judge should take into account the potential effect of the custody sentence on dependent children prior to issuing the sentence. Such organisations as Barnardo's, Children Heard and Seen (CHAS), and Families Unite provide targeted services. Nevertheless, studies reveal that services are regional and referral- and capacity-constrained.³¹ This UK approach has relevance for India in two aspects. First, there is a formal consideration of the effect of the sentence on the children in the process of sentencing. Second, there is a statutory duty for prison administration to ascertain, evaluate and rehabilitate the children of incarcerated persons. Both these provisions are absent in the Indian legal system.

B. United States of America

The US has one of the biggest prison populations in the world, and the problem of children of incarcerated parents has received considerable legislative attention. The Adoption and Safe Families Act of 1997 (ASFA) has been severely criticised for its inadvertent detrimental effect on this vulnerable section by causing termination of parental rights due to imprisonment of the parents for more than 15 out of 22 months, an average prison term.

US studies suggest that children whose parents are imprisoned are more than thrice as likely to

³⁰ Jane Payler et al., Optimal Development for the Children of Prisoners? How Children with a Parent in Prison Are Supported and Why It Matters, 39 Children & Soc'y 1 (2025), <https://onlinelibrary.wiley.com/doi/10.1111/chso.12925>.

³¹ Id.

exhibit behavioural or depressive disorders than similarly situated children without an incarcerated parent, and at least twice as likely to be affected with learning difficulties, ADHD, and anxiety.³² The Second Chance Act of 2007 provides funding for reintegration and family programs. Some US states, including California, have passed the 'Bill of Rights for Children of Incarcerated Parents' that guarantees rights relating to security, good health, access to family relations, information about their parent's incarceration, and non-discrimination, marking a huge normative step forward in acknowledging this vulnerable population as a separate legal subject group.³³ Developmental research conducted by Poehlmann-Tynan and Turney shows that parental incarceration correlates with negative consequences for children in all behavioural, psychological, educational, and social spheres, and such consequences vary depending on the quality of care, the frequency of contact between a child and his or her parent during incarceration, and community resources.³⁴

C. Australia

Australia has recognised more and more often the fact that children with an imprisoned parent form a particularly vulnerable group that deserves special attention. Thus, the Australian Capital Territory has established rules regarding visitations, taking into account children's timetable and geography. Moreover, the ACT Standards for Adult Correctional Services point out family contact as one of the indicators of rehabilitation and release.³⁵ As per the 2024 report by the Australian Human Rights Commission titled 'Help Way Earlier,' there should be systematic changes to avoid the generational cycle of imprisonment. The most significant lesson learned from Australia is that those children who enter out-of-home care and foster care, which is usually the case for the children of prisoners, have an immensely higher chance of being convicted as adults.³⁶

D. Lessons for India

This comparative analysis reveals some lessons that can be applied to India. Firstly, in both the

³² Paola Scommegna, Parents' Imprisonment Linked to Children's Health, Behavioral Problems, Population Reference Bureau (2014), <https://www.prb.org/resources/parents-imprisonment-linked-to-childrens-health-behavioral-problems/>

³³ Urban Inst., Justice Policy Ctr., Children of Incarcerated Parents Framework Document (2015), <https://www.urban.org/sites/default/files/publication/53721/2000256-Children-of-Incarcerated-Parents-Framework-Document.pdf>.

³⁴ Julie Poehlmann-Tynan & Kristin Turney, A Developmental Perspective on Children With Incarcerated Parents, 15(1) Child Dev. Persp. 3 (2021), <https://doi.org/10.1111/cdep.12392>.

³⁵ Jackie Cui, Clare Doyle & Lynley Carey, Rethinking Prison Visitation for Children with Incarcerated Parents: Lessons from the Australian Capital Territory, 48(2) Alternative L.J. 97 (2023).

³⁶ OECD, Child-Friendly Justice Framework 12 (2023).

UK and various US States, there is a move towards integrating the child impact assessment as an essential factor in the process of sentencing, which means that courts need to assess the impact that the custody sentence will have on the dependent children before issuing the sentence. In India, such a mandatory provision is absent. The principle of giving preference to non-custodial sentences in case of mothers of very young children who have committed non-violent offences according to the Bangkok Rules is still unimplemented through legislation. Secondly, the Scottish example of making it a statutory obligation for prison authorities to refer children of prisoners to child welfare institutions serves as an example that is easy to replicate in interagency collaboration. Thirdly, US children's bills of rights in cases of parental incarceration can serve as an example of how important it is to provide recognition of the right, even when it is not enforceable yet.

PSYCHOLOGICAL AND DEVELOPMENTAL HARM: LEGAL RAMIFICATIONS

Psychological harm suffered by the offspring of incarcerated parents goes beyond the welfare concerns and holds constitutional as well as legal ramifications. Attachment theory, as propounded by Bowlby and Ainsworth, demonstrates that secure attachments during early years form the basis for sound emotional and social development.³⁷ The sudden termination of the parent-child relationship through incarceration, often without an age-appropriate explanation, creates anxiety and insecure attachments, thus causing developmental problems in the child and resulting in an infringement of Article 21 right to live with dignity.

Research conducted on children of prisoners proves that approximately 70% of these children experience mental health problems that are much higher compared to other children.³⁸ Such children are three times more susceptible to depression and suffer from attention deficit hyperactivity disorder and anxiety problems.³⁹ Social learning theory makes it clear how exposure to aggression, abuse, drug abuse, and criminal behaviour in prison settings results in imitation of such conduct by children.⁴⁰

³⁷ John Bowlby, *Attachment and Loss: Volume I: Attachment* (Basic Books 1969); Mary Ainsworth et al., *Patterns of Attachment: A Psychological Study of the Strange Situation* (Lawrence Erlbaum Assocs. 1978)

³⁸ D. Parke & K. Clarke-Stewart, *Effects of Parental Incarceration on Young Children* (Urban Inst. 2001), <https://www.urban.org/sites/default/files/publication/60691/410627-Effects-of-Parental-Incarceration-on-Young-Children.PDF>

³⁹ Scommegna, *supra* note 36; Sethi, *supra* note 1, at 380.

⁴⁰ Albert Bandura, *Social Learning Theory* (Prentice Hall 1977), cited in Sethi, *supra* note 1, at 380.

The point made by Bronfenbrenner through his ecological systems theory is that the harm suffered by the children is not caused by any one factor alone because it affects the individual at all these four levels: microsystems (family disruptions), mesosystems (problematic schooling and peer relationship), exosystems (interaction with the criminal justice system and child welfare system), and macrosystems (social stigma and policy inadequacy).⁴¹ It becomes the duty of the State, which has already started the process of parental incarceration under Article 14, 21, 21-A and 39(f) of the Constitution.

GAP IN THE LEGAL SYSTEM AND SUGGESTIONS FOR REFORM

A. Requirement for Legislation

The basic gap in India's legal system is the lack of legislation which specifically deals with children of incarcerated parents as a distinct group with rights and entitlements. All existing laws are scattered in the form of judicial precedents, manuals not binding on law and in the laws dealing with the general welfare of children, without creating an instrument through which a right could be created or inter-agency coordination mandated, or a monitoring agency formed. It has been suggested that there is a need for a specific bill for the rights of children of incarcerated parents on the lines of that passed in some states of the USA, an instrument which would entitle them to the right to security, health, family contact, education and freedom from discrimination.⁴²

B. Mandatory Child Impact Assessment in Custodial Sentencing

Indian courts should be obligated, either through legislative requirement or sentencing guidelines, to perform child impact assessments before issuing custodial sentences where the accused person is the principal caregiver of dependent children. This does not preclude any custodial sentence but guarantees the judge's understanding of the impact on children and, where feasible, consideration of non-custodial sentences or conditions of custody that preserve the parent-child relationship. Preference for community sanctions as opposed to incarceration for women offenders with dependent children should be enshrined in Indian sentencing laws.

C. Mandatory Identification and Referral

Police and prison officials should be legislatively bound to inquire, at the time of arrest and

⁴¹ Urie Bronfenbrenner, *The Ecology of Human Development* (Harvard Univ. Press 1979), cited in Sethi, *supra* note 1, at 381.

⁴² Dixit, *supra* note 30, at 249–52; Ranta, *supra* note 6, at 626–27.

incarceration, whether the accused has dependent children and report them to the Child Welfare Committees for assessment and care planning. This singular act will bridge the key gap in the current system, which leaves out children who are left behind in the community. The NCPCR should be mandated to create a national register of children of incarcerated parents, categorised according to their age, sex and caregiving arrangements.

D. Prison-Based Child Welfare Infrastructure

Compliance with the Upadhyay guidelines and the Model Prison Manual must become justiciable and be subjected to routine inspections by the NCPCR. The Central Government should establish binding national standards and not just a model manual, with respect to crèches and nurseries within women's prisons, with financial resources allocated to states contingent upon their compliance. Currently, crèches exist in just three states and one union territory (Karnataka, Tamil Nadu, Delhi, and Chandigarh), and such a situation is constitutionally untenable.⁴³ Paediatricians and developmental psychologists must become mandatory staff members at all prisons where mothers and their infants are housed.

E. Bail Reforms for Primary Caregivers

Since about 77% of prisoners in India's jails are undertrials, it means that a large number of children are separated from their parents, who may not even have committed any crime. Bail reforms, especially reforms that enable the release of primary caregivers of young children as undertrials in non-violent offences, will prove to be the most direct and effective solution. The Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS) must include a presumption of bail in favour of primary caregivers of children under six years of age in non-violent cases.

F. Psychological Well-being and Continuity of Education

Mental counselling that is trauma-informed needs to be provided for children who have parents behind bars at state-run mental counselling centres, trained Anganwadi workers, and school counsellors. Education liaison officers should be appointed by the District Education Officer to locate these children and enrol, retain and facilitate smooth transition into school. Admission rights of these children under the RTE Act should be enforced by simplifying the transfer certificate waiving process and conducting sensitisation programs for school administrators.

⁴³ Shah, supra note 4, at 3–4.

CONCLUSION

The children of incarcerated parents exist in a paradoxical situation when it comes to their place in India's legal system. They are mentioned in the discourse about child rights, but not seen in terms of how legal institutions work. They are neither criminals nor formally defined victims. They do not have any legal identity because of the imprisonment of their parents, yet they suffer from it throughout their childhood years. The constitutional rights under Articles 14, 21, 21-A, and 39(f), along with the international commitments India has made through the UNCRC and the Bangkok Rules, provide an extremely strong normative basis for the protection of these children. The three seminal judgments of the Supreme Court of India on *Sheela Barse v. Union of India*, *R.D. Upadhyay v. State of Andhra Pradesh* and *In Re: Inhuman Conditions in 1382 Prisons* show the rights status of these children; that the state has an obligation to guarantee their welfare; and that judicial interference in such cases is not only permissible but also necessary. However, despite all these legal pronouncements, no systemic improvement has been seen, indicating the greater failure of the Indian institution system to formulate enforceable and monitored rights for these children.

The comparative study shows that India does not lack the examples from the UK, USA and Australia, from the statute creating a duty on the part of the state to determine the existence of children of prisoners in Scotland; rights provisions for such children in the USA or the visitation standards in Australia, which are entirely child-centric. There is no way for the criminal justice process to view the sentencing of adults as an entirely personal process anymore. The effects of incarceration have consequences that spread out into families, schools, and the lives of children whose opinions on the process did not matter. For a country, it has to be part of its commitment to justice to see to it that the implementation of the criminal process does not become a form of victimisation for the wrong people. The protection of children from the negative impacts of their parents' incarceration is both a moral and constitutional issue.