
THE RIGHTS OF CHILDREN OF INCARCERATED PERSON AND ROLE OF MEDIATION: A CRITICAL APPRAISAL

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ABSTRACT

Children of Incarcerated Parents (CoIP) is a group which is legally invisible in the margins of the criminal justice system in India. Almost 73.5% of India's inmates are undertrials, meaning that an estimated 800,000 to 900,000 children are exposed to extreme socio-economic and psychological situations without any transitional care system. Due to the rigid six-year cut-off policy in prisons enforced by R.D. Upadhyay, children outside prisons are left with an absolute institutional vacuum. The State's default reliance on combative litigation at the Family Court and/or bureaucratic, cold placement by Child Welfare Committees (CWCs) regularly breaches children's fundamental rights as guaranteed by Articles 14, 21 and 21A of the Constitution of India, and the statutory guidelines of the "Best Interests of the Child" principle.

This paper adopts a doctrinal, comparative and socio-legal framework based on empirical field evidence gathered from PRAYAS-TISS, to evaluate the structural deficiencies in the Mediation Act, 2023. Sec.6(1) of the Act and entries 2 and 7 of the First Schedule of the Act impose an institutional barrier by excluding a dispute over a minor or a criminal prosecution from the mediation matrix.

To dismantle this statutory silo, state shall establish an institutionalised framework for 'Child-Inclusive Family Mediation' with the help of Sec. 6(2) of the Act of 2023. The binding Kinship Care and Parental Contact Plans will be co-authored by incarcerated parents, extended kinship networks and social workers, through this mechanism, harmonized with the Juvenile Justice Act, 2015 and BNSS 2023. Thereby, transitioning Indian jurisprudence from the punitive paradigm to restorative paradigm that recognizes the state's role as a *Parens Patriae*.

Keywords: Children of Incarcerated Parents (CoIP), Mediation Act 2023, Article 21, Juvenile Justice Act 2015, and Kinship Care Plans.

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1. INTRODUCTION & THEORETICAL FOUNDATIONS

Mass incarceration in India has a very narrow, offender-centric focus, which often fails to take into account the immediate social context of the accused. This group of children, estimated at 800,000 to 900,000 per year - exists in a regulatory vacuum and serves as an unrecognized collateral casualty of the criminal justice system.⁴ Moreover, the structural instability which characterizes these families is worsened by the special characteristics of the Indian prison population, with 73.4% of all prisoners in Indian prisons are undertrials.⁵ This abrupt parent-child separation without any warning or institutional transition plan and places dependent minors in a state of vulnerability, both materially and psychologically.

From a sociological standpoint they are often referred to as the “*forgotten children*” or the “*orphans of justice*”⁶, experiencing extreme psychological burden without any distinct legal identity. The parent's incarceration places the child in a very harsh social environment of social ostracization, emotional trauma, and systematic institutional neglect. This marginalisation is rooted in “*Sanskara Inheritance doctrine*” that is culturally embedded in society and assumes that the moral corruption or offences of a parent are inevitably passed down to their children.⁷

While the criminal procedure clearly outlines rules relating to the arrest, presentation and the bail of the accused, it fails to mention anything with regards to the welfare and safety of the minors left behind at the scene of arrest. By reaming silent on the *recognition of CoIP as independent legal stakeholders*, Indian judiciary allows a deep-seated human rights crisis to take place under the pretence of lawful policing.

1.1. The Triadic Legal Dynamic

The legal issue with children of prisoners is a constitutional conundrum between three aspects of the situation: *the State, the incarcerated parent and the minor child*⁸-

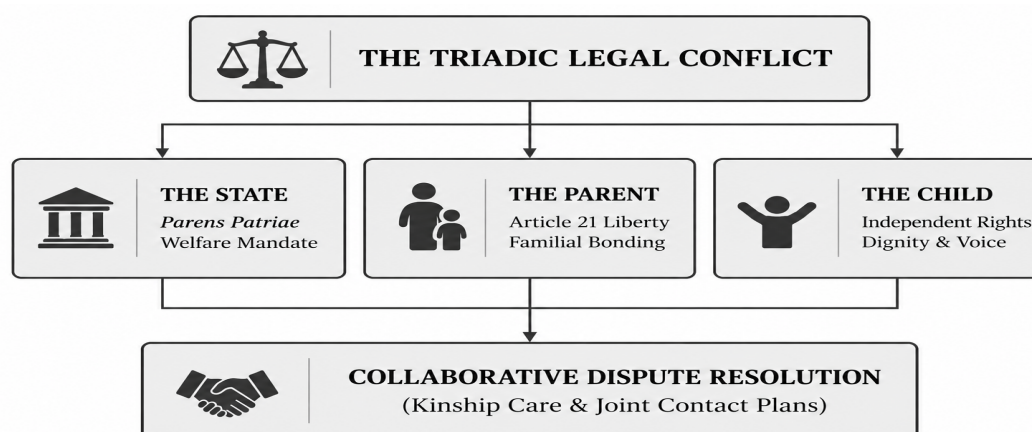
⁴ Tata Institute of Social Sciences, *A Study on Social Work with Children of Prisoners* 14–18 (2024).

⁵ National Crime Records Bureau, Ministry of Home Affairs, *Prison Statistics India 2023* 35 (2025).

⁶ Anshuman Panda, *Orphans of Justice: Analysis of the Judicial System for Children of Incarcerated Parents in India*, 4 *Int'l J.L. Res. & Analysis* 201, 203 (2026).

⁷ Himanshu Dixit, *Child of Incarcerated Parents: A Deemed Criminal*, 48 *J. Indian L. Inst.* 112, 115 (2022).

⁸ See generally Kenneth A. Loparo, *When the Innocent Are Punished: The Children of Imprisoned Parents* 88–94 (2021).



- i. **The State (Parens Patriae):** As the protector of the vulnerable, the state has a positive constitutional obligation to ensure child permanency, welfare and physical safety, under the doctrine of *parens patriae* (parent of the nation).⁹
- ii. **Incarcerated Parent:** The incarcerated parent has certain fundamental liberty interests in his or her children's lives, emotional association and parenting, as guaranteed under the expanded horizon of Article 21 of the constitution.¹⁰ Incarceration or criminal accusations does not strip a citizen of his natural right to maintain a family relationship with his children.
- iii. **Minor child:** At the core of this is the child's right to dignity, mental stability, education and preservation of the family under *Article 14, 21, and 21A*, as an independent stakeholder.¹¹ The *United Nations Convention on the Rights of the Child (UNCRC)* sets out the requirement for the child's independent views to be taken into account in any judicial or administrative action that affects their custody.¹²

⁹ *Nil Ratan Kundu v. Abhijit Kundu*, (2008) 9 SCC 413, 428–29.

¹⁰ *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*, (1981) 1 SCC 608.

¹¹ INDIA CONST. arts. 14, 21, 21A.

¹² Convention on the Rights of the Child art. 12, Nov. 20, 1989, 1577 U.N.T.S. 3.

1.2. Methodology and Scope of the Problem

The study adopts a *Doctrinal, Comparative and Socio-Legal Approach* assessing the constitutional provisions, domestic and foreign laws, and secondary empirical data from the annual reports of PRAYAS-TISS to evaluate the blocks in operation.

The fundamental issue explored in this research paper is the inability of the traditional adversarial trial system to deal with the intricate realignment familial relations in the case of parents' incarceration. In India, when a parent is incarcerated, custody cases are taken up by combative family courts or by cold administrative bodies like the Child Welfare Committees (CWC), ignoring the continuing ability of the incarcerated parent to offer emotional support or contribute to a joint parenting arrangement.¹³

This research delves into the “*Child-Inclusive Family Mediation*”, as a crucial protective mechanism under the Mediation Act, 2023, which prioritizes family preservation, shared responsibility, and collaborative family planning over the adversarial model of litigation.¹⁴ Mediation helps to ensure that extended family members, social workers, and the child sit together in a neutral location, and jointly agree on a mutually satisfactory “*Kinship Care and Parental Contact Plan*” that helps achieve the child's best interests.¹⁵

But the *Mediation Act, 2023*, as institutionalized under Section 6(1), presents a substantial weakness in its framework by excludes disputes between minors (Entry 2) and criminal prosecutions (Entry 5) from the mediation matrix. This paper attempts to explore this lacuna in the statute, the scope of the legislative amending power under section 6(2) of the Mediation Act, 2023 and to formulate a legally binding, restorative process to safeguard the constitutional rights of these invisible children.

2. CONSTITUTIONAL MANDATES & JUDICIAL JURISPRUDENCE IN INDIA

2.1. Constitutional Rights Framework -

The structural harms inflicted upon the Children of Incarcerated Parents (CoIP) represent a continuous, multi-layered, constitutional rights crisis. The State's exercise of its penal power

¹³ The Juvenile Justice (Care and Protection of Children) Act, 2015, No. 2 of 2016, § 27.

¹⁴ The Mediation Act, 2023, No. 32 of 2023.

¹⁵ *Beyond the Best Interests: Embedding the Child's Voice in India's Mediation Landscape*, 7 *Int'l J.L. Mgmt. & Human.* 402, 408 (2024).

against an individual for a wrongdoing causes a *Catastrophic Domino Effect* having direct impact on the minor children of the accused. The existing Indian legal framework fails to distinguish between the child's independent legal identity from the criminal culpability of the parent, thereby transforming the criminal justice system into an *instrument of systematic violation*.

2.1.1. Article 14: Equal Protection and Non-Discrimination

The constitutional harm endured by CoIP can be traced from the moment they are denied of their fundamental right under Article 14.¹⁶ The legal system, however, frequently puts CoIP under institutional neglect, social exclusion and lack of protection and support from the state solely based on their parents' criminal record.¹⁷ This treatment amounts to an *un-constitutional classification*, penalizing a class of innocent minors because of their unchosen kinship status. The absence of special protection or transition frameworks for CoIPs puts them under significantly disadvantaged group, as compared to other children facing other types of family separation (civilian divorce or parent's death), who have access to family courts and social welfare systems offering a strong non-punitive support structure.¹⁸

2.1.2. Article 21 - Right to life and Human Dignity

In the landmark case of *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi*, Supreme Court held that Article 21 is not limited to mere animal existence.¹⁹ The Court ruled that: the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings.”²⁰ In case of a minor child, the right to live with dignity is linked to the maintenance of a stable family relationship and a sense of safety.²¹ The sudden withdrawal of a primary caregiver, without any institutional care arrangements, causes profound emotional harm and deprivation, which stifles the child's faculties.²² For the latter, the lack of any structured and non-adversarial legal process to arrange

¹⁶ INDIA CONST. art. 14.

¹⁷ Dixit, *supra* note 4, at 114.

¹⁸ Tata Institute of Social Sciences, *A Study on Social Work with Children of Prisoners* 45 (2024).

¹⁹ *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*, (1981) 1 SCC 608.

²⁰ *Id.* at 529.

²¹ Dixit, *supra* note 11, at 115.

²² *Id.*

their care is a significant failure of the state.²³

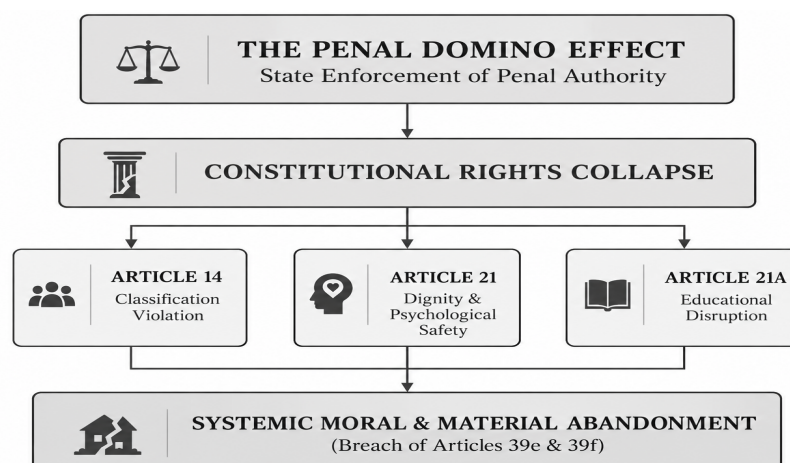


Figure-2: The Penal Domino Effect: Constitutional Consequences of Parental Incarceration

Source: Author's own conceptualisation based on arts. 14, 21, 21A, 39(e) & 39(f), Constitution of India.

2.1.3. Article 21A and Article 45: Right to Education

In addition, the arrest or prolonged detention of a primary caregiver almost invariably leads to a collapse in the child's access to education, thus directly infringing on Article 21A.²⁴ Forced school drop-out rates are higher for minor children of prisoners.²⁵ In the absence of the family's breadwinner or caregiver, the relatives or other family members often withdraw their children from formal schooling to reduce expenses, pushing them into early domestic work or other informal work.²⁶ The State failure to introduce a court-annexed mechanism to ensure that the child's financial and educational needs directly contravenes with its positive obligation under Article 21A and Article 45.²⁷

The Directive Principles of State Policy: Article 39(e) and 39(f)

²³ Neelam Sukhramani & Shivangi Gupta, *Children of Incarcerated Parents: A Study on Guidelines vs. Implementation*, 12 J. L. & Soc. Res. 88, 94 (2020).

²⁴ INDIA CONST. art. 21A.

²⁵ Ayan Ahmad & Jyoti Yadav, *The Rights of Child in India with Special Reference to Incarcerated Parents*, 5 *Int'l J.L. Res. & Analysis* 310, 314 (2025).

²⁶ *Id.*

²⁷ INDIA CONST. art. 45.

The violation of the Constitution is further exacerbated by the inaction of the State to abide by the Directive Principles. **Article 39(e)** explicitly mandate that the state will “*take reasonable measures*” to ensure that the tender age of children is not abused and that citizens shall not be compelled “*by economic necessity*” to engage in vocations inappropriate to their age and strength.²⁸ At the same time, **Article 39(f)** requires the state to turn its policy toward providing opportunities and facilities for children to grow up in a healthy way, under conditions of freedom and dignity, protecting children from being exploited and from moral and material abandonment.²⁹ The current legal lacuna exposes a state’s failure to safeguard its constitutional promises, forcing these children into hostile, adversarial family court proceedings or bureaucratic custody process without an alternative or a child-centred process.³⁰

2.2. Supreme Court Precedents & Evolution –

An analysis of landmark SC rulings shows that while the judiciary has managed to establish protective rules for CoIP *within* the prison system, but that it has failed to address a huge, unaddressed legal problem of what to do with children who are *outside* the prison walls.

2.2.1. *Sheela Barse v. Union of India (1986)* -

This case sits at the starting point for a rights-based approach with respect to the children in custodial environment.³¹ In this landmark public interest litigation, the Court strongly condemned the practice of detaining abandoned, destitute, or vulnerable children inside adult jails under the guise of “*safe custody*”, emphasizing that the environment of an adult prison is not suitable for children, and is fundamentally harmful to their physical, mental and moral health. ³² *Sheela Barse* established that ‘*children are national assets*’ and deserve specialized rehabilitation, care, and proactive judicial supervision, holding that if the state assumes control of a custodial setting it has a “*constitutional obligation*” to protect any affected minor from the realities of the criminal justice system.³³

2.2.2. *R.D. Upadhyay v. State of Andhra Pradesh (2006)*

After two decades, the SC in this case addressed the plight of children affected by parental

²⁸ INDIA CONST. art. 39, cls. (e).

²⁹ INDIA CONST. art. 39, cls. (f).

³⁰ Panda, *supra* note 3, at 204.

³¹ *Sheela Barse v. Union of India*, (1986) 3 SCC 596.

³² *Id.* at 597.

³³ *Id.*

incarceration and the one's living *inside* the prison with their incarcerated mothers.³⁴ The Apex Court noted that the “*Best interests of child*” is an underlying principle in the Indian constitutional structure and issued a set of mandatory and detailed directions to the prison authorities in all States and Union Territories.³⁵ The court held that the Children living in jail are not convicts, or undertrials and they have the *full* right to enjoy the food, shelter, clothing, specialized health care and recreational facilities.³⁶ The R.D. Upadhyay judgement further gave the following mandates-

- i. Providing special crèches and nursery schools outside prisons yards to isolate children from the prison atmosphere.³⁷
- ii. Providing age-appropriate nutrition, regular paediatric check-ups and required vaccinations.³⁸
- iii. An absolute prohibition on the name and location of the prison being recorded on the child's birth certificate, protecting the child from lifelong social stigma.³⁹

However, *R.D. Upadhyay* judgement also laid down a hard and fast rule that introduced an altogether new legal issue; that children should remain with their mothers in prison till they turn six years old, beyond which they must be sent out of the prison.⁴⁰

In Re: Inhuman Conditions in 1382 Prisons (2016/2018)

In this Suo-motu case, the SC expanded its systemic regime of penal system. Alongside addressing the issues of overcrowding, unnatural deaths, and the absence of legal aid for prisoners, it explicitly held that prisoners do not cease to have fundamental rights when they enter the prison, and that their right to dignity under Article 21 also applies to their dependent families.⁴¹ The Court issued directives to the *Ministry of Women and Child Development* to draft a detailed *Juvenile-Care Manual*.⁴² Though this was a step forward, the judgement failed

³⁴ *R.D. Upadhyay v. State of Andhra Pradesh*, (2007) 15 SCC 337.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 340.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *In Re: Inhuman Conditions in 1382 Prisons*, (2016) 3 SCC 700.

⁴² The Juvenile Justice (Care and Protection of Children) Act, 2015, No. 2 of 2016, § 2(14).

to establish a specific legal link between the criminal court and family dispute resolution and thereby leaving the practical management of child's kinship relationships, completely unresolved.

2.2.3. *Re: Exploitation of Children in Orphanages v. Union of India (2017)*

The Court required all CCI to be registered and obligated to enforce the minimum standards of care which include nutrition, mental health and education under the *Juvenile Justice (Care and Protection of Children) Act, 2015*.⁴³ Importantly, court held that the definition of 'Children in Need of Care and Protection' (CNCP) in Section 2(14) of the Juvenile Justice, Act, is illustrative, not exhaustive, thereby include - *children of incarcerated persons*.⁴⁴ Thereby, effectively placing *CoIP* under the ambit of statutory protection of the State.

However, this is a judicial remedy exposes a significantly deeper problem within the legal system: The law remains entirely dependent on the machinery of the Juvenile Justice Act to institutionalise these children in CCIs or to send them through a rigid bureaucratic order established by CWCs. Blindly relying on either or between combative and costly family court proceedings, and cold and bureaucratic state institutionalization, rather than providing a structured, child-inclusive family mediation.

3. INTERNATIONAL NORMS & COMPARATIVE SENTENCING MODELS

Domestic frameworks related to Children of Incarcerated Parents (CoIP) must be reviewed in light of international human rights standards, rather than in isolated silos. India's international duties call on the state to go beyond its traditional narrow sightedness towards the offender and to act in a manner which safeguards the fundamental rights of dependent children who are the victims of state action.

⁴³ *Re: Exploitation of Children in Orphanages in the State of Tamil Nadu v. Union of India*, (2017) 7 SCC 578.

⁴⁴ *Id.*

Jurisdiction / Framework	Specific Statutory Clause or Case Precedent	Core Legal Mandate & Operational Framework	Utility for Indian Policy Reform & Harmonization
International (UNCRC)	Article 3(1), Article 9(1), Article 9(3), Article 12, Article 20 ⁴⁵	Mandates that the "best interests of the child" be a primary consideration in sentencing; guarantees the right against forced family separation, enforces direct, regular contact with jailed parents, and mandates that the child be heard in all custody proceedings.	Provides the fundamental global human rights basis to challenge India's current adversarial family court systems and cold, bureaucratic CWC placements.
International (UN Penal Standards)	Nelson Mandela Rules (Rule 5); UN Bangkok Rules (Rules 2, 28, 57-58, 64) ⁴⁶	Establishes a formal caretaking registration upon an inmate's admission; explicitly commands a strict legal preference for non-custodial sentences for pregnant women and primary caregivers of dependent minors.	Shifts focus to alternative sentencing options under the <i>Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS)</i> to avoid breaking up the family unit.
South Africa	<i>S v M (2007) Constitutional Court Standard</i> ⁴⁷	Imposes a mandatory five-part judicial balancing test before sentencing a primary caregiver: (1) verify caregiver status; (2) establish individual child impact; (3) confirm external care placement; (4) prioritize non-custodial options; (5) issue explicit directives to secure the child's education and parental ties if jailed.	Serves as a perfect template to amend the BNSS, making "Child/Family Impact Statements" a mandatory procedural step before a judge decides on bail or sentencing.

⁴⁵ Convention on the Rights of the Child arts. 3(1), 9(1), 9(3), 12, 20, Nov. 20, 1989, 1577 U.N.T.S. 3.

⁴⁶ United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), G.A. Res. 70/175, annex, U.N. Doc. A/RES/70/175, Rule 5 (Dec. 17, 2015); United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), G.A. Res. 65/229, annex, U.N. Doc. A/RES/65/229, Rules 2, 28, 57–58, 64 (Dec. 21, 2010).

⁴⁷ *S v M* (CCT 53/06) [2007] ZACC 18, paras. 28–36 (S. Afr.).

New Zealand	Family Dispute Resolution Act 2013 (FDRA) (Sections 4 & 11) ⁴⁸	Establishes a statutory framework for child-inclusive family mediation that explicitly provides for remote, hybrid, or telephonic dispute resolution sessions conducted with incarcerated parents.	Provides the operational layout to build "Correctional Tele-Mediation Suites" in India, resolving kinship care disputes outside of family court backlogs.
United States	Washington State Law HB 1284 (<i>Incarcerated Parents Act</i>) ⁴⁹ ; San Francisco Bill of Rights for CoIP ⁵⁰	Prohibits the automatic termination of parental rights during incarceration if a "meaningful role" is maintained via visits/calls; guarantees explicit rights for children to be safe during arrests and considered as independent stakeholders by judges.	Offers a statutory blueprint to reform Section 6 of India's <i>Mediation Act, 2023</i> , ensuring that a parent's criminal status cannot be used to automatically deny them a role in care planning.

Table 2 - Comparative Analysis of Global Human Rights Instruments and Foreign Jurisdictional Care Frameworks

Source: Author's own conceptualization based on the legal standards and judicial precedents.

4. CRITICAL APPRAISAL OF MEDIATION IN THE INCARCERATION CONTEXT

4.1. The Theoretical Promise of Mediation -

Under the Supreme Court's landmark directives in *R.D. Upadhyay v. State of A.P.*⁵¹, children are permitted to reside with their incarcerated mothers only until the age of six, after which they face mandatory relocation. To manage this critical transition, the system relies heavily on rigid administrative transfers and combative family court litigation. Traditional adversarial systems treat child custody as a binary win/loss contest, routinely depicting incarcerated parents as inherently unfit. This paradigm often results in the permanent alienation of the incarcerated parent, creating an accidental and unjust termination of parental rights. In stark

⁴⁸ Family Dispute Resolution Act 2013 (N.Z.) §§ 4, 11.

⁴⁹ Substitute H.B. 1284, 63d Leg., Reg. Sess. (Wash. 2013), ch. 173, Laws of 2013 (amending Wash. Rev. Code §§ 13.34.067, 13.34.136, 13.34.145, and 13.34.180).

⁵⁰ San Francisco Children of Incarcerated Parents Partnership, *A Bill of Rights for Children of Incarcerated Parents* (2013).

⁵¹ *R.D. Upadhyay v. State of A.P.*, (2006) 3 S.C.C. 164.

contrast, mediation offers a collaborative framework that mitigates this adversarial trauma by shifting the focus toward family preservation. By facilitating the collaborative drafting of Kinship Care and Parental Contact Plans which address visitation schedules and schooling decisions, mediation protects the fundamental liberty interests of the incarcerated parent while serving the best interests of the child.

The theoretical foundation for this approach is deeply rooted in Robert A. Baruch Bush and Joseph P. Folger's transformation theory, which posits that mediation is a mechanism for transforming disputants' behavior and moral development by fostering self-empowerment and empathy.⁵² Incarcerated individuals, who often suffer from a profound lack of control, are empowered to analyze situations and make independent decisions. This sense of self-determination is crucial in altering behavior, as modifying a person's basis for self-evaluation can reduce violent tendencies. This premise is further supported by Albert Bandura's Social Learning Theory, which conceptualizes aggression and violence as learned behaviors.⁵³ Consequently, the cognitive and affective components of empathy can also be cultivated through mediation, acting as a powerful cognitive inhibitor of interpersonal aggression. From a sociological perspective, Donald Black and Marion Borg highlight mediation as a highly effective alternative means of social control.⁵⁴ Borg's empirical research indicates that providing alternative conflict management strategies, alongside the presence of a neutral third party, significantly reduces the likelihood that disputants will resort to violence. This theoretical promise is heavily corroborated by international empirical evaluations of restorative justice.⁵⁵

Critical Structural & Procedural Deficits:

Despite its theoretical advantages, the practical application of mediation in the context of parental incarceration is severely compromised by statutory omissions and the inherent coercive dynamics of the penal environment.

⁵² Linda Morton & Floralynn Einesman, "The Effects of Mediation in a Juvenile Incarceration Facility: Reduction of Violence through Transformation", 49 *Clev. St. L. Rev.* 255, 260-262 (2001).

⁵³ Albert Bandura, *Aggression: A Social Learning Analysis* (1973), cited in Linda Morton & Floralynn Einesman, "The Effects of Mediation in a Juvenile Incarceration Facility: Reduction of Violence through Transformation", 49 *Clev. St. L. Rev.* 255 (2001).

⁵⁴ Donald Black, *The Social Structure of Right and Wrong* (1998) & Marion Borg, "Using Violence as Social Control", 10 *U. Fla. J.L. & Pub. Pol'y* 313 (1999), cited in Linda Morton & Floralynn Einesman, *supra* note 1, at 265.

⁵⁵ Mamdouh Hasan Mana' Al-Adwan, "The Role of Mediation in Resolving Criminal Disputes", 9(6) *Global Journal of Politics and Law Research* 1, 9 (2021).

4.2.1. Statutory Silence of the Mediation Act, 2023:

India's unified Mediation Act, 2023, contains a fatal blind spot for families affected by the criminal justice system. It fails to incorporate family-specific protocols, child welfare exceptions to confidentiality, or mandatory child consultants. Under Section 6(1), disputes listed in the First Schedule are explicitly declared unfit for mediation. Entry 2 excludes claims against minors, and Entry 3 bars disputes involving the prosecution of criminal offences. While Entry 5 exempts matrimonial disputes involving a child's interest, this carve-out is strictly applied to civil divorces, completely failing to accommodate custodial realignments required during criminal prosecution.⁵⁶ This inadequacy is empirically supported: 74% of surveyed mediators believe India's existing laws insufficiently address complex disputes.⁵⁷ Furthermore, the Act fails to express how mediated custody interacts with a court's *parens patriae* jurisdiction under the Guardianship and Wards Act, 1890, read alongside the paramount welfare principle established in landmark cases like *Mausami Moitra Ganguli v. Jayant Ganguli*. Consequently, the statute provides no explicit guidance if a parental consensus harms the child's welfare.⁵⁸

4.1.1. Power Asymmetries and the Vulnerability Critique:

Relying on feminist legal theory, particularly the work of Trina Grillo, it is evident that mediation's inherent focus on compromise can silence vulnerable parties.⁵⁹ In the context of incarceration, bargaining power is drastically unequal. An incarcerated parent facing social isolation, restricted liberty, and economic dependency is structurally unable to effectively advocate for their interests. The lack of explicit statutory guidance to ensure true voluntariness leaves significant room for damaging practices.

4.1.2. Penal Surveillance and the Compromise of Voluntariness:

The structural realities of the penal environment inherently conflict with the foundational principles of mediation. When tele-mediation is employed as a logistical workaround, the strict security protocols of correctional facilities make absolute confidentiality practically impossible

⁵⁶ The Mediation Act, 2023 (Act No. 32 of 2023), s. 6(1), First Schedule (Entries 2, 3 & 5).

⁵⁷ Nazrah Altaf & Nazia Khan, "Comprehensive Analysis of the Functioning of Juvenile Justice Institutions in India", 7(1) *Journal on the Rights of the Child* 76, 77 (2026).

⁵⁸ The Guardianship and Wards Act, 1890 (Act No. 8 of 1890), s. 10, read with *Mausami Moitra Ganguli v. Jayant Ganguli*, cited in "Supreme Court on Child Welfare in Guardianship Under Section 10"

⁵⁹ Manyata Singh & Lakshmi P. Vinjamuri, *Reconciling Relationships: A Critical Appraisal of Mediation as a Transformative Alternative Dispute Resolution Mechanism in Indian Family Law*, 6(9) *Indian J.L. Rev.* 8, 16 (2026).

to achieve. The necessary proximity of security personnel fundamentally alters the negotiation dynamic, naturally chilling open communication and skewing bargaining power against the incarcerated parent. Furthermore, without guaranteed, real-time access to legal representation during these virtual sessions, an isolated individual remains structurally susceptible to external pressures from free relatives or state actors.

4.1.3. The "Child's Voice" Paradox and Cognitive Vulnerabilities:

Integrating the "child's voice" into mediation presents a complex jurisprudential dilemma. The push for "Child-Inclusive Mediation" (CIM) is anchored in Article 12 of the UNCRC, which guarantees a child's right to express their views.⁶⁰ However, Marian Roberts' critique highlights the distinct risk of over-exposing vulnerable children to severe conflict. Asking a child to vocalize preferences places them at the epicenter of a high-stakes loyalty conflict between the incarcerated parent and outside caregivers.⁶¹

This paradox is worsened by structural failures. Prioritizing parental consensus without independent child representation severely undermines the child's best interests. The current Indian framework lacks explicit guidelines requiring a child welfare representative or *guardian ad litem* in family mediation, leaving children structurally unprotected.⁶² Furthermore, an uncritical application of mediation ignores the cognitive realities of affected youth. Many children living in the shadow of the penal system have cognitive deficits and are under socialized. Lacking the reasoning abilities and interpersonal strategies required for traditional mediation, they face immense difficulty effectively articulating their needs. Without specialized, developmentally appropriate interventions, placing a child directly into the crossfire of adversarial adult mediation risks inflicting profound secondary trauma rather than achieving genuine restorative justice.

5. FIELD-BASED EVIDENCE & ADMINISTRATIVE SILOS: THE *PRAYAS-TISS* LENS

5.1. Ground Realities in Indian Corrections:

Theoretical frameworks of restorative justice and child protection frequently collapse when

⁶⁰ Convention on the Rights of the Child art. 12, Nov. 20, 1989, 1577 U.N.T.S. 3.

⁶¹ Marian Roberts, *Mediation in Family Disputes: Principles of Practice* (2014).

⁶² Manyata Singh & Lakshmi P. Vinjamuri, "Reconciling Relationships: A Critical Appraisal of Mediation as a Transformative Alternative Dispute Resolution Mechanism in Indian Family Law", 6(9) *Indian Journal of Legal Review* 8, 15 (2026).

subjected to the harsh operational realities of the Indian penal system. To critically understand this disjunction, *PRAYAS a Tata Institute of Social Sciences (TISS) Field Action Project initiated in 1990* provides an indispensable empirical lens.⁶³ Through sustained interventions across Maharashtra and Gujarat, PRAYAS meticulously documents the intersectional vulnerabilities of marginalized individuals in the criminal justice system, advocating for policies that enhance welfare access for incarcerated populations and their children.

A comprehensive 2024 study of Maharashtra prisons exposes a systemic failure to protect familial integrity, noting that correctional facilities are predominantly situated in remote, geographically isolated locations.⁶⁴ This extreme physical isolation creates prohibitive logistical and financial barriers. For economically disadvantaged families, the loss of daily wages combined with high travel costs often forces them to abandon visitation entirely. Consequently, children are abruptly cut off from primary caregivers, leading to severe psychological distress, separation anxiety, and social ostracization.

The operational landscape of child protection is paralyzed by a complete lack of inter-departmental coordination. The Criminal Justice System operates in a strict procedural vacuum divorced from the restorative mandates of Child Welfare Committees (CWCs) and Child Care Institutions (CCIs).⁶⁵ Without a centralized nodal agency bridging criminal justice and child welfare, transitioning a child from an arrested parent to CWC custody is fraught with bureaucratic negligence and systemic delays.⁶⁶ Furthermore, the arbitrary placement of probation services under disparate ministries such as Social Justice, Women and Child Development, or Prison Departments creates highly inconsistent directives and administrative friction.⁶⁷

5.2. Administrative Gaps & Social Work Interventions:

This structural fragmentation is directly worsened by a crippling human resource crisis. National vacancy rates for prison and probation staff consistently exceed 30 percent, leaving

⁶³ Tata Institute of Social Sciences (TISS) Centre for Criminology and Justice, *A Field Action Project (FAP): Prayas*, 1 (1990).

⁶⁴ TISS Centre for Criminology and Justice, *A Study on Open Prisons in Maharashtra*, 84-86 (2024).

⁶⁵ Altaf & Khan, *supra* note 56, at 85–86.

⁶⁶ *Id.*

⁶⁷ National Human Rights Commission, *Proceedings of the National Consultation on Implementation of the Probation of Offenders Act, 1958*, 5-6 (2025).

one in three positions unfilled.⁶⁸ Overburdened Probation Officers are routinely forced to juggle conflicting statutory responsibilities under both the Probation of Offenders Act, 1958, and the Juvenile Justice Act, 2015.⁶⁹ This extreme administrative overload severely diminishes their capacity for core child-centric duties, such as conducting timely social investigation reports, drafting individualized care plans, and facilitating appropriate child placements. Crucially, systemic understaffing devastates the facilitation of statutory *mulakats* (visitations), the only lifelines for maintaining the parent-child bond. Prisoners report that existing *mulakat* procedures are rigid, surveilled, and stripped of dignity; visits are frequently restricted to mere 20-minute intervals through glass partitions, with overworked staff denying access if families are even marginally late.⁷⁰

Faced with these severe gaps, civil society organizations like PRAYAS have stepped in to safeguard the fundamental rights of Children of Incarcerated Parents (CoIP). Embedding social workers directly within the correctional framework bypasses institutional inertia to bridge the penal environment and the external child welfare apparatus. Field achievements include orchestrating expansive *mulakat* initiatives to prevent permanent familial alienation. For example, "Galabhet" (meeting of hearts) programs at Nagpur and Kalyan District Prisons bypassed standard restrictions, allowing 197 children meaningful, face-to-face reunions with their parents.⁷¹ When physical barriers proved insurmountable, video-conferenced *mulakats* successfully connected institutionalized children in Dongri Children's Home with fathers in Arthur Road Prison. In total, these sustained efforts facilitated 399 critical *mulakats*, preserving youth psychological stability.

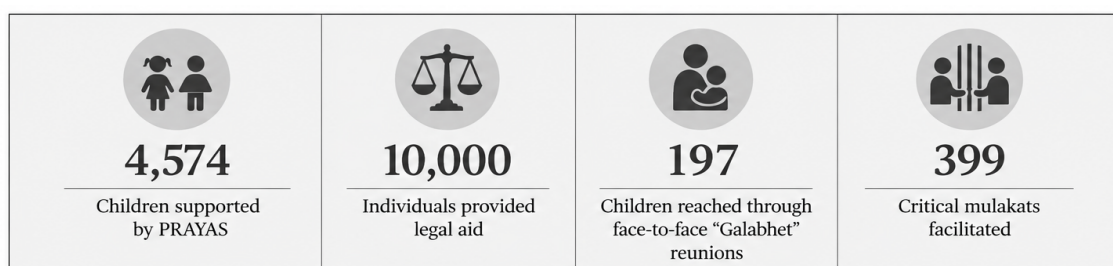


Figure 5. Empirical Evidence of PRAYAS Interventions and Family-Contact Support

⁶⁸ *Id.*

⁶⁹ The Juvenile Justice (Care and Protection of Children) Act, 2015, No. 2 of 2016.

⁷⁰ Maharashtra Prison Manual, 1979, Chapter XXXI (Interviews and Communications), read with TISS Centre for Criminology and Justice, *A Study on Open Prisons in Maharashtra*, 84-86 (2024).

⁷¹ PRAYAS, *Newsletter May 2024 - August 2024*, 3 (2024).

Source: Author's compilation based on Tata Institute of Social Sciences, *PRAYAS Field Action Project: Annual Report 2023–2024* (2024)⁷²

Drawing on data from supporting 4,574 children and delivering legal aid to 10,000 individuals, PRAYAS successfully advocated for structural financial reforms. Their evidence-based lobbying compelled the Government of Maharashtra to radically enhance educational sponsorships under the Bal Sangopan Yojana. Recognizing the financial devastation of incarceration, the state officially increased the monthly grant for children of prisoners from Rs. 425 to Rs. 2,250 per child, securing an essential economic safety net. Furthermore, addressing early childhood needs, these interventions championed prison Anganwadis to provide foundational nutrition, education, and age-appropriate stimulation.⁷³

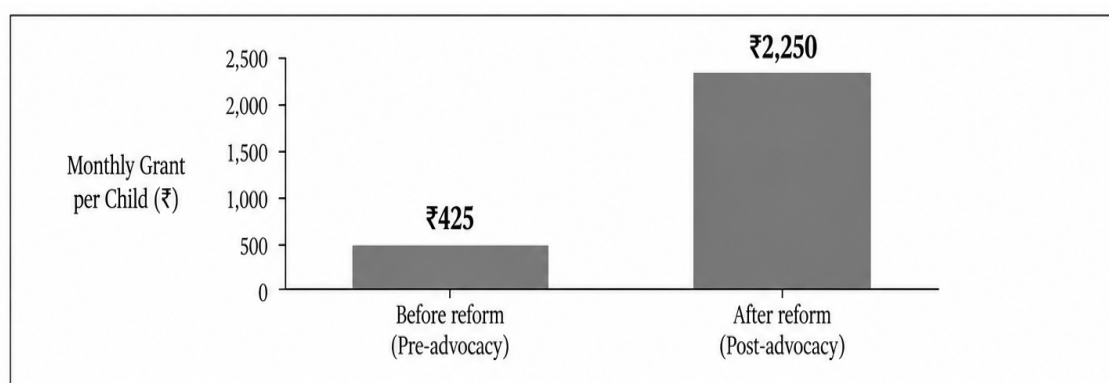


Figure 6. Change in Monthly Educational/Welfare Grant for Children of Prisoners under *Bal Sangopan Yojana*

Source: Author's compilation based on Tata Institute of Social Sciences, *PRAYAS Field Action Project: Annual Report 2023–2024* (2024).⁷⁴

Finally, to combat the gendered dimensions of penal vulnerability and staff shortages, persistent advocacy secured a transformative administrative reform. Maharashtra formally appointed full-time female probation officers across the women's sections of nine central and district prisons.

⁷² Tata Institute of Social Sciences, *PRAYAS Field Action Project: Annual Report 2023–2024*, 1 (2024).

⁷³ *Id.*

⁷⁴ *Id.*

6. LEGISLATIVE & PROCEDURAL REFORM DIRECTIVES

6.1 Statutory Amendments

6.1.1. Amendments to the Mediation Act, 2023:

The Mediation Act, 2023 contains structural limitations precluding its application to the incarceration context. Section 6 and the First Schedule expressly declare disputes involving criminal prosecution unfit for mediation⁷⁵. While *Entry 5* permits mediation for third-party rights in matrimonial disputes involving children, it fails to extend this protection to children affected by a caregiver's criminal prosecution.⁷⁶ To rectify this, the paper proposed the Central Government use its statutory amending power under Section 6(2), to amend the First Schedule and to add a specialized “Schedule for Family and Child Protection Disputes”.⁷⁷ Legislative reform must broaden exception under Section 22, mandating child welfare overrides to empower mediators to report systemic neglect or trauma risks under Section 23(2)(b), without violating statutory privilege. Furthermore, under its Section 38 mandate, the Mediation Council of India must develop specialized accreditation modules focused on trauma-informed practice and penal environments.⁷⁸

6.1.2. Amendments to the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS):

To fully realize its rehabilitative ethos, the BNSS must be amended to *mandate* “*Child/Family Impact Statements*” prior to bail adjudication or sentencing of primary caregivers. Formally introducing the socio-psychological impact of parental incarceration into the judicial matrix would compel courts to weigh the child's best interests. This will requires judicial officers to actively exhaust non-custodial BNSS alternatives before severing the primary caregiving bond.

6.2 Institutional Protocols

6.2.1. Establishment of Correctional Tele-Mediation Suites:

Prison administrations must leverage digital provisions under BNSS to establish dedicated, confidential “*Correctional Tele-Mediation Suites*” in all facilities, structurally isolated from

⁷⁵ The Mediation Act, 2023, No. 32 of 2023, s 6(1), First Schedule, item 3.

⁷⁶ *Id.* First Schedule, item 5.

⁷⁷ *Id.* s. 6(2).

⁷⁸ *The Mediation Act, 2023*, No. 32 of 2023, ss. 22–23, 38.

guard surveillance to ensure privacy and voluntariness. Furthermore, protocols must mandate the presence of state-appointed legal aid counsel alongside the incarcerated parent. Thereby, ensuring parents understand their rights and are shielded from coercive pressures during negotiations over Kinship Care and Parental Contact Plans.

6.2.2. Joint Operational Guidelines for CWCs and Prison Administrations:

To dismantle these silos, the state must institutionalize comprehensive joint operational guidelines binding Prison Administrations, Child Welfare Committees (CWCs), and Child Care Institutions (CCIs) to streamline virtual and physical *mulakat* (visitation). Protocols must mandate immediate CWC notification upon a primary caregiver's arrest to trigger a coordinated care plan. Restrictive, surveilled encounters must be replaced with child-friendly physical visitation environments and guidelines must mandate regular virtual *mulakats* utilizing secure BNSS digital infrastructure.

7. CONCLUSION

Sentencing cannot not be considered as an isolated punishment to be imposed on the offender by the State. When the primary caregiver is jailed, the family collapses and dependent children become unrecognised facing collateral consequences of the criminal justice system. The Indian state cannot ignore the need to look beyond the traditional approach of the accused and affirm the constitutional guarantee of *equality before the law (Article 14)* and *the right to live with human dignity (Article 21)*. The law needs to recognise and respect the evolving legal identity of the “Child” as an independent stakeholder.

The inefficiencies of the adversarial Family Courts and the bureaucratic failures of the Child Welfare Committees (CWCs) expose how the traditional system of litigation fails to protect the “*best interests of the child*”. The legal structure must provide for a *specialized, supportive, and restorative alternative* instead of pushing families and children into the expensive courtroom process and the state-run Child Care Institutions.

To address this crisis, family mediation needs to be institutionalised, child-centred and protected under the Constitution as a dispute resolution process. The legislature can do this by using its statutory powers under Section 6(2) of the Mediation Act, 2023, to amend the institutional barriers of *Entry 2 and Entry 3 of the First Schedule* that prevent incarcerated

families from accessing mediation.

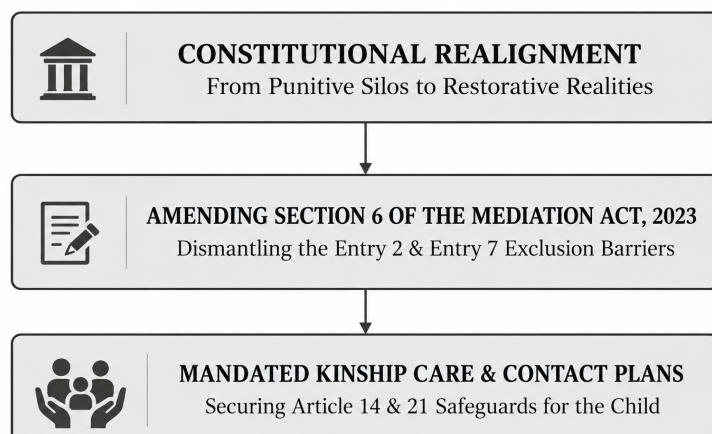


Figure-4: Constitutional Realignment: From Punitive Silos to Restorative Realities

Source: Author's own conceptualisation based on the proposed amendments to § 6 of the Mediation Act, 2023, and the constitutional safeguards under arts. 14 and 21 of the Constitution of India.⁷⁹

The implementation of child-inclusive family mediation framework directly in the *Juvenile Justice Act, 2015* and the *Bharatiya Nagarik Suraksha Sanhita, 2023* will ensure that there is a coordinated response to the welfare of the child in the event of parental arrest rather than systemic child abandonment. The state can help sustain important family connections and protect children from secondary trauma by enabling an incarcerated parent, extended family members, and child protection social workers to all co-author a binding Kinship Care and Parental Contact Plan. Finally, this statutory re-engineering shifts the focus of Indian jurisprudence out of the blind and punitive approach towards a restorative ecosystem, which will ensure that the fundamental rights of such forgotten children are permanently secured.

⁷⁹ The Mediation Act, 2023, No. 32 of 2023, § 6; *The Constitution of India*, arts. 14, 21.

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