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INVISIBLE VICTIMS: A CRITICAL LEGAL STUDY ON THE RIGHTS AND WELFARE OF CHILDREN OF WOMEN PRISONERS IN INDIA¹

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ABSTRACT

Children of incarcerated women occupy a uniquely marginalised position in India's criminal justice landscape. Though innocent of any offence, these children are compelled to inhabit prison environments that are antithetical to their physical, psychological, and developmental needs. This article critically examines the constitutional and statutory framework, judicial responses, and institutional mechanisms governing the rights and welfare of children of women prisoners in India. It argues that while the Indian Constitution, international instruments such as the United Nations Convention on the Rights of the Child (UNCRC) and the Bangkok Rules, and landmark judgments such as *R.D. Upadhyay v. State of Andhra Pradesh* provide a normative foundation for protecting these children, the gap between legal recognition and practical realisation remains vast. Drawing on the extant literature, NCRB data, comparative material, and detailed case analysis, the article identifies systemic failures in implementation, institutional fragmentation, and the absence of a dedicated legislative framework as the principal obstacles to reform. It concludes by proposing a cluster of legal and policy measures, including dedicated legislation, mandatory codification of Supreme Court guidelines, expanded non-custodial alternatives, and structural reforms to monitoring and accountability mechanisms, that can transform the promise of child rights into lived reality for this invisible population.

I. INTRODUCTION

Children of women prisoners constitute one of the most overlooked categories of vulnerable individuals in India's criminal justice system. Numbering approximately 1,700 to 1,800 according to the National Crime Records Bureau's Prison Statistics India 2023, they are neither accused nor convicted, yet they bear the collateral consequences of maternal incarceration with

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a force that shapes their entire developmental trajectory. The prison, designed as an instrument of punishment and discipline for offenders, becomes for these children their earliest, and often only, remembered home.

This phenomenon sits at an uneasy intersection of several legal domains: criminal justice, constitutional law, child rights jurisprudence, and human rights more broadly. Each domain offers a partial vocabulary for understanding the predicament of these children, yet none, taken alone, captures the full complexity of their situation. The criminal justice system views the mother as an offender (or an undertrial) whose presence in custody is a function of the penal process. Constitutional law views the child as a rights-bearing citizen entitled to dignity, equality, and development. Human rights discourse situates the child within a global framework of obligations that India has voluntarily assumed but has been slow to operationalise domestically. The result is a body of law that is doctrinally rich but practically fragmented.

The scale of the problem, while numerically modest in comparison to other categories of vulnerable children, such as street children or child labourers, is nonetheless significant when measured against the intensity and duration of harm experienced by each individual child. A child who spends the first six years of life inside a prison experiences a foreshortened and distorted version of early childhood: the formative years recognised by developmental psychology as critical for cognitive, emotional, and social growth unfold instead within walls, under surveillance, and amid the institutional rhythms of a penal facility.

The constitutional architecture of India furnishes a robust normative platform. Article 21 guarantees the right to life with dignity; Article 39(f) mandates that children be given opportunities to develop in conditions of freedom and dignity; and Article 45 requires early childhood care for children below six years of age. At the international level, the United Nations Convention on the Rights of the Child (UNCRC), ratified by India in 1992, demands that the best interests of the child serve as a primary consideration in all actions concerning children. The Bangkok Rules of 2010 further specify that decisions on the accommodation of children in prison must be grounded in the child's welfare.

The Supreme Court's landmark judgment in *R.D. Upadhyay v. State of Andhra Pradesh* (2006) represents the most significant judicial articulation of these principles. Yet, as this article demonstrates, neither the normative framework nor the judicial guidelines have translated reliably into improved conditions on the ground. The persistence of institutional failures, legislative lacunae, and administrative fragmentation has left these children in a liminal space, acknowledged in law, neglected in practice.

This article situates itself within a growing body of scholarship that interrogates the gap

between rights-on-paper and rights-in-practice in the Indian context. It draws methodologically on doctrinal legal analysis, supplemented by an examination of empirical data published by the NCRB, the NHRC, and the NCPCR, and informed by comparative reference to international standards. The objective is not merely descriptive. The article seeks to identify the structural and institutional reasons for the persistent implementation gap and to translate that diagnosis into a concrete set of policy and legislative recommendations.

The article proceeds in six parts. Section II examines the constitutional and statutory framework, including the Model Prison Manual and international instruments. Section III analyses key judicial developments, particularly the Supreme Court's evolving jurisprudence on the rights of children in custodial settings. Section IV critically interrogates the living conditions, institutional mechanisms, and systemic failures that undermine the realisation of children's rights. Section V draws on this analysis to propose a comprehensive reform agenda. Section VI concludes with reflections on the broader significance of this issue for India's constitutional commitment to social justice.

I-A. LITERATURE REVIEW

BOOKS:

1. One of the first thorough studies on children residing with their detained moms in Indian jails was conducted by B. N. Chatteraj in his book *Children of Women Prisoners in Indian Jails* (2006). He looked at their living circumstances, schooling, diet, medical care, and emotional growth. The author noted that prisons are unsuitable settings for kids' overall development and suggested institutional changes to protect their rights.
2. S. P. Pandey and Awadhesh Kumar Singh, in their book *Women Prisoners and Their Dependent Children* (2006), discussed the socio-economic background of women prisoners and analysed the adverse consequences of maternal imprisonment on dependent children. The study emphasized that children suffer deprivation of basic rights, including education, health and family care, and suggested policy reforms for their rehabilitation.
3. In her 2009 book *Women in Prison: An Insight into Captivity and Crime*, Suvarna Cherukuri explored the socio-legal circumstances of women incarcerated in India. She emphasized the necessity for a child-sensitive prison administration while highlighting the gender-specific difficulties experienced by female inmates, such as pregnancy, parenthood, and childcare while incarcerated.

REPORTS:

4. *Initiatives for Women in Prisons* (2018), the Ministry of Women and Child Development

looked at the state of Indian women incarcerated and their offspring. In addition to appropriate nutrition, healthcare, education, legal assistance, and rehabilitation programs, the research suggested jail infrastructure that is kid-friendly. Additionally, it suggested changes to the Model Prison Manual to better safeguard children's rights.

5. The National Commission for Protection of Child Rights (NCPCR), in its report Education Status of Children of Women Prisoners in India (2021), assessed the educational and welfare status of children living inside prisons and those residing in hostels after separation from their mothers. The report identified significant gaps in education, nutrition and psychological support and recommended stronger coordination among prison authorities, Child Welfare Committees and educational institutions

RESEARCH PAPERS AND ARTICLES:

6. Neelam Sukhrmani and her colleagues investigated the psychological, emotional, and social effects of maternal incarceration in their research on children of incarcerated parents. They came to the conclusion that these kids frequently face social isolation, stigma, anxiety, and disruptions in their education, and they made the case for rights-based interventions to guarantee their general development.

7. Joseph Murray and David P. Farrington, in their research on children of imprisoned parents, found that parental incarceration negatively affects children's mental health, educational attainment and social behaviour. The authors emphasized that child welfare policies should prioritize the best interests of the child rather than focusing solely on punishment

8. Julie Poehlmann examined the effects of maternal incarceration on connection, emotional stability, and child development in her research on children of jailed mothers. She came to the conclusion that a child's wellbeing depends on sustaining positive mother-child ties through frequent interaction and kid-friendly discipline procedures.

I-B. RESEARCH OBJECTIVES, QUESTIONS, HYPOTHESIS AND METHODOLOGY

A. Objectives of the Study

The present study is guided by the following objectives, drawn from the foundational inquiry undertaken in the original dissertation research:

- (i) To examine the legal and constitutional framework governing the rights of children of women prisoners in India, including both domestic provisions and

applicable international instruments.

- (ii) To analyse the role of the judiciary in protecting the welfare of children residing with incarcerated mothers, with particular attention to the trajectory of the Supreme Court's public interest jurisprudence in this domain.
- (iii) To evaluate the living conditions and welfare measures available for children in Indian prisons, including healthcare, nutrition, education, and psychological support, and to assess the degree of compliance with prescribed standards.
- (iv) To identify the gaps and challenges in the implementation of existing laws and policies, including the structural, institutional, and administrative factors that contribute to the persistent disparity between legal norms and ground-level conditions.
- (v) To suggest suitable legal reforms and policy measures for ensuring the protection and holistic development of children of women prisoners, informed by comparative international experience and the principles of child rights jurisprudence.

B. Research Questions

The study is oriented around the following core research questions, each of which corresponds to a distinct dimension of the broader inquiry:

- (i) What legal rights are available to children of women prisoners under Indian constitutional law and applicable international legal instruments, and how have these rights been interpreted and extended by the courts?
- (ii) How effective are the existing prison policies, including the Model Prison Manual 2016 and the guidelines issued pursuant to *R.D. Upadhyay v. State of Andhra Pradesh*, in ensuring the welfare and development of children residing with incarcerated mothers, and what evidence exists regarding the consistency of their implementation across states?
- (iii) What has been the role of the judiciary, including the Supreme Court and High Courts, in addressing the rights and welfare of children of incarcerated mothers, and to what extent have judicial pronouncements translated into durable institutional change?
- (iv) What are the major structural, administrative, and socio-economic challenges faced in the implementation of welfare measures for children of women prisoners, and how do factors such as institutional fragmentation, data deficiencies, and resource constraints contribute to these challenges?
- (v) What legislative, administrative, and policy reforms are required to improve the protection and development of children living in prisons, and how can comparative

international frameworks inform a credible reform agenda for India?

C. Hypothesis

The study proceeds on the basis of the following working hypotheses, formulated in the light of the existing literature and the preliminary observations that motivated this research:

- (i) The existing legal and constitutional framework in India, comprising constitutional provisions, domestic statutes, judicial guidelines, and international instruments to which India is a party, provides formal recognition of the rights of children of women prisoners; however, the implementation of this framework remains inadequate and inconsistent across different states and prison establishments, resulting in a significant and persistent gap between legal norms and practical conditions.
- (ii) Judicial interventions, particularly those of the Supreme Court of India, have played a significant and often decisive role in safeguarding the welfare and rights of children residing with incarcerated mothers, especially in contexts where executive and legislative measures have proven insufficient; however, the reactive and case-by-case nature of such interventions, and the absence of robust enforcement mechanisms, limits their capacity to produce durable systemic change.
- (iii) Effective and sustained reform in prison infrastructure, child welfare policies, educational provision, healthcare, and rehabilitative support, underpinned by dedicated legislation, strengthened inter-agency coordination, and robust accountability mechanisms, can substantially improve the protection and holistic development of children living in prisons, and is both legally required and practically achievable within the existing constitutional framework.

D. Methodology

The present study adopts a doctrinal (library-based) research methodology. It critically analyses the legal framework governing the rights and welfare of children of women prisoners in India. The research primarily relies on secondary sources of data, including constitutional provisions, statutes, judicial decisions, prison manuals, government reports, Law Commission Reports, books, research articles, journals, international conventions, and reports published by organizations such as UNICEF, the National Commission for Protection of Child Rights (NCPCR), and the Ministry of Women and Child Development.

The study examines the relevant provisions of the Constitution of India, particularly Articles 14, 15(3), 21, 21A, 39(e) & (f), 42 and 45, along with the Juvenile Justice (Care and Protection

of Children) Act, 2015, the Model Prison Manual, 2016, the Prisons Act, 1894, and other applicable legal instruments. Judicial pronouncements of the Supreme Court and various High Courts, especially those concerning the rights of women prisoners and their children, have also been analysed.

Further, the research adopts a critical and analytical approach to evaluate the effectiveness of existing laws, policies and welfare schemes relating to children of women prisoners. Relevant international human rights instruments, including the United Nations Convention on the Rights of the Child (UNCRC), 1989, the United Nations Bangkok Rules, 2010, and the Nelson Mandela Rules, 2015, are also examined to compare Indian legal standards with international norms.

The study identifies the gaps in the implementation of legal safeguards and policy measures and proposes recommendations for strengthening the protection, development and rehabilitation of children affected by maternal imprisonment.

II. THE LEGAL AND CONSTITUTIONAL FRAMEWORK

A. Constitutional Foundations

The Indian Constitution does not address the rights of children of women prisoners as a distinct category. Nevertheless, its provisions, read together and interpreted expansively by the judiciary, provide a formidable normative basis for their protection. The pivotal provision is Article 21, which guarantees the right to life and personal liberty. In *Maneka Gandhi v. Union of India* (1978), the Supreme Court held that the right to life encompasses the right to live with human dignity, extending constitutional protection to basic necessities such as food, shelter, healthcare, and education. In *Bandhua Mukti Morcha v. Union of India* (1984), this expansive interpretation was applied to the rights of vulnerable groups, a lineage that has been repeatedly invoked in the prison context.

This expansive reading of Article 21 has been reinforced in a succession of cases beyond the prison context. In *Olga Tellis v. Bombay Municipal Corporation*, the Court held that the right to life includes the right to livelihood, a principle whose underlying logic, that survival rights cannot be divorced from dignity rights, applies with equal force to children whose survival is contingent on conditions within a custodial facility. Similarly, in *Unni Krishnan v. State of Andhra Pradesh*, the Court read the right to education into Article 21 even prior to the Eighty-Sixth Amendment, a holding of direct relevance to children whose access to schooling is mediated by their confinement within a prison.

Article 14, guaranteeing equality before the law, requires affirmative measures to address

the special needs of children in prisons. Article 15(3) empowers the State to make special provisions for women and children, offering a constitutional warrant for targeted welfare schemes. The Directive Principles of State Policy, while not justiciable, impose a normative obligation on the government: Article 39(f) directs that children be given opportunities to develop in conditions of freedom and dignity, a mandate that is systematically violated when children reside in custodial environments. Article 21A's guarantee of the right to education further reinforces the State's obligations, though its implementation within prison walls remains woefully inadequate.

It is worth pausing on the doctrinal significance of treating Directive Principles as interpretive aids to fundamental rights rather than as freestanding, unenforceable aspirations. The Supreme Court has, since the 1980s, consistently read Part III and Part IV of the Constitution together, treating the Directive Principles as the conscience of the Constitution that informs the content of fundamental rights. This interpretive method has been central to the expansion of Article 21 in the prison context. Without it, Article 39(f) and Article 45 would remain mere statements of intent, incapable of generating concrete obligations. With it, these provisions acquire teeth: they inform what 'dignity' under Article 21 actually requires for a child confined to a prison.

1. The Equality Dimension

The equality guarantee under Article 14 deserves closer attention than it has typically received in the literature on this subject. Children of women prisoners are, almost by definition, drawn disproportionately from economically and socially marginalised communities. Equality jurisprudence in India has increasingly recognised that formal equality, treating all persons identically, can itself produce substantive inequality where underlying social and economic disadvantages are ignored. The doctrine of substantive equality, which permits and indeed requires differential treatment to achieve equal outcomes, provides a constitutional basis for demanding that the State take affirmative steps tailored to the specific vulnerabilities of children in prisons, rather than treating their welfare needs as identical to those of children outside the custodial system.

B. Statutory Framework and Policy Guidelines

The primary legislation governing prison administration, the Prisons Act of 1894, was enacted under colonial conditions and makes no provision for women prisoners or their children. This legislative antiquity has forced courts and executive bodies to fill the gap through directive

and policy. The Juvenile Justice (Care and Protection of Children) Act, 2015 (JJ Act) provides a partial framework by recognising children in need of care and protection, a category potentially encompassing children of incarcerated mothers, and emphasising principles of the best interests of the child, rehabilitation, and social reintegration. However, coordination between prison authorities and Child Welfare Committees established under the JJ Act remains limited and ad hoc in practice.

The colonial vintage of the Prisons Act is not a merely historical curiosity. It reflects a structural orientation toward the prison as a site of discipline and control, an orientation inherited from a regime whose primary concern was the maintenance of order rather than the welfare of incarcerated persons or their dependants. Successive amendments to the Act have addressed administrative matters such as classification of prisoners and disciplinary procedures, but none have squarely addressed the presence of children within prison walls. This is a telling absence: it suggests that for over a century, Indian prison law simply did not contemplate children as a category requiring distinct legal treatment.

The most comprehensive executive response is the Model Prison Manual, 2016, issued by the Ministry of Home Affairs. The Manual permits children up to the age of six years to reside with their mothers, mandates the establishment of crèches and play areas, prescribes nutritional standards, requires regular medical check-ups, and calls for access to formal schooling. Critically, however, the Manual is not legally binding. Its enforcement depends entirely on the political will of state prison administrations, producing a mosaic of compliance that is uneven at best and absent at worst.

The Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS) introduces a modest reform in Section 480, enabling courts to favour bail for women, particularly those with young children, in minor offence cases. This provision, if consistently applied, could reduce the number of children unnecessarily confined to prisons. Yet its implementation remains discretionary and inconsistent, with significant variation across trial courts in different states and even across different benches within the same court.

It is instructive to compare the regulatory status of the Model Prison Manual with that of other policy instruments in adjacent fields. The National Food Security Act, 2013, for instance, converts what might otherwise have been a discretionary welfare scheme into an enforceable legal entitlement, with statutory grievance redressal mechanisms. The contrast with the Model Prison Manual, which remains an advisory document without the force of law, illustrates a broader pattern in Indian welfare governance: where political will and budgetary commitment exist, welfare entitlements are codified into binding statutes; where such will is

absent or contested, the State retreats into advisory guidelines that create the appearance of regulation without its substance.

1. The Juvenile Justice Act and Its Limits

The JJ Act, 2015 deserves particular scrutiny because it represents the most plausible existing statutory vehicle through which children of women prisoners could be brought within a binding legal framework. The Act defines a 'child in need of care and protection' broadly enough to potentially encompass children whose parent is incarcerated, particularly where no alternative caregiver is available. In principle, this definitional reach could trigger the full institutional machinery of the Act: assessment by Child Welfare Committees, individualised care plans, and structured rehabilitation pathways.

In practice, however, this potential remains largely unrealised. Prison authorities frequently do not refer children residing with incarcerated mothers to Child Welfare Committees, treating their presence in prison as a matter internal to prison administration rather than triggering the JJ Act's protective machinery. This administrative silo, prisons handling children as a custodial matter, CWCs handling children as a child protection matter, with little overlap between the two, represents one of the clearest illustrations of the institutional fragmentation that this article identifies as a central obstacle to reform.

C. International Standards

India's international obligations considerably enrich the domestic framework. The UNCRC's core principle that the best interests of the child shall be a primary consideration in all actions concerning children is directly applicable to decisions on whether, and under what conditions, children should reside with incarcerated mothers. Articles 6 (right to life and development), 27 (adequate standard of living), and 9 (conditions for separation from parents) collectively impose obligations to ensure that the custodial environment does not deprive children of their developmental rights.

The Bangkok Rules provide the most targeted international guidance. They require that decisions on accommodating children in prisons be based on the child's best interests, mandate child-friendly conditions, advocate for alternatives to incarceration for women with dependent children, and emphasise the importance of maintaining mother-child contact when separation is necessary. The Nelson Mandela Rules offer complementary general standards of humane treatment. These instruments, though not domestically enforceable in the strict sense, are regularly invoked by Indian courts as interpretive aids and have been partially incorporated

into the Model Prison Manual's provisions. Their full legislative codification remains an outstanding reform imperative.

Two additional international instruments merit attention, though they are less frequently discussed in the domestic literature. The International Covenant on Economic, Social and Cultural Rights (ICESCR) obligates State parties to progressively realise rights to an adequate standard of living, health, and education, rights of obvious relevance to children confined within prison facilities.

The United Nations Guidelines for the Alternative Care of Children, adopted in 2009, articulate the principle that institutionalisation should be a measure of last resort and that family-based care, including kinship care and foster care, should be prioritised wherever possible. Applied to the present context, these guidelines suggest that prison residence with the mother, while preferable in many cases to outright separation, should itself be understood as a measure of last resort rather than a default arrangement, with alternative family-based care actively explored as a preferred option wherever feasible.

The doctrinal status of these international instruments within Indian law deserves brief clarification. India follows a dualist approach to international law, meaning that treaties do not automatically become part of domestic law upon ratification; they require legislative incorporation. The UNCRC, the Bangkok Rules, and related instruments have not been comprehensively incorporated into Indian statutory law. Their influence has instead been indirect, mediated through judicial interpretation of constitutional provisions, particularly Article 21, in light of India's international commitments. This indirect mode of incorporation, while doctrinally legitimate, produces a weaker and less predictable form of legal obligation than direct legislative incorporation would provide.

III. JUDICIAL APPROACH AND THE EVOLUTION OF CHILD RIGHTS IN PRISONS

A. Foundational Jurisprudence

The trajectory of judicial protection for children of women prisoners is inseparable from the broader evolution of prisoners' rights jurisprudence in India. The starting point is *Sunil Batra v. Delhi Administration* (1978), which affirmed that fundamental rights survive incarceration, subject only to the necessities of imprisonment. Although the case did not address children directly, it established the rights-based grammar that subsequent courts would deploy in the prison context. *Maneka Gandhi and Francis Coralie Mullin v. Administrator, Union Territory of Delhi* (1981) further entrenched the view that Article 21 imposes positive obligations on the State to ensure humane conditions within custodial institutions.

The significance of this foundational period, roughly the late 1970s through the mid-1980s, lies in its establishment of a methodological template that would later be applied to the specific situation of children. The Court developed, during this period, a distinctive form of public interest litigation in which letters from prisoners, journalists, or concerned citizens were treated as writ petitions, dispensing with the formal requirements of standing that might otherwise have barred such claims. This procedural innovation proved essential to the eventual emergence of *R.D. Upadhyay*, which itself originated from correspondence drawing the Court's attention to the conditions faced by children in prisons.

The specifically gendered dimension of prison rights was introduced in *Sheela Barse v. Union of India* (1986), where the Supreme Court addressed custodial conditions for women prisoners and directed the establishment of separate lock-ups, provision of legal aid, and protection from custodial violence. This case marked a pivotal shift towards recognising the gender-specific vulnerabilities of incarcerated women and, by implication, the precarious situation of their children.

It is worth noting that *Sheela Barse* did not arise in a vacuum. It built on a series of cases from the same period addressing the conditions of undertrial prisoners, including *Hussainara Khatoon v. State of Bihar*, which exposed the scandal of prolonged pre-trial detention and its disproportionate impact on the poor. The cumulative effect of this jurisprudential lineage was to establish prison conditions as a legitimate and justiciable subject of constitutional scrutiny, paving the way for the more targeted intervention in *R.D. Upadhyay* two decades later.

B. R.D. Upadhyay: A Landmark in Child-Centric Prison Jurisprudence

The Supreme Court's judgment in *R.D. Upadhyay v. State of Andhra Pradesh* (2006) is the most comprehensive judicial engagement with the rights of children of women prisoners. Treating a letter about the deplorable prison conditions of such children as a public interest writ petition, the Court held categorically that children residing in prisons are not prisoners and must not be treated as such. It recognised that these children are independent rights-bearing individuals entitled to the full spectrum of fundamental rights.

The Court's guidelines addressed multiple dimensions: children up to six years were permitted to stay with their mothers; crèches and play facilities were mandated; nutritional standards were prescribed; regular medical check-ups and immunisation were required; access to schooling was directed for older children; and, critically, appropriate arrangements for rehabilitation and alternative care were required when children reached the age threshold for separation. The judgment also invoked the 'best interests of the child' principle, derived from the

UNCRC, as an interpretive anchor for all decisions concerning children in custodial settings. This doctrinal move aligned Indian constitutional jurisprudence with international child rights standards and has been cited approvingly in subsequent cases.

A close reading of the judgment reveals a structure characteristic of Indian public interest litigation in this period: the Court did not confine itself to declaring rights in the abstract but issued a detailed, almost administrative, set of directions covering matters as specific as the type of food to be provided, the frequency of medical examinations, and the qualifications required of staff overseeing crèche facilities. This level of granularity reflects the Court's awareness that abstract declarations of right, without concrete operational guidance, are unlikely to produce compliance from a prison administration accustomed to operating without reference to child welfare considerations.

At the same time, this granularity carries a structural cost. By embedding detailed administrative directions within a judicial judgment rather than a statute, the Court created a regime whose authority rests on judicial pronouncement rather than legislative enactment. Judicial directions of this kind lack the institutional apparatus, dedicated implementing agencies, budgetary allocations, and periodic legislative review, that typically accompanies statutory welfare schemes. The absence of this apparatus has proven to be one of the principal reasons why the R.D. Upadhyay guidelines, notwithstanding their comprehensiveness, have not achieved uniform implementation across the country.

1. The Best Interests Principle in Indian Jurisprudence

The invocation of the 'best interests of the child' principle in R.D. Upadhyay deserves particular attention because it represents one of the clearest instances of direct judicial reliance on the UNCRC in shaping Indian constitutional doctrine. The principle had previously been applied in the adoption context in *Laxmi Kant Pandey v. Union of India*, where the Court held that the welfare of the child must be the paramount consideration in determining whether and to whom a child should be given in adoption. The extension of this principle to the custodial context in R.D. Upadhyay represents a doctrinal innovation: it requires prison authorities, and ultimately courts reviewing their decisions, to engage in an individualised welfare assessment rather than applying a uniform rule mechanically to all children residing in prisons.

This individualised assessment requirement, while doctrinally sound, has rarely been operationalised in practice. There is little evidence of systematic, case-by-case welfare assessments being conducted for children in Indian prisons. Instead, the age threshold of six years functions as a blunt, categorical rule: children below the threshold remain with their

mothers, children above it are separated, largely irrespective of individualised circumstances that the best interests principle would, in theory, require courts and authorities to consider.

C. Post-Upadhyay Developments and Systemic Concerns

In *In Re: Inhuman Conditions in 1382 Prisons* (2016), the Supreme Court addressed systemic prison conditions more broadly, emphasising the need for compliance with constitutional and human rights standards and directing reforms in respect of overcrowding, healthcare, and living conditions. The case extended the Court's supervisory jurisdiction over the prison administration and reinforced the principle that prison conditions must meet minimum constitutional thresholds for all residents, including children.

The case is significant for present purposes because it illustrates the Court's continued reliance on its supervisory, rather than legislative, role. The amicus curiae appointed in the case submitted extensive reports documenting deficiencies across the prison system, including with respect to women and children, yet the Court's response, while detailed, remained in the form of directions rather than a referral to Parliament for comprehensive legislative reform. This pattern, of the judiciary repeatedly stepping into a regulatory vacuum that the legislature has declined to fill, recurs throughout the jurisprudential history examined in this article and forms a central theme of the critical analysis in Section IV.

More recently, the COVID-19 pandemic prompted further judicial engagement with prison conditions in *In Re: Contagion of COVID-19 Virus in Prisons*, where the Supreme Court directed states to consider decongestion measures, including the release of prisoners on parole or interim bail. While the case did not specifically address children, decongestion measures of this kind have an obvious bearing on children residing with their mothers, since reduced overcrowding directly improves the conditions under which such children live. The episode illustrates how interventions framed primarily around public health or general prison administration can have significant, if incidental, consequences for the welfare of children in custodial settings.

The use of public interest litigation has been central to sustaining judicial engagement with this issue. Courts have repeatedly been compelled to intervene because the legislative and executive branches have not taken proactive steps to address the rights of this group. The pattern is one of reactive jurisprudence: courts respond to petitions documenting specific failures, issue guidelines, and monitor compliance, yet without a binding statutory framework, compliance remains discretionary, and the cycle of neglect continues. High Courts in several states have also contributed to this jurisprudence, directing state governments to implement Supreme Court

guidelines and to improve prison facilities for women and children.

1. The Limits of Judicial Monitoring

A recurring feature of Indian public interest litigation is the use of continuing mandamus, whereby courts retain jurisdiction over a matter and require periodic compliance reports from the executive, rather than disposing of the case with a final, one-time judgment. This technique has been employed in several of the cases discussed above, including R.D. Upadhyay itself, where the Court has periodically revisited compliance with its guidelines. While continuing mandamus represents an important judicial innovation for addressing systemic failures, it also exposes the limits of judicial capacity. Courts lack the administrative infrastructure, the budgetary authority, and the on-ground presence necessary to verify compliance independently. They depend instead on reports submitted by the very authorities whose compliance is in question, a structural weakness that significantly limits the practical efficacy of continuing judicial supervision.

IV. CRITICAL ANALYSIS: RIGHTS IN LAW VERSUS RIGHTS IN PRACTICE

A. The Structural Contradiction

The fundamental tension at the heart of this issue is structural. Prisons are designed to punish and correct offenders; children require nurture, stimulation, and freedom. These objectives are not merely in tension, they are often directly contradictory. Children living in prisons are denied the environment necessary for their cognitive, emotional, and social development. Overcrowding, inadequate sanitation, restricted movement, and exposure to adult penal culture constitute a form of deprivation that no legal framework, however well-crafted, can fully mitigate so long as children remain in prison.

This structural contradiction is compounded by the socio-economic profile of women prisoners in India. Most belong to economically disadvantaged and socially marginalised communities, are frequently undertrials rather than convicted persons, and are incarcerated for minor offences. Their imprisonment often reflects the compounded disadvantages of poverty, gender discrimination, and lack of legal aid rather than serious criminality. As Flavia Agnes has observed, incarceration policies are formally gender-neutral but substantively discriminatory, failing to account for the familial responsibilities of women. The children of such women are doubly penalised: first, by their mothers' marginalisation; second, by the State's failure to provide adequate alternatives.

The undertrial dimension of this problem deserves particular emphasis. A significant

proportion of women in Indian prisons have not been convicted of any offence; they remain in custody pending trial, often because they cannot afford bail or lack the social and legal resources to secure release. For their children, this means that the period of confinement, and the accompanying developmental harm, is frequently the product not of a judicially determined sentence but of pre-trial detention whose justification rests on considerations entirely unrelated to the welfare of the child. This raises a distinct constitutional concern: the deprivation experienced by the child is, in many cases, a downstream consequence of systemic delays in the criminal justice process, delays that themselves implicate the right to a speedy trial recognised in *Hussainara Khatoon*.

B. Gaps in Implementation

Despite the comprehensive guidelines in *R.D. Upadhyay* and the Model Prison Manual, implementation remains deeply uneven. Many prisons lack crèches, trained childcare staff, adequate nutrition, and educational facilities. The NHR has documented persistent violations of children's rights in custodial settings, including overcrowding, poor sanitation, and absence of medical care. NCPCR inspections have similarly highlighted the gap between the prescribed standards and the actual conditions in which children live.

Several factors contribute to this implementation deficit. First, prison administration is a state subject under the Constitution's Seventh Schedule, and resources, administrative capacity, and political will vary enormously across states. A state with greater fiscal capacity and a more proactive prison administration may achieve substantial compliance with *R.D. Upadhyay* guidelines, while a state facing budgetary constraints or administrative inertia may achieve almost none. The resulting disparity means that a child's effective entitlement to a minimally adequate standard of care depends, in practice, on the geographic accident of which state's prison she happens to reside in, a result difficult to reconcile with the equality guarantee under Article 14.

Second, the non-binding character of the Model Prison Manual means that compliance is dependent on executive discretion rather than legal obligation. Unlike a statute, which creates enforceable rights and corresponding duties, the Manual operates as a set of recommendations that prison administrations may adopt, modify, or ignore without legal consequence. This is not a hypothetical concern: multiple states have adopted only partial versions of the Manual's child welfare provisions, often omitting precisely those provisions, such as mandatory staffing ratios for crèches or minimum budgetary allocations, that would impose the greatest administrative or financial burden.

Third, monitoring mechanisms are inadequate. While the NHRC and NCPDR conduct periodic inspections, their recommendations are advisory and their follow-up mechanisms are weak. The absence of a statutory obligation to implement judicial guidelines or to report on compliance further reduces accountability. Inspections, moreover, are often announced in advance, allowing prison administrations to make temporary improvements that do not reflect the everyday conditions experienced by children.

1. Data Deficiencies as an Implementation Barrier

A frequently underappreciated dimension of the implementation gap concerns the quality and granularity of available data. NCRB figures provide an aggregate national count of children residing in prisons but offer little insight into the conditions under which they live, their health status, educational enrolment, or long-term outcomes following separation from their mothers. Without disaggregated, regularly updated data, it is extremely difficult for policymakers, courts, or civil society organisations to assess whether the R.D. Upadhyay guidelines are being implemented in substance or merely in form. This data deficiency is not incidental; it is itself a symptom of the broader institutional fragmentation discussed in the following subsection, since no single agency holds clear responsibility for collecting and publishing comprehensive data on this population.

C. Institutional Fragmentation

A critical structural failing is the fragmentation of institutional responsibility. Prison authorities, Child Welfare Committees under the JJ Act, social welfare departments, district child protection units, and human rights commissions all have relevant mandates, yet they function largely in isolation from one another. This fragmentation produces significant gaps in service delivery: a child may be entitled to educational support under the RTE Act but no mechanism exists to ensure that the prison administration, the school system, and child welfare authorities coordinate to provide it.

The issue of post-separation care exemplifies this fragmentation most acutely. When a child reaches the age threshold for separation from her incarcerated mother, the transition to alternative care, whether kinship care, foster care, or institutional care, is frequently handled without adequate preparation, support, or follow-up. The psychological trauma of separation is compounded by the absence of continuity in care. Oliver Robertson's characterisation of these children as 'invisible victims' of the criminal justice system captures precisely this failure of institutional visibility.

The fragmentation problem is not unique to India, but its consequences are particularly acute given the absence of a dedicated legislative framework that might otherwise mandate coordination. In jurisdictions with more developed child protection systems, statutory case management requirements often compel different agencies to share information and coordinate decisions affecting a particular child. In the Indian context, by contrast, there is no statutory requirement that prison authorities notify Child Welfare Committees of the presence of a child in custody, no requirement that educational authorities be informed of a child's residence within a prison facility, and no requirement that healthcare providers coordinate with prison medical staff regarding a child's ongoing care needs. Each agency operates within its own silo, applying its own forms, its own timelines, and its own criteria, with little institutional incentive to coordinate with others.

1. Comparative Reflections on Coordination Mechanisms

It is instructive to consider, briefly, how other jurisdictions with significant prison populations of incarcerated mothers have approached the coordination problem. In several European jurisdictions, dedicated multidisciplinary panels, typically comprising representatives from corrections, child welfare, education, and health authorities, are statutorily required to review the situation of each child residing in a custodial facility at defined intervals. Such panels are empowered to make binding recommendations regarding continued residence, alternative placement, and the specific services to be provided. The absence of any equivalent mechanism in Indian law represents one of the clearest institutional gaps identified in this article, and one of the more readily actionable reform proposals discussed in Section V.

D. Psychological Dimensions and Stigma

The psychological impact of growing up in a custodial environment is a dimension that the legal literature has insufficiently addressed. Exposure to a restrictive, stigmatised, and often institutionally rigid environment produces measurable harms: emotional distress, anxiety, behavioural issues, and difficulty forming stable attachments. The stigma attached to having a parent in prison extends beyond the prison walls, affecting children's integration into schools and communities even after their mother's release or their own separation.

Sociological research indicates that children separated from incarcerated mothers are at heightened risk of emotional crises, educational disruption, and long-term social marginalisation. Despite this evidence, mental health services within prisons remain almost universally absent. The Model Prison Manual calls for counselling and recreational activities, but trained mental

health professionals are rarely deployed within prison environments. The cost of this neglect, measured in developmental harm and cycles of disadvantage, is both human and economic.

The economic dimension deserves brief elaboration, since it is frequently absent from rights-based analyses of this issue. Developmental psychology and labour economics both suggest that early childhood deprivation produces measurable long-term costs: reduced educational attainment, diminished earning potential, and increased likelihood of intergenerational poverty. Framed in these terms, the failure to invest in adequate care for children of women prisoners is not merely a human rights failure but also a failure of social policy with quantifiable downstream fiscal consequences, consequences that a purely punitive approach to maternal incarceration tends to externalise onto the child and, eventually, onto the broader social welfare system.

E. The Absence of a Legislative Framework

The most fundamental gap in the Indian framework is the absence of dedicated legislation specifically addressing the rights of children of women prisoners. The existing statutory landscape is composed of general laws, the Prisons Act 1894, the JJ Act 2015, the RTE Act, none of which address the particular vulnerabilities of this group. The Supreme Court's guidelines in *R.D. Upadhyay* have not been codified into statute. This means that their application depends on individual prison administrations' awareness of and compliance with judicial directives, a standard that is manifestly insufficient.

The contrast with the legislative treatment of other vulnerable groups is instructive. Children in conflict with the law have the benefit of a comprehensive statute, specialised institutions such as Juvenile Justice Boards, and dedicated oversight bodies. Children with disabilities have the Rights of Persons with Disabilities Act, 2016, which establishes enforceable entitlements and grievance redressal mechanisms. Children of women prisoners have none of these. This legislative silence is not a neutral oversight; it reflects and reproduces the invisibility of this group within policy discourse, an invisibility that, in turn, makes legislative reform politically less urgent, since there is no organised constituency advocating forcefully on their behalf.

1. Federalism and the Limits of a Uniform Standard

Any proposal for dedicated legislation must grapple with the federal structure of Indian prison administration. Because prisons fall within the State List under the Seventh Schedule, Parliament's legislative competence to enact a uniform, binding national statute on this subject

is not entirely free of doubt. Two routes present themselves. First, Parliament could legislate under Article 253, giving effect to India's international obligations under the UNCRC and the Bangkok Rules, a route that has been used in other contexts to enact legislation on subjects that would otherwise fall within state competence. Second, individual states could be encouraged, through model legislation and conditional central funding, to enact substantially similar statutes,

achieving de facto uniformity without formally displacing state legislative competence. Both routes carry distinct institutional and political costs, and a comprehensive reform proposal must address this federalism question explicitly rather than assuming it away.

V. TOWARDS A COMPREHENSIVE REFORM AGENDA

A. Dedicated Legislation

The most urgent reform is the enactment of comprehensive legislation specifically addressing the rights and welfare of children of women prisoners. Such a statute should, at minimum: define the rights of these children, establish enforceable standards for their care within prisons, mandate the codification of the Supreme Court's guidelines in *R.D. Upadhyay*, create clear lines of institutional responsibility, and establish independent monitoring and accountability mechanisms. The legislation should enshrine the 'best interests of the child' as the primary principle governing all decisions affecting these children, in alignment with the UNCRC.

Beyond these minimum requirements, the proposed legislation should include a statutory presumption in favour of individualised welfare assessment rather than the current categorical age-based rule. While administrative simplicity has obvious appeal, a rigid age threshold cannot adequately capture the wide variation in circumstances across individual cases, the availability of alternative caregivers, the specific conditions of the prison facility, and the particular developmental needs of the child in question. A statutory framework requiring periodic, documented welfare reviews, conducted by a multidisciplinary panel along the lines discussed in Section IV, would better operationalise the best interests principle that *R.D. Upadhyay* itself articulated but never fully implemented.

B. Expanding Non-Custodial Alternatives

A comprehensive reform agenda must extend beyond improving prison conditions and address the prior question of whether women with young children should be incarcerated in the first place. The Bangkok Rules advocate for non-custodial measures, probation, community

service, house arrest, for women offenders, particularly those with dependent children. Section 480 of the BNSS offers a modest legislative foothold for this approach, but its application must be systematised and made less discretionary through judicial guidelines and statutory direction. Courts should be required to consider the impact of incarceration on dependent children as a sentencing factor and to prioritise non-custodial alternatives in cases involving women with young children charged with minor offences.

This recommendation should not be mistaken for an argument that maternal incarceration should never occur. There are cases, particularly those involving serious or violent offences, where incarceration remains an appropriate and necessary response notwithstanding its impact on dependent children. The argument advanced here is narrower: in the substantial subset of cases involving minor offences and undertrial detention, where the primary justification for continued custody is procedural rather than the gravity of the underlying offence, the impact on dependent children should weigh more heavily in bail and sentencing determinations than it currently does. Judicial training programmes for trial court judges, who make the overwhelming majority of bail decisions in such cases, should explicitly incorporate child welfare considerations into standard sentencing and bail guidance.

C. Strengthening Institutional Coordination

Institutional fragmentation can be addressed through the creation of a statutory inter-agency coordination mechanism, bringing together prison authorities, Child Welfare Committees, social welfare departments, and educational authorities under a unified framework for the care of children of women prisoners. This mechanism should be anchored in a designated national body, ideally under the NCPCR, with the mandate to develop standards, monitor compliance, investigate complaints, and initiate corrective action. State-level counterparts should mirror this structure, with clear reporting obligations and publicly available performance data.

A practical first step toward this coordination mechanism would be a statutory requirement that prison authorities notify the relevant Child Welfare Committee within a fixed period, for instance, seventy-two hours, of a child's admission to a prison facility alongside an incarcerated mother. This single procedural requirement, modest in scope, would immediately close one of the most significant gaps identified in Section IV: the absence of any reliable mechanism by which child protection authorities become aware of, and are able to monitor, the situation of children residing in custodial facilities.

D. Infrastructure, Education, and Mental Health

Investment in prison infrastructure to create genuinely child-friendly environments is a prerequisite for any meaningful reform. This includes not merely the physical provision of crèches and play areas, but the deployment of trained childcare staff, early childhood educators, healthcare professionals, and mental health counsellors. The right to education guaranteed by Article 21A and the RTE Act must be operationalised within the prison context through partnerships with local schools, digital learning platforms, and specifically designed curricula. Mental health services, conspicuous by their absence in virtually all prison settings, must be introduced as a mandatory component of the care framework for children.

Budgetary commitment is essential to this dimension of reform and should not be treated as a secondary or implementation-stage concern. Experience with other welfare schemes in India suggests that statutory entitlements without corresponding, ring-fenced budgetary allocations tend to remain aspirational. A dedicated legislation of the kind proposed in this article should therefore include a statutory funding mechanism, whether through a dedicated cess, a budgetary line item subject to annual parliamentary review, or a formula-based central grant to states tied to verified compliance with prescribed standards.

E. Data Collection and Evidence-Based Policy

Evidence-based reform requires reliable data. The current system of data collection on children in prisons is inadequate: NCRB figures capture aggregate numbers but not the qualitative dimensions of children's welfare, developmental outcomes, or post-separation trajectories. A centralised, disaggregated database, tracking the number, age, health status, educational enrolment, and post-separation outcomes of children in prisons, should be established as a statutory obligation on prison administrations. This data should be publicly accessible and subject to independent audit, enabling civil society, academic researchers, and parliamentary oversight bodies to assess the effectiveness of reform measures.

Such a database would also serve an important diagnostic function for ongoing policy refinement. Without longitudinal data tracking outcomes for children after separation from their mothers, it is impossible to assess whether current rehabilitation and alternative care arrangements are achieving their stated objectives. A statutory mandate for periodic, independent evaluation of post-separation outcomes, modelled on similar evaluation requirements found in other child welfare legislation, would close this evidentiary gap and provide a feedback mechanism for continuous improvement of the broader legal and institutional framework proposed in this section.

VI. CONCLUSION

Children of women prisoners are, in the most precise sense, innocent bystanders in the criminal justice process. They have committed no offence, yet they bear the developmental, psychological, and social costs of a system that was not designed with their interests in mind. India's constitutional and judicial framework acknowledges their rights in principle, but the translation of principle into practice has been fitful, fragmented, and deeply inadequate.

The core argument of this article is that the existing approach, reactive judicial intervention in the absence of a comprehensive legislative framework, is insufficient to secure the sustained protection of these children's rights. The guidelines laid down in *R.D. Upadhyay* represent a crucial judicial contribution, but their non-codified status and the absence of robust enforcement mechanisms render them vulnerable to administrative indifference. The Model Prison Manual provides a detailed policy framework, but its non-binding character makes compliance discretionary.

This pattern is not unique to the present subject. It recurs across multiple domains of Indian constitutional law in which the judiciary has stepped into a regulatory vacuum left by legislative inaction, issuing detailed guidelines that function, in effect, as quasi-legislation but lack the institutional permanence, budgetary backing, and democratic legitimacy of statute. The history traced in this article, from Sunil Batra through Sheela Barse to *R.D. Upadhyay* and beyond, illustrates both the considerable achievements and the inherent limitations of this judicial mode of governance. Achievements, because without judicial intervention it is doubtful that the rights of children of women prisoners would have received any sustained institutional attention at all. Limitations, because judicial guidelines, however carefully crafted, cannot substitute for the sustained administrative capacity, budgetary commitment, and democratic accountability that only legislative action can provide.

The reform agenda proposed in this article is both normative and institutional. Normatively, it requires a decisive legislative commitment to the 'best interests of the child' as the governing principle for all decisions affecting children of incarcerated mothers. Institutionally, it requires coordinated action across multiple domains: legislative codification of judicial guidelines, expansion of non-custodial alternatives, inter-agency coordination mechanisms, investment in prison infrastructure and services, and robust data collection systems. None of these measures, taken alone, would resolve the structural contradiction between the punitive logic of imprisonment and the developmental needs of children. Taken together, however, they represent a coherent pathway toward narrowing, even if not entirely eliminating, the gap between constitutional promise and lived experience for this population.

Upendra Baxi's observation that the effectiveness of rights depends on their enforcement is nowhere more apposite than in the context of these children. The constitutional promise of dignity, development, and equality will remain unfulfilled for this group until the legal system deploys the full weight of its institutional capacity, legislative, executive, and judicial, to ensure that children of women prisoners are not invisible victims but recognised, protected, and empowered members of a just society. The measure of a constitutional democracy's commitment to social justice lies not only in the rights it proclaims for those who can advocate for themselves, but in the protection it affords to those, like these children, who cannot.

E. Reforming the Bail and Sentencing Framework

The bail framework as it currently operates in India is poorly calibrated to account for the welfare of dependent children. Bail decisions are governed primarily by considerations of flight risk, risk of evidence tampering, and the gravity of the alleged offence, with the welfare of dependent children treated at best as a secondary factor, and more commonly as entirely irrelevant to the judicial calculus. This reflects a broader feature of Indian criminal procedure: its individualist orientation, which conceives of the accused as a single, self-contained legal subject, and largely ignores the web of familial dependencies within which that subject is embedded.

The proposed reform in this area has two dimensions. First, at the stage of remand and bail, courts should be required by statute to inquire into whether the accused has a dependent child below the age of six years residing with her in custody, and, if so, to treat this as a factor weighing in favour of bail unless countervailing considerations of a serious nature are established. This requirement, analogous to the existing provisions on bail for sick or infirm prisoners, would give legislative form to the principle already implicit in Section 480 of the BNSS, while removing the discretionary character that currently allows courts to ignore it.

Second, at the stage of sentencing, the impact of a custodial sentence on a dependent child should be treated as a mitigating factor in appropriate cases, consistent with the sentencing principles already recognised in Indian case law that permit courts to take into account the personal circumstances of the offender, including family responsibilities.

Judicial awareness training is a prerequisite for the effective implementation of both these proposals. Many trial court judges, who make the overwhelming majority of bail and remand decisions in cases involving women with dependent children, have received no specific training on the rights and developmental needs of children of incarcerated mothers. A structured training curriculum, developed in collaboration with judicial academies and child rights

organisations, should be incorporated into both pre-service and continuing education programmes for the subordinate judiciary. Such training should address not only the legal framework but also the empirical evidence regarding the developmental harms associated with custodial residence, equipping judges with the knowledge base necessary to give genuine weight to child welfare considerations in their decision-making.

G. The Role of Civil Society and Legal Aid

Sustained reform in this area will require the active engagement of civil society organisations, legal aid providers, and academic researchers, in addition to state actors. Civil society organisations have historically played a crucial role in surfacing the situation of children of women prisoners through public interest litigation, investigative journalism, and advocacy campaigns. Several of the landmark cases discussed in this article, including Sheela Barse, originated from the efforts of journalists and activists rather than from official monitoring. This pattern reflects a structural feature of Indian constitutional democracy: the formal monitoring and accountability mechanisms are weak, while the informal accountability provided by civil society can, in the right conditions, be powerful.

Legal aid providers occupy a particularly important position in this ecosystem. Many women prisoners, especially undertrials from economically marginalised backgrounds, lack effective legal representation. Their inability to secure bail or to challenge prolonged pre-trial detention is often a direct function of this lack of legal support, which in turn prolongs the custodial residence of their children. Strengthening legal aid provision for women prisoners, with specific attention to those with dependent children, is therefore not merely a measure to protect the rights of the mother but also, indirectly, a child welfare measure. The Legal Services Authorities Act, 1987, and the institutions it established, provide a statutory vehicle for this strengthened provision, but require significantly greater resourcing and prioritisation of this category of cases.

Academic researchers have a distinct contribution to make. The empirical literature on children of incarcerated parents in India is limited in volume and scope compared to equivalent literatures in Western jurisdictions, where longitudinal studies tracking the developmental outcomes of this group over extended periods have produced a rich body of evidence to inform policy. Building a comparable Indian evidence base requires sustained collaboration between law schools, social work faculties, and institutions such as the NCRB and NCPCR, supported by dedicated research funding. Without such a base, reform proposals, however normatively compelling, risk being contested on empirical grounds and may fail to achieve the political

traction necessary for legislative action.

H. Addressing the Separation Trauma

The moment of separation, when a child reaches the age threshold and must leave the prison environment in which she has lived with her mother, is one of the most psychologically significant events in the life of a child of a woman prisoner, and one of the most poorly managed by the current institutional framework. The transition from prison to alternative care, whether to extended family, a foster family, or a residential institution, is abrupt, insufficiently prepared, and rarely accompanied by adequate psychological support for either the child or the mother.

A reformed framework should treat the separation process as a structured, planned transition requiring active management by a multidisciplinary team over a sustained period rather than as an administrative event triggered automatically by the child reaching a certain age. This means, at minimum, that preparations for separation should begin well in advance of the age threshold, that the child should be supported by a trained counsellor throughout the transition, that the receiving caregiver should be provided with information about the child's developmental history and needs, and that follow-up contact between the child and her incarcerated mother should be facilitated to the extent consistent with the child's best interests. None of these requirements presently exist as legal obligations under Indian law, a gap that dedicated legislation could address directly.

The question of post-separation contact between children and their incarcerated mothers is particularly sensitive and requires nuanced handling. International guidance, including the UNCRC and the Bangkok Rules, emphasises the importance of maintaining family bonds even during periods of incarceration, recognising that the mother-child relationship is itself a significant factor in the child's long-term wellbeing. Indian prison rules generally permit visits from family members, but the conditions under which such visits occur, duration, supervision, physical environment, are rarely designed with the needs of young children in mind. Reforming these visiting conditions to facilitate meaningful, child-centred contact between incarcerated mothers and separated children would represent a low-cost but high-impact reform that could be implemented through administrative action even in advance of comprehensive legislative reform.

VII. COMPARATIVE PERSPECTIVES

A. International Approaches to Children in Custodial Settings

A comparative perspective enriches the domestic analysis and provides concrete models from which Indian policymakers might draw. Several jurisdictions have developed statutory and institutional frameworks specifically addressing the rights of children of incarcerated parents, and their experiences offer both positive lessons and cautionary illustrations.

In the United Kingdom, the Corston Report of 2007 marked a watershed in policy thinking on women in the criminal justice system. The Report, commissioned following a series of deaths in women's prisons, recommended a fundamental reorientation of the approach to women offenders, with an emphasis on community-based alternatives to custody and a recognition of the particular impact of women's imprisonment on dependent children. While the Report's recommendations have been only partially implemented, they have nonetheless shaped policy and jurisprudence in important ways, including through the development of statutory guidance requiring judges to consider the impact on dependent children before imposing a custodial sentence on a primary carer.

In the United States, the issue of children of incarcerated parents has attracted sustained academic and policy attention, driven in part by the scale of the incarceration crisis and its disproportionate impact on African-American communities. The federal Adoption and Safe Families Act has been criticised for creating perverse incentives for the termination of parental rights in cases of incarcerated mothers, illustrating the risk that child welfare legislation, if not carefully calibrated, can produce outcomes contrary to the best interests of the child by prioritising permanency over family preservation. This cautionary experience underscores the importance of designing any Indian legislation with explicit attention to the preservation, wherever possible, of the mother-child relationship.

In South Africa, the Children's Act, 2005 includes specific provisions addressing children in the care of incarcerated parents and mandates child-centred procedures for decisions about their placement. The Act reflects a constitutional framework, anchored in Section 28 of the South African Constitution, that treats the best interests of the child as paramount in all matters concerning children, a provision that has been interpreted by South African courts to impose positive obligations on the State to create conditions conducive to children's development, including within custodial settings. The South African experience is instructive for India not only substantively but methodologically: it illustrates how constitutional provisions, when coupled with dedicated statutory implementation and active judicial supervision, can produce meaningful

improvements in the practical conditions of children's lives.

B. Lessons for Indian Reform

Several conclusions emerge from this comparative survey. First, legislative reform is more durable and more effective than judicial direction alone, but it must be accompanied by adequate institutional capacity and budgetary commitment if it is to produce real-world change. Second, the framing of reform matters: approaches that foreground the rights of the child rather than the interests of the prison administration or even the rights of the mother tend to produce more child-centred outcomes. Third, the risk of unintended consequences, illustrated by the American experience with the Adoption and Safe Families Act, underscores the importance of careful drafting and of building evaluation and review mechanisms into any legislative framework from the outset. Fourth, international instruments such as the Bangkok Rules and the UNCRC provide a valuable normative anchor for domestic reform, but their translation into law requires domestic political will and institutional capacity that cannot be assumed.

Applied to the Indian context, these lessons suggest that a credible reform agenda must address not only the content of any proposed legislation but also the conditions necessary for its effective implementation. Legislation that mandates child welfare assessments without creating the institutional capacity to conduct them, or that requires inter-agency coordination without establishing the machinery to facilitate it, risks producing the same implementation gap that has characterised the post-Upadhyay period. Building capacity alongside legal entitlement is therefore not a secondary concern but a central feature of effective reform.

C. The Gender Dimension in Comparative Perspective

Any comparative analysis of children of women prisoners must engage seriously with the gender dimension of the problem. Women constitute a small minority of prison populations in virtually every jurisdiction, including India, where they represent approximately four per cent of the total prison population according to NCRB data. This numerical minoritisation has historically meant that prison systems, designed predominantly with male prisoners in mind, have been poorly equipped to address the specific needs of women, and by extension the needs of children who accompany them. The comparative literature consistently finds that women's prisons are more likely than men's prisons to be remote from family support networks, less likely to have dedicated childcare facilities, and more likely to have staff with limited training in child welfare.

This structural gender bias in prison design has important implications for reform. It

meansthat improvingconditions for childrenofwomenprisoners is inseparable fromthebroader project of developing gender-responsive approaches to incarceration. A prison systemthat treats the male prisoner as the default subject and women as an afterthought will, bydesign, be poorly placed to meet the needs of children in its care. Gender-responsive reform, including the development of dedicated women's facilities with appropriate childcare infrastructure, the recruitment and training of female custodial and welfare staff, and the integration of gender-sensitive assessment tools into decision-making processes, is therefore a necessary condition for the kind of child welfare improvements this article advocates.

The intersection of gender and caste in the Indian context adds a further dimension that comparative analysis from other jurisdictions cannot fully capture. Criminological research in India consistently finds that women from Scheduled Castes, Scheduled Tribes, and Other Backward Classes are overrepresented in prison populations relative to their share ofthe general population. This overrepresentation reflects a range of factors including differential policing, limitedaccesstolegalaid,andthe compoundedvulnerabilitiesassociatedwithcaste-based discrimination and economic deprivation. For the children of such women, the harms associated withcustodialresidence arethus layered uponpre-existing socialand economic disadvantages in waysthat maketheirsituationparticularlyacuteandthatmaketargeted,affirmative interventions especially necessary. A legislative framework for the rights of children of women prisoners should acknowledge this intersectional dimension explicitly and design its provisions accordingly.

D. Accountability Mechanisms: Lessons from Other Domains

Theaccountabilitygap identifiedthroughoutthisarticle, between therightsproclaimed in law and the conditions experienced in practice, is not unique to the present subject. It recurs across multiple domains of Indian social welfare law, from the implementation of the Mahatma Gandhi National Rural Employment Guarantee Act to the enforcement of minimum wage legislation to the realisation of the right to food. In each of these domains, scholars have identified a recurring pattern: ambitious legislation, weak implementation machinery, inadequate monitoring, and a reliance on litigation as the primary accountability mechanism. The lessons drawn from reform efforts in these domains have direct relevance to the proposed legislative framework for children of women prisoners.

One particularly instructive example is the evolutionofaccountability mechanisms under the Right to Education Act. Initial implementation was hampered by familiar problems: states' failure to meet statutory timelines, inadequate teacher training, infrastructure deficits,

and weak monitoring. Over time, a combination of civil society pressure, judicial supervision, and administrative reform has produced incremental improvements, particularly in the area of enrolment, even as quality deficits persist. The lesson is not that accountability mechanisms inevitably succeed, but that they create pressure points for reform that purely aspirational policy documents do not. A statutory framework for children of women prisoners that includes clear timelines, measurable indicators, independent monitoring, and accessible grievance redressal would, by the same logic, create a more sustained impetus for implementation than the current combination of judicial guidelines and non-binding policy documents.

Social audit mechanisms, which have proven effective in creating community-level accountability for welfare scheme implementation in areas such as the employment guarantee scheme, also deserve consideration in this context. Periodic social audits, conducted with the participation of civil society organisations, former prisoners, and community members, could provide an accessible and low-cost mechanism for verifying compliance with prescribed standards in women's prisons, supplementing the more formal monitoring role of the NHRC and NCPCR. The legal basis for such mechanisms already exists under various social welfare statutes; extending the principle to the prison welfare context would require relatively modest legislative innovation.

E. Towards a Rights-Based Prison Reform Culture

Beyond any specific legislative or administrative reform, the situation of children of women prisoners points toward a broader need for cultural change within India's prison administration. Prison culture, shaped by decades of institutional practice oriented toward security and discipline rather than welfare and rehabilitation, does not shift readily in response to legal mandates alone. The most enduring reforms in prison systems internationally have tended to occur when institutional culture shifts, when prison administrators, staff, and the broader criminal justice system come to internalise a welfare orientation as part of their professional identity rather than experiencing it as an external constraint imposed by courts or legislation.

The institutional inertia of prison administration is a well-documented phenomenon in comparative prison scholarship. Organisations that have historically prioritised order and control do not readily reorient themselves around welfare and rehabilitation without sustained external pressure and internal leadership. In the Indian context, this inertia is compounded by severe resource constraints, overcrowding, and the absence of a coherent rehabilitative ideology within the prison system at large. Reforming the treatment of children within this

system therefore requires more than changes to rules and procedures; it requires a sustained investment in the human capital of the prison administration and a reconfiguration of the values and priorities that shape everyday institutional practice. This is a long-term project whose timeframe extends well beyond the electoral cycles that typically govern legislative and policy attention in India, and it underscores the importance of building legal and institutional structures that can sustain reforming pressures over time regardless of shifts in political priorities.

Cultivating this orientation requires investment in professional education and training for prison staff at all levels, from senior administrators to frontline custodial officers. Training programmes should cover not only the legal framework governing the rights of children in prisons but also the developmental psychology of early childhood, trauma-informed approaches to childcare, and the specific vulnerabilities of children of incarcerated mothers. Such training is particularly important because prison staff are the primary interface between the institution and the children who reside within it; their attitudes, behaviours, and professional commitments shape, on a daily basis, the actual conditions of these children's lives in ways that no legal provision can fully determine.

Professional associations of prison administrators, welfare officers, and other criminal justice practitioners can play an important role in promoting and sustaining this cultural shift. The development of professional standards and codes of conduct specific to the care of children in custodial settings, analogous to the professional standards that govern childcare workers in other settings, would signal that work with children in prisons is a specialised professional role requiring specific competencies rather than a peripheral administrative task. Recognising and rewarding excellence in child welfare practice within the prison system, including through dedicated awards, promotions, and professional development opportunities, would further reinforce the message that child welfare is a core institutional priority rather than an afterthought.

There is also an important role for parliamentary oversight in sustaining this cultural shift. A dedicated parliamentary committee, or a sub-committee of the existing Committee on the Welfare of Scheduled Castes and Scheduled Tribes or the Committee on Empowerment of Women, tasked with periodic review of conditions for children in prisons, would bring legislative scrutiny to bear on an area that has historically received little parliamentary attention. Annual reporting requirements imposed on state governments, with data submitted to and reviewed by such a committee, would create a regular accountability cycle that supplements judicial supervision with democratic oversight. In the long run, it is this

combination of judicial, executive, legislative, and civil society accountability that offers the most credible path toward durable reform.

TABLE OF CASES

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