

**INVISIBLE VICTIMS: ANALYZING THE RIGHTS OF CHILDREN OF
INCARCERATED PARENTS AND THE NEED FOR A LEGAL
FRAMEWORK**

**Dissertation submitted to the National University of Advanced Legal Studies,
Kochi, in partial fulfilment of the requirements for the award of L.L.M Degree
in Constitutional and Administrative Law.**



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PREFACE

The incarceration of a parent is a life-altering event for a child. While the criminal justice system often focuses on the offender, it is the silent, unintended victims, the children, who bear the emotional, psychological, and social burden of their parent's imprisonment. These children frequently slip through the cracks of law, policy, and public awareness, left to navigate a system that was never designed to accommodate their needs or protect their rights. This dissertation seeks to bring these invisible voices to the forefront of legal discourse. The idea for this research was born out of a deep concern for the rights and welfare of children who find themselves entangled in the consequences of parental incarceration, through no fault of their own. The absence of a dedicated legal framework in India to safeguard these children's rights prompted a closer look at how the issue is addressed globally, and what lessons can be drawn for the Indian context.

This study is a multidisciplinary inquiry, one that combines doctrinal research, international legal analysis, empirical insights, and socio-legal perspectives. It critically examines the lacunae in the existing Indian legal system, draws upon international human rights instruments, explores theoretical frameworks explaining the impact of incarceration on children, and presents a comparative analysis of policies adopted by other jurisdictions.

Conducting this research has been both a scholarly and personal journey. It has required not only an academic understanding of law but also empathy and sensitivity toward the lived realities of affected children. Through this work, I hope to contribute meaningfully to the discourse on child rights and criminal justice reform, and to advocate for a more compassionate and rights-based approach to justice, one that recognizes the child not just as a dependent of the offender, but as an individual rights-holder in their own right.

I extend my deepest gratitude to all those who supported this research journey, whose insights and encouragement have shaped the contours of this work. It is with great hope for policy reform and greater awareness that I present this dissertation, in the belief that no child should be punished for the crimes of their parent.

TABLE OF ABBREVIATIONS

ABCS	Achieving Baby Care Success
ACEs	Adverse Childhood Experiences
ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACRWC	African Charter on the Rights and Welfare of the Child
AIR	All India Report
Art.	Article
AWC	Anganwadi Center
BIC	Best Interest of Child
BJA	Bureau of Justice Assistance
BNS	Bharatiya Nyaya Sanhita
BNSS	Bharatiya Nagarik Suraksha Sanhita
BSA	Bharatiya Sakshya Adhiniyam
CCIs	Child Care Institutions
CCL	Children in Conflict with Law
CNCP	Children in Need of Care and Protection
COIPs	Children of Incarcerated Parents
COPE	Council of Europe
CPCR	Commissions for Protection of Child Rights
CPO	Chief Probation Officer
CRC	Convention on the Rights of the Child
CWC	Child Welfare Committee
DCPCR	Delhi Commission for the Protection of Child Rights
DCPU	District Child Protection Unit
DGD	Day of General Discussion
DRC	Department of Rehabilitation and Correction
DSLSA	Delhi State Legal Services Authority
DWCD	Department of Welfare of Children's Development
ECHR	European Convention on Human Rights
EU	European Union
H. P	Himachal Pradesh
IA	Interim Application
IACP	International Association of Chiefs of Police
ICCPR	International Covenant on Civil and Political Rights
ICDS	Integrated Child Development Scheme
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESR	International Covenant on Economic, Social and Cultural Rights
I.O	Investigating Officer
IQ	Intelligence Quotient
JJ	Juvenile Justice
MBUs	Mother and Baby Units

MANU	Manupatra
NCPCR	National Commission for Protection of Child Rights
NCRB	National Crime Records Bureau
NGO	Non-Governmental Organization
NIACRO	Northern Ireland Association for the Care and Resettlement of Offenders
PIL	Public Interest Litigation
POST	Peace Officer Standards and Training
RTE Act	Right of Children to Free & Compulsory Education Act
SA	South Africa
SAA	Specialized Adoption Agencies
SCC	Supreme Court Cases
SCR	Supreme Court Report
SLP	Special Leave Petition
TADA	Terrorist and Disruptive Activities (Prevention) Act
TISS	Tata Institute of Social Sciences
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCRC	United Nations Convention on the Rights of the Child
W. P	Writ Petition

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11.	In Re: Inhuman Conditions In 1382 Prisons, IA 36553/2024, Order dated 16 February 2024.
12.	Ioan Pop and Others v. Romania, App. No. 52924/09, Eur. Ct. H.R. (2016).
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20.	R.D. Upadhyay v. State of A.P. & Ors., AIR 2006 SC 1946. Ratan Singh v. State of Punjab, 1964 SCR (5) 1098.
21.	Ratan Singh v. State of Punjab, 1964 SCR (5) 1098.
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23.	Saheli, A Women's Resource v. Commissioner of Police, (1990) 1 SCC 422.
24.	Santosky v. Kramer, 455 U.S. 745, 758 (1982).
25.	S v M (Centre for Child law as Amicus Curiae), 2008 (3) SA 232 at para 24.
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29.	Sunil Batra (II) versus Delhi Administration, 1980 AIR 1579.
30.	Valita M. v. City of Chicago, 1986 WL 15133 (N.D. Ill. 1986).
31.	White v. Rochford, 592 F.2d 381 (7th Cir. 1979).

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CHAPTER 1

INTRODUCTION

1.1 Introduction

Human rights are universal rights. It forms the foundation of a just and equitable society. These rights are inherent to us all, regardless of nationality, sex, national or ethnic origin, colour, religion, language, or any other status.¹ They range from the most fundamental - the right to life - to those that make life worth living, such as the rights to food, education, work, health, and liberty.² These human rights need to be protected so that individuals can achieve holistic development. The United Nations set a common human rights standard with the adoption of the Universal Declaration of Human Rights.³ Central to this framework is the protection of vulnerable groups, particularly children, who are entitled to special care and assistance to ensure their physical, emotional, and psychological well-being.

There are around 2.3 billion children around the globe. They are entitled to human rights just like the adults. These vulnerable groups face human rights violations right from their birth. For example, an estimated 290 million children globally have not had their births registered, so they have no legal identity or proof of existence.⁴ It makes it difficult for them to receive education or proper healthcare. Millions of children become victims of sexual abuse, exploitation, and armed conflict. States must protect the inherent rights available to children without any discrimination. The United Nations Convention on the Rights of the Child gives primary consideration to four fundamental rights each child must have and includes the right to survival, protection, participation, and development.⁵ The UNCRC is the first international treaty that recognizes the rights of children. It provides a legal framework that casts an obligation on the states to protect and uphold the rights of children without any discrimination. The only two countries that have not ratified the treaty are the United States of America and Somalia.

¹ U.N. Population Fund, *Human Rights Principles* (2005), <https://www.unfpa.org/resources/human-rights-principles>.

² U.N. Human Rights Comm., Universal Declaration of Human Rights at 70: 30 Articles on 30 Articles, News & Press Release (Nov. 10, 2018).

³ Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948).

⁴ Available at <https://www.amnesty.org/en/what-we-do/child-rights/> (last accessed on Dec 6, 2024).

⁵ United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

Every crime has two sides involved- the perpetrator and the victim. The criminal justice system does not often go beyond these two sides. Most often, the families of both sides are left unnoticed. This lacuna in the criminal justice system was first highlighted by Justice V.R. Krishna Iyer, J. in the landmark case of *Ratan Singh v. State of Punjab*⁶. He remarked as follows:

“The victimization of the family of the convict may well be a reality and is regrettable. It is a weakness of our jurisprudence that the victims of the crime, and the distress of the dependents of the prisoner, do not attract the attention of the law. Indeed, victim reparation is still the vanishing point of our criminal law! This is a deficiency in the system which must be rectified by the Legislature.”

There are various factors that challenge children's rights. However, parental incarceration poses a unique set of issues that affect the children invariably. The imprisonment of a parent disrupts the family unit, often leaving children exposed to social stigma, poverty, emotional and mental distress. These children are often referred to as ‘orphans of justice’,⁷ ‘forgotten victims of incarceration’.⁸ These children suffer from juvenile delinquency. Children who are not directly involved in the criminal activity of their parents bear the consequences of the criminal justice system and these consequences manifest as a lack of a supportive atmosphere and limited access to basic services like healthcare and education. In addition, these children's rights are frequently overlooked during policy discussions, resulting in inadequate protection and assistance suited to their individual needs.

1.2 Scope of the Study

While significant studies have explored the effects of parental incarceration on children from sociological and psychological perspectives, examining issues like emotional trauma, behavioural problems, and social stigma, there has been comparatively little legal research on this subject. The existing legal framework fails to adequately address the unique challenges to their rights especially rights to family life, visitation, education

⁶ *Ratan Singh v. State of Punjab*, 1964 SCR (5)1098.

⁷ Roger Shaw, “Imprisoned fathers and the Orphans of Justice” in R. Shaw (eds.), *Prisoners' children: What are the issues?* 41-49 (Routledge, London, 1992).

⁸ Jill Matthews, *Forgotten Victims: How Prison Affects the Family* (NARCO, 1983).

and health. This gap in the legal system highlights the need for a more robust legal framework to protect the children whose parents are in prison and also ensure their welfare and holistic development. This study aims to fill that void by providing an extensive legal study on the rights of these children and how such a lacuna causes human rights violations of these children. This study also analyses the challenges that lie ahead and identifies the opportunities for reforming policies to safeguard the rights and well-being of children affected by parental incarceration.

1.3 Statement of the Problem

Current legal frameworks in India lack provisions to address the unique needs of the children of incarcerated parents, leaving their fundamental rights to survival, protection, and development inadequately safeguarded.

1.4 Research Objectives

1. To understand the international instruments that recognise the rights of children of incarcerated parents.
2. To assess the social, behavioural, psychological and legal impacts of parental imprisonment on children.
3. To analyze the current legal framework in India concerning the rights of these children.
4. To analyze other jurisdictional policies for children of incarcerated parents.
5. To propose recommendations for a comprehensive legal framework that addresses the needs and rights of these children.

1.5 Research Questions

1. What are the existing international instruments that provide for the rights of children, and how far do they cater to the needs of these children?
2. How does parental incarceration impact the social, behavioural, psychocological, and emotional well-being of children, and how have international frameworks recognized and addressed the rights of these children?

3. What are the legal gaps in the present Indian criminal justice system that make these children invisible victims?
4. How have other countries addressed the special needs of these vulnerable groups and what can India adopt from them?
5. What changes must be made to the Indian legal system to tackle the issues?

1.6 Hypothesis

Implementing child-centered legal reforms that incorporate the best interests of the child into sentencing and correctional policies will significantly reduce the negative impacts of parental incarceration.

1.7 Research Methodology

The researcher has adopted doctrinal research for this topic. This study has helped the researcher to understand the multifaceted issue from different perspectives. The primary sources include international statutes, regulations and case laws from national and international jurisdictions. This helps the researcher understand the legal standing of the children of incarcerated parents. The researcher has also relied extensively on reports from the National Crime Records Bureau to obtain statistical data to understand the dearth of information available. Other sources are mainly books, articles from journals and research reports.

1.8 Chapterisation

Chapter 1. Introduction

This chapter introduces the subject of study while outlining the preliminary requirements of the research problem, hypothesis, method adopted, research questions and literature review.

Chapter 2. Understanding the Rights of Children of Incarcerated Parents: Legal Framework

This chapter will first explain the basic concepts of this research, such as children, parents, family, incarceration and parental incarceration. Then, it moves into the categories of COIPs. Then, the chapter will delve into the international instruments that

deal with the rights of children and to what extent they apply to children who are victims of parental incarceration. These include the United Nations Convention on the Rights of the Child (UNCRC), UN Guidelines for the Alternative Care of Children, the Bangkok Rules and the Nelson Mandela Rules. All these instruments put forward the ‘Best Interest of the child’ while formulating Rules and policies. The principle of the best interest of the child is discussed in detail. The chapter concludes by pointing out that there is still a lack of a solid legal framework that directly addresses the human rights violations faced by COIPs.

Chapter 3. Children as collateral victims: Consequences of parental incarceration on children

This chapter will first analyze the theoretical framework, which highlights the inter-relationship between parental incarceration and the effects it has on children. Then, it moves into detail about the various social, behavioural, emotional, psychological issues that children face as consequences of parental incarceration. It will also cover the significant legal consequences including visitation rights, custody battles and reunification challenges.

Chapter 4. Invisible victims: Addressing the current legal gap

This chapter covers the categories of COIPs in India and the rights available to children under Indian Statutes. This chapter delves into the criminal justice system and identifies the lacunas in the system that make these children the invisible victims. This chapter covers the rights of the children from the moment of arrest to detaining the parents inside the prisons. These include the role of police, courts, and prisons and how these agencies of the criminal justice system are oblivious to the needs and rights of the COIPs.

Chapter 5. Insights from other jurisdictions: A Comparative Analysis

This chapter will analyze the various legal frameworks and social policies that countries like Sweden, Norway and the US follow so that the negative impact of parental incarceration on children is minimized and the rights, welfare, and development of children are ensured. The chapter aims to understand the workings of the criminal justice machinery of various other countries and to pick the best practices that can be incorporated into the Indian legal system.

Chapter 6. Proposed Framework: Balancing Rights and Realities

The concluding chapter seeks to summarize and enumerate the findings of the study and suggests recommendations to remedy and improve the challenges faced by the legal system to protect the rights of COIPs.

1.9 Literature Review

BOOKS

1. KATE LUTHER, BEYOND BARS 89-93 (Kristen M. Budd et al. eds., 2023).

The chapter in focus is titled “The impact of mass incarceration on children of incarcerated parents.” This chapter of the book mainly highlights the negative consequences of parental incarceration on children such as behavioural issues, social stigma, poverty and educational difficulties. The author suggests specific recommendations for children to stay in contact with their parents during the incarceration. The author suggests policies for peaceful visitation and reunification of the parent with the child to develop a better relationship. It focuses on recommendations and solutions to minimize the effects of parental incarceration on children. He also states alternatives for parental incarceration, like community sentencing, which has been adopted in Denmark.

2. NEELAM SUKHRAMANI et.al, CHILDREN OF INCARCERATED PARENTS EXPERIENCES AND IMPACTS Bloomsbury Publishing India Pvt. Ltd, 2009

This book is an annotated bibliography that focuses mainly on the experiences of COIPs. The book delves into the gap vis-à-vis Children of Prisoners in India. This book contains various articles and unpublished works written by various authors on COIPs. These articles deal with the multifaceted human rights violations that children face. Some of the articles deal with the emotional and psychological consequences faced by these children, illustrating how the absence of a parent due to incarceration often leads to trauma, feelings of abandonment, confusion, and guilt, which can manifest as anxiety, depression, and behavioural issues. The book explores how severing the parent-child bond can cause long-term attachment problems that impact children's relationships in the future. The ineffectiveness of

the current support systems for these kids is emphasized by the writers, who also point out that the families do not have access to social services and counselling that could assist them in overcoming their particular challenges. The authors urge for systemic changes to support their well-being and development in the face of such adversity.

3. TRUDE HAUGLI, CHILDREN'S CONSTITUTIONAL RIGHTS IN THE NORDIC COUNTRIES Published by: Brill. (2020).

The book explores the legal frameworks that protect children's rights across the Nordic nations—Sweden, Norway, Finland, Denmark, and Iceland. It highlights why there must be a special provision for COIPs who fall under the category of vulnerable population. It states the specific constitutional guarantees available for children and includes the right to respect for human dignity, participation, personal integrity, social and economic development and health security and other indirect rights, such as right against harm, child labour, and visitation, right to family life and education. It examines the role of the judiciary in upholding these rights through landmark legal cases. The author concludes by stating that even if the Constitution of Norway does not reflect a fully comprehensive child law perspective, the importance of recognizing children's human rights in the Constitution and securing these rights at the highest formal level should not be underestimated.

4. SMITH, P. S. WHEN THE INNOCENT ARE PUNISHED: THE CHILDREN OF IMPRISONED PARENTS. ENGLAND: Palgrave Macmillan (2014).

This book is a compelling account of the processes through which parental imprisonment is consequential for children and makes three broad contributions to the literature. First, the author documents the challenges faced by children of imprisoned parents. The challenges that begin with parental arrest and end with parental re-entry are discussed from both the point of view of the children and other adults in the children's lives. Second, the author examines how children can maintain their rights and how individuals connected to these children can help them maintain their rights while their parents are under the supervision of the criminal justice system. Finally, the author investigates how prisons relate to broader societal processes. Taken together, the author makes the case that children of imprisoned individuals. This book is commendable since it collects data outside the US and

focuses on countries like Denmark, Italy, and Poland to document the challenges faced by the children.

5. LOIS M. DAVIS ET.AL, THE IMPACT OF INCARCERATION ON FAMILIES: KEY FINDINGS Published by: RAND Corporation

This book covers the effect of parental incarceration on children in the United States and specifically, in California. It states that the impact it has on a child is similar to the effect that a traumatic experience would give that child. The book highlights the impact of child welfare policies like the Federal Adoption and Safe Families Act of 1997 and the Personal Responsibility and Work Opportunity Reconciliation Act. The authors suggest approaches that provide services and support to these families and parents, which fall into three broad categories: (1) addressing the needs of parents and children, (2) addressing child support issues, and (3) addressing child welfare issues. The authors also point out that the limitation of the study is that the discussion with caregivers was based on a small sample of seven individuals. Thus, these findings can only be considered exploratory and not indicative of the range of experiences of caregivers.

ARTICLES

1. Joseph Murray & David P. Farrington, “Effects of Parental Imprisonment on Children”, 37 (1), Crime and Justice, pp.133-206 (2008).

This Article provides a comprehensive study of how parental incarceration causes adverse effects on children and examines theories of the effects of such incarceration. Children of incarcerated parents are more likely to suffer from mental health issues, such as anxiety and depression, and exhibit antisocial behavior, including a heightened risk of delinquency and criminal activity. It uses empirical evidence from the United States, England, and Wales to understand the adverse outcomes on children. Secondly, the Article focuses on what factors can mitigate the effect of parental incarceration. It also highlights the need for better research and surveys to be conducted regularly to analyze these outcomes. The authors urge researchers to conduct enhanced studies on the causal effects of parental incarceration, mechanisms linking parental incarceration and children, and to understand the factors that alter the impact of parental imprisonment on children.

They emphasize the urgent need for funding agencies and researchers to collaborate in implementing an ambitious research agenda to advance knowledge about the effects of parental imprisonment on children.

2. Chesa Boudin, *Children of Incarcerated Parents: The Child's Constitutional Right to the Family Relationship*, 101 J. Crim. L. & Criminology 77 (2013).

While there is a body of literature on the social issues presented by incarceration, little attention has been given to the legal issues. This article mainly addresses the constitutional rights of children to family relationships. It explores the relevance of children in sentencing and visitation policies and the factors in the criminal justice system that make the children of incarcerated parents the 'hidden victims.' The central goal of this article is to reframe the problem of third-party harm to children from current sentencing law through the child rights perspective rather than the traditional frame of prisoners' rights. Boudin, in this article, argues that the right to family must be recognized as a fundamental right. He challenges policymakers and courts to take into account the profound impact parental incarceration has on children and to adopt measures that better protect these vulnerable groups. Although there are many areas in the criminal justice system where children's rights should be respected, he contends that visitation and sentencing are two of the most crucial and can act as stand-ins for other areas such as parole, alternatives to incarceration, furloughs and phone calls.

3. Sukhramani, N., Hassan, S. & Panneer, S, "Children of incarcerated parents in India: The Uncharted Territory", 64 (1) The Indian Police Journal, pp.54–59 (2017).

While there has been some focus on children living with their mothers in prison, discussion on children of incarcerated parents living outside prisons has been largely absent. Authors have cited research from other contexts vis-à-vis negative impacts and outcomes of this group of children compared to others of their age. This includes aspects such as experiences of distress, shame, stigma, labeling, and bullying; poor mental health including aggressive behavior, attention problems and poor educational outcomes. Based on this background, implications for the Indian context have been discussed, along with the concerns regarding difficulties in accessing social security mechanisms.

4. **Elizabeth I. Johnson & Beth Easterling, “Understanding Unique Effects of Parental Incarceration on Children: Challenges, Progress, and Recommendations”,**74(2), **Journal of Marriage and Family**, pp. 342-356 (2012).

Johnson and Easterling’s article highlights the various psychological and sociological perspectives that help one to understand the aftereffects of parental incarceration on a child’s well-being. The authors suggest that even though there are numerous methodological and conceptual challenges in studying the unique and multifaceted effects of parental incarceration on children, urging policymakers and researchers to prioritize this underexplored area. They suggest in-depth research to understand the complex factors that shape these children's experiences and call for nuanced interventions to support impacted children. According to the authors, this kind of research will have a significant impact on the effectiveness of programs intended to enhance the well-being of children whose parents are behind bars.

5. **Roy Light & Bryony Campbell, Prisoners’ Families: Still Forgotten Victims?** 28(3), **Journal of Social Welfare & Family Law**, (2006).

It was the groundbreaking research by Morris in 1965 that led the authors to research more on the topic of parental incarceration and its effect on children and how their rights are being violated. The authors highlight that the families of prisoners experience significant social, emotional, and economic hardships yet remain largely ignored in discussions surrounding criminal justice and prison reform, making them the ‘forgotten victims.’ The families of the prisoner suffer the stigma of ‘guilt by association’. This Article focuses more on the prison and administrative agencies and their role in bringing reforms to reducing the effects of incarceration on children. The authors promote the idea of community prisons, which would be a positive move towards improving the lives of prisoners’ families.

RESEARCH REPORT

1. **Tata Institute of Social Sciences, “*Forced Separation: Children of imprisoned mothers (An exploration in two cities)*”** 18 (2002).

Prayas is a field action project of the Tata Institute of Social Sciences and has been working with persons affected by crime or the criminal justice process since

February 1991. The report starts by defining terms like prisoners, children of prisoners, and categories of children of prisoners in India. This study brings into the limelight the real-life experiences of children whose parents are incarcerated and also the effects of the incarceration of parents. The Report offers a better explanation of the ramifications of maternal incarceration by examination of two cities. The project highlights the necessity for modifications in both the legislative and administrative structures to reduce the negative impacts of parental incarceration. The researchers have highlighted the role of judges, police, and prison officials to understand how a nuanced strategy can be developed to cater to children's unique needs. The report ends with some recommendations and suggestions in order to minimize the adverse impacts of incarceration on the mother and the child.

CHAPTER 2

UNDERSTANDING RIGHTS OF CHILDREN OF INCARCERATED PARENTS: **LEGAL FRAMEWORK**

2.1 Introduction

*“There is no trust more sacred than the one the world holds with children.
There is no duty more important than ensuring that their rights are respected,
that their welfare is protected, that their lives are free from fear and want and
that they grow up in peace.”*

-Kofi Annan⁹

Children and childhood worldwide have broadly been construed as a ‘golden age’ synonymous with innocence, freedom, joy, play, and the like. There are several International Declarations, Conventions, Treaties, National Charters, Policies, Schemes and Welfare programs that facilitates the all-around child’s development. Determining the rights of prisoners’ children is a complex and challenging task. They are not widely recognized as a distinct group. However, the rights that are applicable to the children are also applicable to the children of incarcerated parents (COIP).

The term ‘child’ has been defined in the United Nations Convention on the Rights of the Child as every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier.¹⁰ In India, Section 2(12) of the Juvenile Justice (Care and Protection of Children) Act, 2015¹¹ defines a child as a person who has not completed eighteen years of age. The Act identifies two types of children- Children in conflict (CCL) with law and Children in Need of Care and Protection (CNCP). The COIP fall under the category of Children in Need of Care and Protection.

States implement responses to crime within the criminal justice system in the name of justice, including the deprivation of liberty. Consequently, incarceration and handling of offenders must demonstrate a state’s duty to ensure justice, maintain public safety,

⁹ Kofi Annan, Secretary-General’s Statement on the Launch of the “Say Yes for Children” Campaign (May 8, 2001), <https://www.un.org/press/en/2001/sgsm7798.doc.htm>.

¹⁰ United Nations Convention on the Rights of the Child art. 1, Nov. 20, 1989, 1577 U.N.T.S. 3.

¹¹ Juvenile Justice (Care and Protection) Act, 2015 (ACT NO. 2 OF 2016).

and hold offenders accountable, all while thoroughly respecting relevant human rights throughout the process. Incarceration has been there from time immemorial. Black's Law Dictionary defines *incarceration* as 'imprisonment; confinement in a jail or penitentiary'. Incarceration is defined as the state of being deprived of liberty in prisons, including pretrial detention facilities.¹² Prisons refer to all authorized places of detention within a criminal justice system, including those used for the purposes of pretrial detention and imprisonment upon conviction.¹³ An estimated 11.5 million people were detained globally in 2022, 5.5 percent more than a decade ago. Thus, 144 persons out of every 100,000 people worldwide were in prison in 2022.¹⁴ Most of the prisoners worldwide are men, representing almost 94 percent of the prison. At the end of the same year, 700,000 women were held in prison. The United States is the world leader in incarceration, with about 25% of the world's prison population.

Black's Law Dictionary defines the word 'Parent' as a 'lawful father or mother of a person'. Article 18 of the Convention of the Rights of Child states that a parent or the legal guardian has the primary responsibility for the upbringing and development of the child.¹⁵ Parents can be both legal or adoptive. When a parent is absent, another individual is responsible and will be called the guardian. Both parents and guardians should consider what is best for the child. If both parents are present, both are responsible for the child's upbringing. Section 2 (d) of the Maintenance and Welfare of Parents and Senior Citizens Act defines "parents" as father or mother, whether biological, adoptive or stepfather or stepmother, as the case may be, whether or not the father or the mother is a senior citizen.¹⁶ Children in their early childhood require the care of both parents for holistic development. The absence of parents can have adverse childhood experiences (ACEs).

Parental incarceration refers to a mother or father having ever served time in jail or prison. There can be times when both parents are in prison. In the United States, in 2016, 47% of people in state prisons and 57% in federal prisons were parents of minor

¹² United Nations System Common Position on Incarceration, April 2021. https://www.unodc.org/res/justice-and-prison-reform/nelsonmandelarules-GoF/UN_System_Common_Position_on_Incarceration.pdf

¹³ *Id.*

¹⁴ United Nations Office on Drugs and Crime (UNODC), 2024 Prison Matters: Global Prison Population and Trends – A Focus on Rehabilitation (2024).

¹⁵ Convention on the Rights of the Child (UNCRC) art. 18, Nov. 20, 1989, 1577 U.N.T.S. 3.

¹⁶ Maintenance and Welfare of Parents and Senior Citizens Act, 2007 (ACT NO. 56 of 2007).

children.¹⁷ As of 2021, women constituted approximately 4.1 percent of the prison population in India, and 1,537 of these women were accompanied by their 1,764 children in prisons.¹⁸ Parental incarceration is most common in vulnerable families, and it increases disadvantages and worsens well-being.

Children are confronted with a host of challenges when a parent or caregiver is in conflict with the law. They have to contend with the break-up of their family and may need to be placed in alternative care. They may be more vulnerable to violence, abuse, neglect, and exploitation as a consequence. The loss of a primary caregiver may result in financial hardship, leading to difficulties in accessing health and education services. They may experience discrimination and stigma as a result of their parent's status as a suspect, defendant, or convicted prisoner. In certain circumstances, they may end up living with their mother in detention facilities. The rights of these children remain largely unacknowledged within the criminal justice systems, and they fall through the cracks created by inadequate social welfare provision, lack of clarity in law and policy as to how to respond to them, and wholly inadequate protection for children living in prisons—almost always with their mothers.

2.2 Categorization- Children of Prisoners

The legal processing of an arrested person provides a significant and valuable point of departure for appreciating the situation of his or her family. Thus, 'Children of Prisoners' — undertrial/ unconvicted or sentenced could denote all of the following sub-groups¹⁹:

- i. Children born to mothers while in custody
- ii. Minors (which includes infants being breast-fed) permitted to be taken into police or prison custody with their mothers
- iii. Minors, taken into penal custody with their mothers, who have been later sent outside (before or after attaining the prescribed age limit) while the mother remains incarcerated

¹⁷ L.M. Maruschak et al., Parents in Prison and Their Minor Children: Survey of Prison Inmates, 2016, U.S. Dep't of Just., Bureau of Just. Stat., NCJ 252645 (2021).

¹⁸ National Crime Records Bureau Ministry of Home Affairs, Prison Statistics India 2022, Available at <https://www.data.gov.in/catalog/prison-statistics-india-psi-2022>.

¹⁹ Tata Institute of Social Sciences, "Forced Separation: Children of imprisoned mothers (An exploration in two cities)" 3 (2002) Available at <https://www.tiss.edu/uploads/files/Dharmadikari.pdf> (last visited on Dec. 12, 2024).

- iv. Minors taken into custody with their mothers, who leave with their mothers (bail/discharge/acquittal/ completion of sentence)
- v. Minors left outside when either or both parents are taken into custody
- vi. Adult — sometimes married — children of prisoners
- vii. Adult or minor children from a previous marriage, of persons in custody
- viii. Minors who grow into adulthood while a parent is serving a sentence.

Children of incarcerated parents in India are broadly divided into two broad categories – those who can live along with their mother in prison (up to the age of 6 years) and those who are left outside when their parent(s) is/are incarcerated. A woman prisoner can keep her child in prison until that child becomes a 6-year-old. Children who are left behind either live with the parent who is not incarcerated, and when both the parents are incarcerated, they live with relatives and sometimes with neighbours/ friends or in children’s institutions managed by the Government or Voluntary Organizations. They are sometimes referred to as ‘Children who are left behind in the community’.²⁰

2.3 International Instruments

While analyzing the rights of children of incarcerated parents, one must take into account that there are no specific conventions that directly talk about their rights. To understand their rights, one must examine the general provisions in various conventions available to all children. Inculcating this perspective into the study will allow for a more comprehensive understanding of the unique set of challenges that these children face. It will help to formulate a robust policy framework to address their human rights violations.

2.3.1 United Nations Convention on the Rights of the Child (UNCRC)

The Preamble of UNCRC states that “the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community”.²¹ The UN Convention on the Rights of the Child 1989 emphasizes the need to protect children from any discrimination and violation of their rights based on the status of their parents. It gives

²⁰ Jeremy Travis et al., *Families Left Behind: The Hidden Costs of Incarceration and Re-entry* (Urban Inst. 2005).

²¹ Preamble, Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

primary consideration to the best interests of the child. The UNCRC contains 54 Articles providing four sets of rights to every child. They are Survival, Protection, Participation, and Development.

The CRC does not explicitly mention the rights of children of incarcerated parents. Instead, it provides a strong legal basis for a child-oriented approach to sentencing and visitation policies.

2.3.1.1 Right to non-discrimination

No child should be discriminated against, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion or national, ethnic or social origin.²² All children should have equal opportunity.²³ The right to non-discrimination requires a proactive obligation on the part of the states to ensure that children are provided with equal opportunities. Children whose parents are incarcerated should not be discriminated against and are entitled to the same rights as other children.

2.3.1.2 Right to Participate and Be Heard

In all actions concerning children, whether it is undertaken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies, the best interests of the child should be the primary consideration.²⁴ The Committee on the Rights of the Child has identified Article 3(1) as one of the four general principles of the Convention for interpreting and implementing policies for the betterment of children. The word "action" includes acts, conduct, proposals, services, procedures, and all other measures. The criminal justice system should take into account the best interests of the children while incarcerating their parents. Most often, these children are not considered by the criminal justice system, which makes them the invisible victims. In the case of *Korneykova and Korneykova v Ukraine*²⁵, the mother and child faced degrading treatment inside prison. The court held that there was a violation of Article 3 of the United Nations Convention on the Rights of the Child and pointed out that it is the obligation of the authorities to provide adequate medical facilities and care for the

²² Chesa Boudin, *Children of Incarcerated Parents: The Child's Constitutional Right to the Family Relationship*, 101 J. CRIM. L. & CRIMINOLOGY 77 (2011).

²³ Convention on the Rights of the Child (UNCRC) art. 2, Nov. 20, 1989, 1577 U.N.T.S. 3.

²⁴ Convention on the Rights of the Child (UNCRC) art. 3, Nov. 20, 1989, 1577 U.N.T.S. 3.

²⁵ *Korneykova and Korneykov v. Ukraine*, App. No. 56660/12, Eur. Ct. H.R. (2012).

newborn staying with the mother in prison for six months and requires continuous monitoring.

Every child must be provided with an opportunity to be heard in any judicial and administrative proceedings that affect them, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.²⁶ Assessment of a child's best interest must include respect for the child's right to express his or her views freely and due weight given to said views in all matters affecting the child. The respect for the child's best interest is clearly set out in the Committee's general comment No. 12, highlighting the inextricable links between articles 3, paragraph 1, and 12.²⁷ The Right to be heard is defined as the heart of the legal rights of children. Sentencing a parent has adverse consequences on the child, including the possibility of multiple changes in caregivers and addresses, the loss of parental support, and even termination of parental rights. Thus, children should be given the right to be heard in all the decisions concerning parental incarceration. The extent to which the decision-makers should take into account children's views depends upon the age and maturity of the child. It is usually for older children, but the voices of minor children can be heard through a guardian ad litem. The domestic statutory laws should be capable of addressing these rights of children.

The CRC provides children with certain rights, but most often, children are not aware of their rights or do not have the capacity to act on them. Even when the children have the capacity to act, most of the time, practical problems such as information about remedies or access to remedies may hinder their capacity to claim their rights.

2.3.1.3 Right to survival, protection and development

The State Parties shall ensure to the maximum extent possible both the survival and development of the children.²⁸ The children face emotional, psychological, and mental distress due to parental incarceration, which affects their overall development. This Article creates a positive obligation on the states to provide a conducive environment

²⁶ Convention on the Rights of the Child (UNCRC) art. 12, Nov. 20, 1989, 1577 U.N.T.S. 3.

²⁷ Comm. on the Rights of the Child, General Comment No. 12: The Right of the Child to Be Heard, U.N. Doc. CRC/C/GC/12 (2009).

²⁸ Convention on the Rights of the Child (UNCRC) art. 6, Nov. 20, 1989, 1577 U.N.T.S. 3.

for the holistic development of every child. Article 20²⁹ and 21³⁰ states about the right to development of children and how it is affected due to reasons like parental imprisonment, armed conflicts, epidemics, wars, and forced migration. Children will respond to adversities in varying ways based on their resilience, age, personal circumstances, and the availability of external support and alternative care options. Studies indicate that poor-quality institutional care is unlikely to foster healthy physical and psychological growth, potentially leading to significant negative effects on long-term social adaptation, particularly for those under the age of three, but also affecting children under five.

2.3.1.4 Right to Family Unit and Contact

From nurturing to holistic development of a child, family plays a crucial role. There is no legal definition of the term ‘family’. Article 8(1) of the ECHR states that every individual has a right to family and no interference from public authority is permitted except in accordance with the law. Incarceration not just affects the individual but also the family around the individual. The most affected are children. The right to respect for privacy and family life is stated in various international instruments like the International Covenant on Civil and Political Rights³¹ and International Covenant on Economic, Social and Cultural Rights.³²

Article 7(1) states that the child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality, and, as far as possible, the right to know and be cared for by his or her parents. This Article encourages the State parties to create a positive agenda for the realization of rights in early childhood. It is during the early childhood that children experience rapid growth and require nurturing, attention, and guidance from their parents. This period lays the foundation for their physical, mental, health, emotional security, cultural and personal identity. This Article is subject to the condition that it is in the best interest of the child. The burden lies on the state to prove that the being of the child with the parent is not in his/her best interests.

²⁹ Convention on the Rights of the Child (UNCRC) art. 20, Nov. 20, 1989, 1577 U.N.T.S. 3.

³⁰ Convention on the Rights of the Child (UNCRC) art. 21, Nov. 20, 1989, 1577 U.N.T.S. 3.

³¹ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

³² International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

Article 7(1) should be read together in consonance with Article 9 (3) of the CRC, which states that States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regularly, except if it is contrary to the child's best interests. This right emphasizes the child's right to maintain contact with both parents.

2.3.1.4 Right to know about the whereabouts

The State Party shall, upon the request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family when the separation results from any action initiated by a State Party as the detention, imprisonment, exile, deportation or death. The information can be withheld if it is detrimental to the well-being of the child. However, while granting these rights, it is essential to determine whether contact with the parent is in the best interest of the children. Principle 16 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment also provides that the imprisoned person shall have the right to inform family members or other suitable people of his choosing of his arrest and the location of his detention as soon as he is arrested, or to demand that the competent authorities do so.

2.3.1.6 Right to be financially supported by the State

Every child has the right to state-provided financial assistance.³³ When parents are incarcerated, the family faces financial hardships due to loss of parental income. The interface with the criminal justice system can also create financial constraints. The financial constraints manifest in the form of selling or mortgaging houses, borrowing money, skipping meals, children forced into labour, and skipping schools. Article 26(2) provides that the State should provide appropriate benefits, considering the resources and circumstances of the child and the persons responsible for maintaining the child.

³³ Convention on the Rights of the Child (UNCRC) art. 26, Nov. 20, 1989, 1577 U.N.T.S. 3.

2.3.2 Report on 2011 UN Committee on the Rights of the Child Day of General Discussion

It was in 2011 that CRC devoted its Day of General Discussion (DGD) to the topic of “Children of incarcerated parents”.³⁴ There were two Working Groups that addressed the rights of “babies and children living with or visiting a parent in prison” and the rights of “children left outside when their parent is incarcerated.” The discussion addressed issues such as the impact on children of a parent’s involvement with all stages of the criminal justice process, including arrest, investigation, pretrial measures, trial and sentencing, imprisonment, release, and reintegration into the family and community; the general impact of parental imprisonment on a child’s life; and coping with a parent in cases involving capital punishment. The Committee reaffirmed the fundamental right to maintain family contact, the right to non-discrimination, the right to visitation and the right to be heard.

The first working group emphasized that the children living inside the prison with his or her parent must also be provided with adequate health care, education, food, and playground facilities. It also recognized the need for contact of the child with the non-incarcerated parent, if present. There was also consensus on the importance of considering alternatives to parental detention when considering possible sentences or pre-trial measures in situations where detention would negatively affect the rights of the incarcerated person’s child(ren).

In the case of *M vs State*,³⁵ M was a 35-year-old mother of three boys aged 16, 12 and 8 respectively. She committed a series of frauds and was facing imprisonment. The South African Court passed a judgement stating that when a parent is imprisoned, it will be detrimental to the child. Hence, the court should promote non-custodial sentences but only after taking into account the severity of the offence committed. The woman was sentenced to a period of correctional supervision, and the sentence included community service and paying back to victims instead of a custodial sentence, which would have negatively affected her child.

³⁴ Comm. on the Rights of the Child, Report and Recommendations of the Day of General Discussion on “Children of Incarcerated Parents,” Para 1–2, U.N. Doc. CRC/C/64/CRP.11 (Sept. 30, 2011).

³⁵ *S v M* (Centre for Child law as Amicus Curiae) 2008 (3) SA 232 at para 24.

The second working group identified the visitation rights of the children to reconcile with their parents if it is in the best interest of the child. It is the State's responsibility to ensure that the visitation is in a child-friendly environment. Visits should be scheduled at times that do not disrupt other important aspects of the child's life, like their education, and for lengths of time that support the development or maintenance of strong relationships. Additionally, it is important to allow visits to occur outside of the detention facility to promote essential emotional connections between the child and their incarcerated parent(s) in a setting that is welcoming and suitable for children.

ICRC shares the story of Samuel, who was just 9 years old when his father was imprisoned. He savors every moment he gets to spend with his father, who is in prison. Before the visit, he tells what he wants to confide to his father, 'I came fourth out of my class of 40. I know my father will be proud of me. There are big boys at school who beat me up or made me feel scared. I want to tell my father because I do not know what to do about them.' During the visit, he holds the telephone receiver tight and does not want to be disturbed by anyone."³⁶

2.4 UN Guidelines for the Alternative Care of Children

When a child's primary caregiver is arrested, the natural question that comes into play is who will take care of the child. Rule 32 provides that the States must bring out policies that help children to realize their right to have a relationship with both parents.³⁷ The UN Guidelines for the Alternative Care of Children sets out guidelines for alternative arrangements for the children. Rule 48³⁸ read with Article 20 of CRC states that when the child's sole or primary carer may be the subject of deprivation of liberty as a result of preventive detention or sentencing decisions, non-custodial remand measures and sentences should be taken in appropriate cases wherever possible, the best interests of the child being given due consideration. When determining whether to remove children born in prison or children incarcerated with a parent, states should consider the child's best interests. Such children's removal ought to be handled similarly to other situations where separation is taken into consideration. The best efforts should

³⁶ Boy from Namibia talking to ICRC - Extracted from submission by ICRC to the UN Committee on the Rights of the Child, Day of General Discussion (2011).

³⁷ Guidelines for the Alternative Care of Children, Rule 32, G.A. Res. 64/142, U.N. Doc. A/RES/64/142 (Feb. 24, 2010).

³⁸ Guidelines for the Alternative Care of Children, Rule 48, G.A. Res. 64/142, U.N. Doc. A/RES/64/142 (Feb. 24, 2010).

be made to guarantee that children who are still in custody with their parents receive proper care and protection, as well as the opportunity to participate in community activities and maintain their status as free individuals.³⁹

These policies should address the root causes of child abandonment, relinquishment, and separation of the child from his/her family by ensuring basic health, education, and social welfare services, as well as by promoting measures to combat poverty, discrimination, marginalization, stigmatization, violence, child maltreatment, sexual abuse, and substance abuse.

2.5 The African Charter on the Rights and Welfare of the Child

The African Charter on the Rights and Welfare of the Child (ACRWC) makes explicit provisions for the children of imprisoned parents in a stand-alone article responding to the specific risks they face.⁴⁰ Article 19(2) states that a child who is separated from one or both parents shall have the right to maintain personal relations and direct contact with both parents on a regular basis. According to Article 30 of the Charter, the State Parties guarantee special treatment for pregnant mothers and mothers of babies and young children who have been charged with or convicted of violating the penal code. The State Parties shall in particular⁴¹:

- a) ensure that a non-custodial sentence will always be first considered when sentencing such mothers. This means that the State should review the sentencing procedure to determine if the convicted person is a primary caregiver/parent. If that is the case, then the State must ensure that the children will be adequately cared for while the caregiver is in prison. The UN Guidelines for the Alternative Care of Children lays down in its guidelines that the States should pay special attention to ensuring that children in alternative care because of parental imprisonment and they have the opportunity to maintain contact with their parents and receive any necessary counselling and support in that regard.

³⁹ *Id.* at 8.

⁴⁰ African Charter on the Rights and Welfare of the Child art. 30, July 1, 1990, OAU Doc. CAB/LEG/24.9/49 (entered into force Nov. 29, 1999).

⁴¹ *Ibid.*

- b) establish and promote measures alternative to institutional confinement for the treatment of such mothers. The Committee recommends that such measures must be given priority when incarcerating a caregiver/parent.
- c) establish special alternative institutions for holding such mothers
- d) ensure that a mother shall not be imprisoned with her child
- e) ensure that a death sentence shall not be imposed on such mothers
- f) The essential aim of the penitentiary system will be the reformation, the integration of the mother into the family, and social rehabilitation. In order to ensure that the caregivers are reintegrated into the system, it is highly essential that they maintain contact with the children, provided that it is in the best interest of the child.

It was in the case of *Fletcher v. Fletcher*⁴², the South African Court held that *'In determining the best interests of the child, the Court must decide which of the parent is better able to promote and ensure his physical, moral, emotional and spiritual welfare.'* The Court then identified criteria such as (i) love, affection, emotional ties and parental compatibility with child (ii) character and temperament of the parent and impact thereto on the child (iii) capacity and disposition of the parent to give guidance that the child requires (iv) ability of the parent to provide for basic physical necessities of the child and other needs (v) the fitness of the parents (vi) stability of the family and (vii) child's preference as relevant factors which must be taken into consideration when assessing and determining a child's best interests.⁴³

From these provisions, one can understand that there is an assumption that the effects of incarceration of mothers tend to invariably affect children than that of the fathers. All these provisions tend to focus on the mothers who are in prison. This assumption cannot hold true in all circumstances. This Charter fails to recognise the rights of children who reside with their fathers inside the prison. The African Committee of Experts on the Rights and Welfare of the Child (ACERWC) extends the protections in Article 30 of the African Charter on the Rights and Welfare of the Child to the children of any caregiver facing incarceration "under whose custody a child is placed either under- recognized formal arrangements or informal mechanisms available in a given

⁴² *Fletcher v. Fletcher* 1948 (1) SA 130 (A).

⁴³ U.N. High Comm'r for Refugees (UNHCR), Guidelines on Assessing and Determining the Best Interests of the Child (Nov. 2018).

society.”⁴⁴ The scope was widened in the Bangkok Rules, in which the role of both the father and the mother was recognized and how both of them play a vital role in the development of a child.

2.6 UN Standard Minimum Rules for the Treatment of Prisoners

The UN Standard Minimum Rules for the Treatment of Prisoners is known as the Nelson Mandela Rules, which was revised in 2015. The Rules set international standards on detention conditions in line with human rights, public health, and criminal justice.

The Rules provide for special accommodation for prenatal and post-natal care in women’s prisons.⁴⁵ It also states that arrangements should be made for children to be born in a hospital outside the prison. The fact that the child is born in prison shall not be mentioned in the birth certificate.

Rule 29 facilitates the children who stay inside the prison with his or her parent if it is in the best interests of the child. When the child is staying inside the prison, provisions shall be made for the following:

- (a) Internal or external childcare facilities staffed by qualified persons, where the children shall be placed when they are not in the care of their parents.
- (b) Child-specific healthcare services, including health screenings upon admission and ongoing monitoring of their development by specialists.⁴⁶

Specific staff must be assigned and should be trained on child development and their healthcare requirements so that they can respond appropriately in times of need and emergencies. Authorities should also establish links with local specialists in the community, who may be able to visit prisons to assess the impact of imprisonment on the children concerned. They should ensure that babies and children are taken to special clinics for regular check-ups. This ensures that the authorities can better respond to the

⁴⁴ The African Committee of Experts on the Rights and Welfare of the Child, General Comment on Article 30 of the African Charter on the Rights and Welfare of the Child, ACERWC/GC/01 (2013), adopted by the Committee at its twenty-second Ordinary Session (04 - 08 November, 2013), para. 13.1.

⁴⁵ United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), Rule 28, G.A. Res. 70/175, U.N. Doc. A/RES/70/175 (Dec. 17, 2015).

⁴⁶ United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), Rule 29, G.A. Res. 70/175, U.N. Doc. A/RES/70/175 (Dec. 17, 2015).

needs of the child. For better co-ordination between the child and the parent/caregiver, specific staff must be assigned as a point of contact.

2.7 The United Nations Rules for The Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (Bangkok Rules)

Due to the fact that women and girls represent less than a tenth of the prison population, their needs and rights are most often unacknowledged by the criminal justice system. Prisons and their systems, encompassing aspects such as architecture, security measures, healthcare, family communication, and training programs, are typically structured with a focus on male inmates. The Bangkok Rules play a crucial role in protecting the rights of women offenders and prisoners, explicitly addressing the different needs that women have and the different situations they come from. The Bangkok Rules are also the first international instrument to address the needs of children in prison with their parents.

The Bangkok Rules, after taking into consideration the gender of the offender, offer alternatives for both the custody before trial and penalties after conviction, targeting the primary factors that lead to criminal behavior. This approach offers a solution for female offenders who are mothers, allowing them to address the underlying issues of their criminal actions while still caring for their children. Prison services need to cater to the complete range of needs of children who are with their mothers in prison, including medical, physical, and psychological support. Since these children are not inmates, they should not be treated as such. These children should be able to participate in outdoor activities in compliance with security considerations. Children inside prisons must be prevented from any physical and psychological harms. Additionally, the Rules stipulate that special arrangements must be made for mothers before admission to prison, enabling them to arrange alternative childcare for their children who remain outside.

The Resolution 63/241 of 24 December 2008, called upon the States to give attention to the consequences of parental incarceration on children.⁴⁷ It aimed at identifying the good practices for the needs and physical, emotional, social, and psychological

⁴⁷ G.A. Res. 63/241, U.N. Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules) (Dec. 24, 2008).

development of babies and children affected by parental detention and imprisonment. The Human Rights Council resolution 10/2 of 25 March 2009, invited Governments, relevant international and regional bodies, national human rights institutions and non-governmental organizations to devote greater attention to the issue of women and girls in prison, including issues relating to children of women in prison, with a view of identifying and addressing the gender-specific aspects and challenges related to this problem.⁴⁸

2.7.1 Right of Alternate Care

Prior to or on admission, women with care-taking responsibilities for children are permitted to make the required arrangements for children who are left outside the prison, taking into account the best interests of the children.⁴⁹ Most women admitted into prisons are mothers or are separated from their children. They undergo emotional and mental distress. Mothers, before entering the prison, need to make alternate arrangements to take care of their children, and they should be given a chance to explain the reasons for their imprisonment. The children of people in prison can also suffer from the immediate consequences of separation from their parents, especially from their mothers, who are often the primary carers of children. In *Ioan Pop and Others v Romania*⁵⁰, a 12-year-old who witnessed the arrest of his parents was left unattended for several hours without the authorities taking measures to ensure an adult would look after him while the parents were held in police custody (left under the oversight of the villagers), the Court found to be a violation of Article 3 (degrading treatment).

The women prisoners shall be given the maximum opportunity and facilities to meet their children, considering their best interests after the children are separated from their mothers and placed with family or relatives or in any other alternate care.⁵¹ While this Rule grants women the facility to meet the children, it should no way compromise public safety.

⁴⁸ Human Rights Council Res. 10/2, U.N. Doc. A/HRC/RES/10/2 (Mar. 25, 2009).

⁴⁹ United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (Bangkok Rules), Rule 2, G.A. Res. 65/229, U.N. Doc. A/RES/65/229 (Dec. 21, 2010).

⁵⁰ *Ioan Pop and Others v. Romania*, App. No. 52924/09, Eur. Ct. H.R. (2016).

⁵¹ United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (Bangkok Rules), Rule 52, G.A. Res. 65/229, U.N. Doc. A/RES/65/229 (Dec. 21, 2010).

2.7.2 Right to special- treatment

The prison health services shall provide specialized treatment programs designed for women, taking into account prior victimization, the special needs of pregnant women and women with children, as well as their diverse cultural backgrounds.⁵² The children of parents who are in prison must not be treated like criminals. They should be provided with all the rights available to any other children. Most of the prisons face the issue of overcrowding.

2.7.3 Right to Visitation

The Rules allow for visits involving extended contact with children, which should be encouraged, where possible.⁵³ Rule 28 refers to the visits involving children, taking into account the mothers and their children's emotional needs for close physical contact and the importance of a child-friendly environment for children visiting their mothers to mitigate the austere environment and the stressful situation for the child. The conditions of visits should make positive experiences. They must be repeated frequently to limit the trauma and distress associated with having an imprisoned mother and to maintain contact between families and prisoners.

Children are allowed to stay with their mothers in prison; awareness-raising on child development and basic training on the health care of children shall also be provided to prison staff so they can respond appropriately in times of need and emergencies.⁵⁴ This will help the child prepare for the life outside the prison.

The decision to allow the children to stay with their mothers in prison shall only be based on the best interest of the children.⁵⁵ Children in prison with their mothers shall never be treated as prisoners. The Rule 23 specifies that Rule 23 states that placing restrictions on family contact, particularly with children, is not permitted as a disciplinary measure for female inmates. This Rule supplements Rule 45(2) of the Nelson Mandela Rules. Prohibition of women from contacting their family, especially

⁵² United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (Bangkok Rules), Rule 15, G.A. Res. 65/229, U.N. Doc. A/RES/65/229 (Dec. 21, 2010).

⁵³ United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (Bangkok Rules), Rule 28, G.A. Res. 65/229, U.N. Doc. A/RES/65/229 (Dec. 21, 2010).

⁵⁴ United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (Bangkok Rules), Rule 33, G.A. Res. 65/229, U.N. Doc. A/RES/65/229 (Dec. 21, 2010).

⁵⁵ United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (Bangkok Rules), Rule 49, G.A. Res. 65/229, U.N. Doc. A/RES/65/229 (Dec. 21, 2010).

children who live outside the prison will cause adverse effects to both the parent and the child. It goes against the best interest of the child principle.

2.8 Other Legal Instruments

The Council of Europe (COPE) has recognised the children of incarcerated parents as vulnerable groups. Article 8 of the European Convention on Human Rights⁵⁶ provides for the Right to family life. It provides rights for both the parents and the children. It is a positive obligation on the state/public authority not to interfere with the right of private family life except according to law. The court has broadly interpreted Article 8 in the case of *McCotter v UK*.⁵⁷ It requires the State to assist prisoners in creating and sustaining, as far as was practicable, ties with family outside the prison to help facilitate rehabilitation.

The Council of Europe Strategy for the Rights of the Child 2022-2027 recognizes children of imprisoned parents as being in a particularly vulnerable situation and the importance of addressing their situation.⁵⁸ The Council of Europe published its Recommendation in 2018⁵⁹ provided a detailed guidance to the member state to promote a multidisciplinary and multi-agency approach in order to effectively promote, support and protect the rights of children with imprisoned parents. There were 56 recommendations. This involves cooperation with probation services, local communities, schools, health and child welfare services, the police, the children's ombudsperson, or other officials with responsibility for protecting children's rights, as well as other relevant agencies, including civil society organizations offering support to children and their families.⁶⁰

In a landmark judgment of *Baškys v. Lithuania*⁶¹, the Court upheld COPE's contention that all decisions concerning children should take their best interests as a prior consideration and that children have a right, when separated from a parent in prison to

⁵⁶ European Convention on Human Rights art. 8, Nov. 4, 1950, 213 U.N.T.S. 221.

⁵⁷ *R. v. McCotter-Henry*, [2018] EWCA Crim 965.

⁵⁸ Council of Europe, Strategy for the Rights of the Child (2022–2027): Children's Rights in Action – From Continuous Implementation to Joint Innovation (2022).

⁵⁹ Comm. of Ministers, Recommendation CM/Rec (2018)5 'Concerning Children with Imprisoned Parents, Council of Europe' (2018).

⁶⁰ *Id.* at 18.

⁶¹ *Baškys v. Lithuania*, App. No. 47410/20, Eur. Ct. H.R. (Nov. 22, 2022).

regular, ongoing contact with the parent, including during pre-trial detention. In its ruling, the Court cited the Council of Europe Recommendations.

2.9 Termination of Parental Rights

The term 'parental rights' does not have a universal definition. In the case of *Santosky v. Kramer*,⁶² the US Supreme court held that parental rights as the "natural parent's desire for and right to the companionship, care, custody, and management of his or her children." These rights include the right to visit the child, determine education, right to choose medical treatment, right concerning the child's name, right to consent to marriage, right to services, right to determine nationality and domicile, and right to appoint guardians and consent to adoption.

A court may permanently terminate the parental rights of incarcerated parents in one of three ways, depending upon the jurisdiction:

- (1) an adjudication which determines that the children are neglected;
- (2) a special hearing which may be instituted for a variety of reasons including neglect or abusive behavior by the parent, depravity, open and notorious fornication, mental illness, failure to provide financial support, or divorce; or
- (3) an adoption proceeding where the court is permitted to waive the necessity of consent to the adoption by the natural parent.⁶³

The discretion has been given to the informed judiciary to decide on the termination of parental rights. The question of whether the imprisonment of a parent implies an automatic ban on exercising parental duties was settled in the case of *Sabou and Pircalab v. Romania*.⁶⁴ The Court held that imprisonment should be taken in the interest of the child rather than punishing the parent. The Court held that such a law is violative of Article 8. The Court has, in all cases, put the best interest of the child in the forefront. It is therefore settled that when a court decides to terminate the parental rights, there must be "clear and convincing evidence" for such a decision".

⁶² *Santosky v. Kramer*, 455 U.S. 745, 758 (1982).

⁶³ Kathleen Haley, *Mothers Behind Bars: A Look at the Parental Rights of Incarcerated Women*, 4 New Eng. J. on Prison L. 141, 146-47 (1977).

⁶⁴ *Sabou and Pircalab v. Romania*, App. No. 46572/99, Eur. Ct. H.R. (Sept. 28, 2004).

2.10 Best interests of the child

The Best Interest of Child (BIC) as a principle was first evolved in the context of family law primarily in the United States and Great Britain. It was based on the *parens patriae* doctrine. According to this legal doctrine, the State should act as a parent to those who are unable to care for themselves. The doctrine of BIC was first introduced in the case of *Commonwealth v. Addicks*.⁶⁵ In this case, the custody of two minor girls was first granted to the mother, considering their tender age. The father went for an appeal to get the custodial rights of the children. The father argued that it was in the best interests of the girls to stay with him and not their mother due to her “adulterous” nature. The Court later reversed the decision and granted custody to the father only after the girls reached a certain age. The Court pointed out that it was not in the best interest of the children to have separated from their mother at such a tender age and recommended that such removal would cause shock to the mother as well as the children.

The overarching principle is that the best interests of the child should be taken into account in all decisions relating to the detention of someone with child-caring responsibilities.⁶⁶ The concept of the “child's best interests” is not new. It was already enshrined in the 1959 Declaration of the Rights of the Child (para 2), the Convention on the Elimination of All Forms of Discrimination against Women (arts. 5 (b) and 16, para. 1(d), as well as in regional, national and international laws. The concept of the child's best interests is aimed at ensuring both full and effective enjoyment of all the rights recognized in the Convention and the holistic development of the child. The Committee has already pointed out that “an adult’s judgement of a child’s best interests cannot override the obligation to respect all the child’s rights under the Convention.” It recalls that there is no hierarchy of rights in the Convention; all the rights provided for therein are in the “child's best interests” and no right could be compromised by a negative interpretation of the child's best interests.

⁶⁵ *Commonwealth v. Addicks*, 5 Binn. 520 (Pa. 1813).

⁶⁶ Human Rights Council Resolution 19/37 on the Rights of the Child, A/HRC/RES/19/37 of 19 April 2012, paras. 69(a) and (d).

Article 3(1) of the Convention on the Rights of the Child points out the requirement to take the best interests of the child into account as a primary consideration in all decisions affecting them.⁶⁷ In the context of children of prisoners or children of those facing possible incarceration, best-interest assessments should be incorporated into the following:

- Actions and decisions at the point of arrest
- Decisions regarding whether or not to detain someone before trial
- Decisions about sentencing once convicted, including alternatives to custody and the application of the death penalty
- Decisions about whether a child should go into prison with their carer or remain in prison with their carer
- Decisions about the removal of any State financial or other support from the child or the carer.

Thus, the Committee underlines that the child's best interests is a threefold concept⁶⁸:

- a) A Substantive Right: The right of the child to have his or her best interests assessed and taken as a primary consideration when different interests are being considered in order to reach a decision on the issue at stake, and the guarantee that this right will be implemented whenever a decision is made concerning a child, a group of identified or unidentified children or children in general.
- b) A fundamental, interpretative legal principle: If a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen.
- c) A rule of procedure: The decision-making process must always include an assessment of the choice's potential impact, whether positive or negative on the child or children in question, whether the decision will affect a particular child, a designated group of children, or children generally. Procedural assurances are necessary in order to evaluate and determine the child's best interests. The

⁶⁷ UNCRC, art. 3(1).

⁶⁸ Ziba Vaghri et al., eds., *Monitoring State Compliance with the UN Convention on the Rights of the Child: An Analysis of Attributes* (Springer 2022).

rationale behind a decision must also demonstrate that the right has been specifically considered. In this regard, State parties shall explain how the right has been respected in the decision, that is, what has been considered to be in the child's best interests; what criteria it is based on; and how the child's interests have been weighed against other considerations, be they broad issues of policy or individual cases.

2.10.1 When a parent/caregiver is arrested

In the case of *Gutsanovi v. Bulgaria*⁶⁹, the Court had found that the possible presence of children, whose young age makes them psychologically vulnerable, at the scene of an arrest is a factor to be taken into consideration while planning and carrying out the operation. The Court found that the fact that the police operation had taken place at the family home in the early hours of the morning and had involved special agents wearing masks had served to heighten the feelings of fear and anxiety experienced by the children who had witnessed their father's arrest, to the extent that the treatment to which they had been subjected exceeded the threshold of severity required for Article 3 of UNCRC to apply, amounting to degrading treatment.

In the case of *A v. Russia*⁷⁰, the State Party was found to be in breach of Article 3 of the European Convention on Human Rights following the violent arrest of a man in front of his nine-year-old daughter, as the State authorities failed to take her interests into account. The Court made clear that the State authorities, given that the child's presence at the scene was foreseeable as the arrest took place outside her school, should have taken her interests into account when planning and carrying out their operation against her father.⁷¹

2.10.2 When sentencing a parent/caregiver

Take into account the rights of children and prioritize the best interests of the child at all stages. This should be done by all actors involved in the process including law enforcement, prison service professionals, and the judiciary.⁷² In the case of *S v. M*, the

⁶⁹ *Gutsanovi v. Bulgaria*, App. No. 34529/10, Eur. Ct. H.R. (2013).

⁷⁰ *A. v. Russia*, App. No. 37735/09, Eur. Ct. H.R. (2019).

⁷¹ *Ibid.*

⁷² Committee on the Rights of the Child, Report and Recommendations of the Day of General Discussion on Children of Incarcerated Parents, 30 September 2011, para. 32.

main question that came up before the court was: What are the duties of a sentencing court when sentencing a primary caregiver of minor children, bearing in mind the constitutional protection of the best interests of the child?⁷³ Justice Sachs, relying on Article 3 of CRC, held that when it comes to sentencing, “[t]o apply a pre-determined formula for the sake of certainty, irrespective of the circumstances, would be contrary to the best interests of the child concerned.” The Court said that while sentencing a convict to prison, it is essential to balance all the varying interests involved, including that of the children’s. Justice Sachs developed a multipart test for sentencing a parent.

There cannot be a straight-jacket formula for identifying what is the best interest of the child. Every child is unique; hence, it should be based on the facts of each case. The Committee on the Rights of the Child has emphasized that:

*the basic best-interests assessment is a general assessment of all relevant elements of the child’s best interests, the weight of each element depending on the others. Not all the elements will be relevant to every case, and different elements can be used in different ways. The content of each element will necessarily vary from child to child and from case to case, depending on the type of decision and the concrete circumstances, as well the importance of each element in the overall assessment.*⁷⁴

What is best for one child may not be best for another child. There are certain circumstances in which it is in the best interest of children that they do not maintain contact with parents who face imprisonment. This is when the children are the direct victims of his or her parent’s criminal behaviour.

2.11 Conclusion

Families separate due to death, illness, or divorce. These problems often bring families closer. Loss of a family member because of incarceration, however, seldom draws a family closer, nor does it elicit sympathy from others; family members are forced to

⁷³ Chesa Boudin, Children of Incarcerated Parents: The Child’s Constitutional Right to the Family Relationship, 101 J. CRIM. L. & CRIMINOLOGY 77 (2013).

⁷⁴ Committee on the Rights of the Child General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), CRC/C/GC/14 of 29 May 2013, para. 80.

face the difficulties of separation alone.⁷⁵ Children, being the most at-risk group, are frequently overlooked by the criminal justice systems globally. They face social judgments, financial struggles, a lack of support and care, and mental distress.

The various instruments state the general rights available for all children irrespective of their social standing. There is an apparent lack of specific rules that focus on the special needs of the children whose parents face incarceration. When a parent is imprisoned, the impact goes well beyond the prison itself, influencing the child's right to family, care, safety, and overall development. The lack of a robust criminal justice system calls for a comprehensive legal framework that addresses these challenges and requires a combined effort by the states, policymakers, and civil society. Such efforts will ensure that no child is left behind to bear the consequences of their parent's incarceration alone, reaffirming society's commitment to their well-being and development.

⁷⁵ Travis Fritsch & John Burkhead, Behavioural Reactions of Children to Parental Absence Due to Imprisonment, 30 Fam. Rel. 83 (1981).

CHAPTER 3

CHILDREN AS COLLATERAL VICTIMS: THEORETICAL FRAMEWORK ON CONSEQUENCES OF PARENTAL INCARCERATION ON CHILDREN

3.1 Introduction

Children of incarcerated parents have rights that are firmly established in a number of binding and non-binding international legal instruments, although not being fully enshrined in a single International Treaty. Together, these tools provide a framework that emphasizes the importance of protecting these children's rights and welfare, with a focus on the preservation of family ties, non-discrimination, best interests of the child, and protection from undue hardship brought on by parental incarceration. Parents play a very important role in the development of a child. This chapter reviews theories that focus on the adverse effects of parental incarceration on children. While discussing this topic, one has to keep in mind that each child experiences different things, and that will depend upon various factors like age, family, maturity, and social setting. Leonard Pearlin and his colleagues first developed the theoretical framework and it consisted of three main components: the sources of stress (known as stressors), the mediators of stress, and the manifestations of stress.⁷⁶ It can be influenced by a lot of social factors that are embedded in society. Stress mediators are regarded to be in charge of elucidating the variations in outcome variables related to the same stressor. The subjects activate the mediators as a defense mechanism to respond to the stressor. The mediators of stress include social support, coping, self-esteem, and mastery. Manifestations of stress occur in different ways, like anxiety, depression and stress.

Parental imprisonment is not an isolated criminal incident. Their children's lives are profoundly impacted, and the effects extend beyond the prison walls. It is essential to understand the social, behavioural and psychocological impact of parental incarceration on the well-being of children and analyze the factors that makes them collateral victims of incarceration. While it is difficult to predict the full impact of parental incarceration on a child, it is easy enough to attribute antisocial behavior, suspension or expulsion

⁷⁶ Leonard I. Pearlin et al., *The Stress Process*, 22 J. HEALTH & SOC. BEHAV. 337 (1981).

from school, economic hardship, and criminal activity to the psychological strain they experience.⁷⁷

3.2 Theoretical Framework

Various theoretical frameworks have been utilized in parental incarceration research and continue to be integrated to best address the call for a more comprehensive understanding of the effects of parental incarceration on offspring. Despite the lack of clarity from previous research findings, there is growing consensus among scholars and practitioners alike that research on the effects of parental incarceration warrants a multi-dimensional approach to assessing multiple outcomes.⁷⁸

3.2.1 Attachment theory

Attachment theory was developed by a psychoanalyst named John Bowlby. This theory states that infants need to form a close relationship with at least one primary caregiver to ensure their survival and to develop healthy social and emotional functioning. The term ‘attachment’ refers to the affectional bond which is reciprocal between the child and the caregiver. This theory emphasizes the significance of disruptions in relationships that occur when a child is separated from a parent.⁷⁹ The child’s response is called attachment, and the reciprocal reaction of the parent is called caregiving bond. According to Bowlby, children come into this world with an innate need to form relationships or attachments with their primary caregivers as a means of survival.⁸⁰ It helps a child form views about the world. Bowlby analyzed two situations. The first was the experiences of a child during the arrest of the parent. Second was the experiences of the child during their visit to the prison.

Parental incarceration can cause severe trauma to the children if they are already living with the parent or have a significant relationship with the parent.⁸¹ When the child sees

⁷⁷ Eric Martin, Hidden Consequences: The Impact of Incarceration on Dependent Children, 31 Am. Jails 16, 16–18, 20 (2017). Ani Sicilian, The Sentencing Judge’s Role in Safeguarding the Parental Rights of Incarcerated Individuals, 53 COLUM. J.L. & Soc. Probs. 133 (2019).

⁷⁸ J. Murray, D.P. Farrington & I. Sekol, Children’s Antisocial Behavior, Mental Health, Drug Use, and Educational Performance After Parental Incarceration: A Systematic Review and Meta-Analysis, 138 PSYCHOL. BULL. 175 (2012).

⁷⁹ John Bowlby, Attachment and Loss: Vol. 2. Separation: Anxiety and Anger (1973).

⁸⁰ Bretherton I, ‘The origins of the attachment theory: John Bowlby and Mary Ainsworth’ Development PSYCHOL. BULL. 1992, 762.

⁸¹ J. Poehlmann, Representations of Attachment Relationships in Children of Incarcerated Mothers, 76 CHILD DEV. 692 (2005).

the arrest of the parent, it pushes them into a state of mental distress. Bowlby conducted a study on children whose parents were inside the prison. The result of the study suggested that 59% of the children who witnessed their parent's arrest exhibited "extreme distress," and only 18% exhibited little or no distress. These children were described as shouting, crying, or screaming. Most of the children were not able to comprehend what was happening and developed insecure attachments. The International Association of Chiefs of Police, in their 2014 Model Recommendations, offer to train the staff so that the children may be safeguarded during the arrest of their parents.

The in-person meetings between a child and their incarcerated parent provide children with opportunities for continued parent-child connection.⁸² Visitation thus plays a crucial role in improving the strained parent-child relationship. At certain times, visitation has the opposite effect. Young children can see their parents through the Plexiglas but are unable to touch them, these visits, in particular, may activate a child's attachment system and trigger anxiety that cannot be easily assuaged since the parent-child separation continues following the visit.

3.2.2 Social Learning Theory

This theory is developed by Albert Bandura. He argues that a human learns through his interaction with others in a social context. According to social learning theories, behavior can be influenced by observing what happens to other people, as well as by actual experiences of rewards and punishments.⁸³ He states that behaviors are positively or negatively reinforced. Positive reinforcement is the result of a behavior being followed by favorable outcomes. Negative reinforcement relates to the strengthening of behaviors by avoiding an aversive stimulus.⁸⁴

When a child sees his/her parent being imprisoned, there is less chance of the child breaking the rule and tends to avoid undesired consequences. Instead, they may engage in positive behaviors like going to school and getting good grades. This will help them

⁸² J. Poehlmann, Children's Family Environments and Intellectual Outcomes During Maternal Incarceration, 67 J. MARRIAGE & FAMILY 1275 (2005).

⁸³ J. BOWLBY, ATTACHMENT: ATTACHMENT AND LOSS: VOLUME ONE (Basic Books 1969).

⁸⁴ M.C. Arrastia-Chisholm et al., Vicarious Reinforcement and Punishment Among the Children of the Incarcerated: Using Social Learning Theory to Understand Differential Effects of Parental Incarceration, 13 J. THEORETICAL & PHIL. Criminology 101 (2020). Available at <https://core.ac.uk/download/329048616.pdf>.

avoid the negative attention, social stigma, and the at-risk child label. They also tend to develop better resilience against challenges thrown at them in the future. Thus, while socially positive behaviors increase, socially negative behaviors decrease. Billings extend the work of Wakefield and Powell by examining the effect of maternal incarceration on female children. In discussing this relationship, Billings explains that an abusive mother is highly influential, and if removed can allow more positive effects to transpire.⁸⁵ If the child feels that the parent was imprisoned wrongly, they develop a hostile attitude towards the criminal justice system and are more likely to offend. In a clinical study conducted by Starc, boys whose fathers were imprisoned tried to imitate their father's criminal behavior.⁸⁶

3.2.3 Strain Theory

Robert Agnew developed the General Strain Theory (GST) by building upon the strain theory propounded by Merton. Agnew proposed that various forms of strain caused individuals to experience negative emotional states such as anger, depression, and fear.⁸⁷ Agnew's general strain theory encompasses all of these potential sources of strain. It posits that crime may be used as a way to alleviate stress associated with the introduction of various types of strain. He identified three categories of strain:

- 1) Failure to achieve positively valued goals.
- 2) Removal of positive stimuli.
- 3) Introduction of negative stimuli

When the parents are incarcerated, children may resort to rule-breaking behaviour to cope with the stress that they endure. Agnew suggests that individuals engage in rule-breaking behaviors when they (i) dislike their unjust and involuntary conditions, (ii) develop negative emotions following self-appraisal of these conditions, and (iii) consider rule-breaking as an outlet to reduce stress. Parental incarceration can also result in the failure to attain positively valued goals, such as being financially stable or receiving good grades in school. Incarceration can cause emotional and economic strain

⁸⁵ Stephen B. Billings, *Parental Arrest, Incarceration and the Outcomes of Their Children* (2017).

⁸⁶ William H. Sack & Jack Seidler, *Should Children Visit Their Parents in Prison?* 2 LAW & HUM. BEHAV. 261, 261-66 (1978).

⁸⁷ Agnew, R. (1992). *Foundation for a general strain theory of crime and delinquency.* CRIMINOLOGY, 30(1), 47-87

among children. It can also lead to poverty.⁸⁸ The health of a child is also a significant concern because the separation from a parent along with economic strain can cause the child to have a poor health. Parental incarceration can also affect the education of the child leading to low grades in school. With less quality supervision due to parental absence and increased risk for poverty due to loss of income, children are at increased risk for criminal involvement.⁸⁹

3.2.4 Labelling Theory

Labeling theory, was developed by Tannenbaum, Becker, and Lemert. This theory focuses on the informal and formal acts of stigmatizing individuals with deviant labels. For example, a child whose parents are incarcerated for criminal activity is identified as a criminal. The initial act of aberrant behavior is known as primary deviance. When someone who has been classified as deviant due to their prior behavior goes on to commit another deviant act as a result of the classification, this is known as secondary deviance. When individuals in a society adopt a new perspective on the subject and treat them differently, secondary deviance can also happen. This differential treatment can lead them to identify with the label. There are two types of labeling- formal and informal.

Children with incarcerated parents are stereotyped not because of their behavior but because of the situation that they are put in. Having a parent in prison has a negative stigma that can sway the societal perspectives of these children and lead to reduced social opportunities for them.⁹⁰ COIP feel stigma from their peers, and one study of teachers found that they tended to label children whose parents are incarcerated as being less competent than children whose parents are away for other reasons.⁹¹

Gaining a comprehensive grasp of how parental incarceration impacts children and why their experiences cannot be seen in a vacuum requires an analysis of various theoretical frameworks. Every theory provides a different perspective for examining the behavioural, psychological, social, and emotional repercussions that children

⁸⁸ J. Murray & D. P. Farrington, The Effects of Parental Imprisonment on Children, in 37 CRIME & JUST.: A Rev. of Res. 133, 133–206 (M. Tonry ed., Univ. of Chi. Press 2008).

⁸⁹ J.A. Arditti & A.L. Few, Mothers' Re-entry into Family Life After Incarceration, 17 CRIM. JUST. POLICY REV. 103 (2006).

⁹⁰ S.D. Phillips & T. Gates, A Conceptual Framework for Understanding the Stigmatization of Children of Incarcerated Parents, 20 J. CHILD & FAM. STUD. 286 (2011).

⁹¹ Child Welfare Information Gateway, Children's Bureau, Bulletin for Professionals, October 2015.

experience when a parent is incarcerated. Comprehending these theories is crucial for academic research as well as for guiding the development of successful interventions, policies, and support networks. It assists stakeholders, including legislators, educators, child welfare specialists, and law enforcement, in creating trauma-informed, kid-sensitive strategies that lessen harm and foster resilience in kids whose parents are incarcerated. In the end, these ideas serve as a basis for promoting a comprehensive, rights-based framework that acknowledges and attends to the various needs and vulnerabilities of impacted children.

3.3 Impacts of Parental Incarceration

Incarceration is not a single event but a dynamic process. The family members of the incarcerated individual members are often referred to as the hidden victims. The most vulnerable group is the children. It is well established that early childhood years are most critical for physical, emotional, social, and cognitive development.⁹² The effects of incarceration can be both short-term and long-term. While analyzing the impacts, it is critical to consider factors such as whether the child is living with the parent at the time of incarceration, whether a single or two-parent household is involved, and, in the case of a two-parent household, which parent is incarcerated.⁹³ From the statistics, it can be seen that children live with their mothers before incarceration. Thus, the incarceration of the mother affects children more than the incarceration of the father.

3.3.1 Stigma and social isolation

Children, due to their association with the imprisoned parent most often face social isolation and stigma. Unlike “other contexts of loss such as death or illness, loss of a family member because of incarceration seldom elicits sympathy and support from others” and the “stigma and feelings of isolation associated with being the family of a prisoner, of being contaminated in some way by the deeds of the offender, is central to many of the difficulties that children and families face.”⁹⁴ The way children react to these

⁹² UNICEF. Early Childhood Development: Real Life Stories from Around the World [Internet]. New York: UNICEF; 2011. Available from https://www.unicef.org/media/145336/file/Early_Childhood_Development_-_UNICEF_Vision_for_Every_Child.pdf Accessed on January 20, 2025.

⁹³ Ross D. Parke & K. Alison Clarke-Stewart, Effects of Parental Incarceration on Young Children, in From Prison to Home: The Effect of Incarceration and Reentry on Children, Families, and Communities (U.S. Dep’t of Health & Hum. Servs., Dec. 2001).

⁹⁴ Joyce A. Arditti et al., Saturday Morning at the Jail: Implications of Incarceration for Families and Children, 52 FAM. REL. 195-196 (2003).

situations is subject, and it varies depending on the child. Some children tend to be more open about the situation. However, some children tend to isolate themselves from the rest of society and not even inform other family members about the arrest. The incarceration makes the children ‘hide’ the fact that their mother or father is in prison due to fear of stigma which can further lead to a lot of mental health issues. However, at the same time being open about the imprisonment can also have negative effect on the child’s well-being.⁹⁵

Stigma and the fear of stigma can affect the children, which in turn causes anxiety and stress. They also experience bullying and feel marginalized. A study concluded that COIPs feel stigma from their peers and they tended to label children whose parents are incarcerated as being less competent than children whose parents are away for other reasons.⁹⁶ The primary emotion that is connected to stigma is shame. COPE network study found that stigma is recognised across various European countries where children’s coping strategies included dissociation from the guilt of the imprisoned parent, talking to other children of prisoners, and whitewashing, avoiding negative feelings. The COPING project also found that primary caregivers in the UK were less open with their children than those in Germany and Sweden, and shame was an important factor in the non-disclosure of information.⁹⁷

Fear of stigma might often lead to criminal activities. It often leads them to perpetual cycles of criminality. They may be exposed to environments where crime is normalized or prevalent and see it as an alternative path to their mental stress. There are instances where other parents consider the COIPs to be criminals and often do not allow their children to have contact with the Children of prisoners because they fear the negative influence of these children.⁹⁸

Parents whose children are living with them in prison in India can put their children up for adoption, but “according to jail officials, no one wants to adopt children whose parents are serving in criminal cases.” Children may not be told about certain issues

⁹⁵ Kristine Amlund Hagen & Barbara J. Myers, The Effect of Secrecy and Social Support on Behavioral Problems in Children of Incarcerated Women, 12 J. CHILD & FAM. STUD. 229, 229-42 (2003).

⁹⁶ Child Welfare Info. Gateway, Children’s Bureau, Bulletin for Professionals (Oct. 2015).

⁹⁷ Adele D. Jones et al., Children of Prisoners: Interventions and Mitigations to Strengthen Mental Health (Univ. Of Huddersfield 2013).

⁹⁸ S.N. Hannem, Marked by Association: Stigma, Marginalization, and the Families of Male Prisoners in Canada (unpublished Ph.D. dissertation, Carleton Univ. 2008).

relating to their imprisoned parents, such as any mental health problems affecting the parent, due to the stigma surrounding these issues. This may make it harder for them to fully understand what is happening to their parent.⁹⁹

Murray and Farrington always highlighted the dearth of research in understanding the effects of incarceration on children and encouraged the need for extensive research.¹⁰⁰ Society, schools, government, and judiciary plays a crucial role in eliminating the stigma and social isolation surrounding COIP. More research should be conducted in order to address the trauma the children face and to find ways to reduce the negative effects of parental incarceration.

3.3.2 Financial Difficulties

Parental imprisonment affects the financial condition of a family. The children are left with restricted economic resources available for their support. Imprisonment causes financial strain on families due to changes in employment circumstances and benefit provision, the expense incurred by families by providing money and clothing for prisoners, and visiting costs. This puts the children at risk of relative poverty or exacerbates the existing poverty. Incarceration of the mother proved to be more detrimental in cases where they were the sole breadwinner or when the father did not live with them. The economic strain created by incarceration might cause a change in the father's traditional role as a provider.¹⁰¹

There are evidences of increased risk of debt for families due to financial disruption caused by loss of income and pressure on inadequate incomes and explains that financial difficulties experienced by prisoners' families are compounded by the new expenses they incur, including sending money to prisoners, phone calls and visiting prisoners.¹⁰² Parental incarceration promotes child homelessness by disrupting familial finances. Incarceration is also shown to diminish employability after the release of the parent from prison, making the children vulnerable. For instance, under federal laws, a

⁹⁹ Joseph Murray, *The Cycle of Punishment: Social Exclusion of Prisoners and Their Children*, 7 *CRIMINOLOGY & CRIM. JUST.* 55, 59 (2007).

¹⁰⁰ Joseph Murray & David P. Farrington, *The Effects of Parental Imprisonment on Children*, *CRIME AND JUSTICE* 133- 206 (2008).

¹⁰¹ Cynthia F. Hairston, *The Forgotten Parent: Understanding the Relationships Between Incarcerated Fathers and Their Children*, 77 *CHILD WELFARE* 617- 639 (1998).

¹⁰² Peter Scharff-Smith & Lucy Gampell eds., *Children of Imprisoned Parents* (The Danish Institute for Human Rights et al. 2011).

parent convicted of a drug offense is prohibited from obtaining food stamps, cash aid, or subsidized housing. This affects the family members of the accused causing disruption to the family. In order to maintain contact with the incarcerated parent, the family has to incur significant costs. The family of prisoners incur one- third of their income on sending letters, cards and visits to prisons.¹⁰³

In India, interviews were taken among the women who were left behind to look after the children as the fathers were imprisoned or as the caretakers/ relatives of the children. One such instance was the case of Vimal, Neha, and Samir who were forced to live in a semi-pucca house in a resettlement colony with their mother. Their father was incarcerated 6 years ago. The mother was allowed to work in a hospital but was dismissed from her job when they got to know about the father's imprisonment. Now, she works as a house helper far away in order to protect her identity and to maintain the expenses of the children.¹⁰⁴ PRAYAS project conducted by TISS has taken interviews of women undertrial prisoners and children between 6-18 years of convicted prisoners. The financial challenges are manifested in having to borrow money to meet basic necessities or taking them on credit or managing without them, skipping meals, dropping out from school or entering of children into the labor force.¹⁰⁵ In some cases, families are forced to mortgage the house and in some cases the women find it challenging to retain their houses.

3.3.3 Mental and Emotional Distress

Mental distress can arise at every point, from arrest to imprisonment. It affects both the prisoners as well as the families of the prisoners. The emotional consequences on children are contingent on whether the child is able to understand the implications of imprisonment, the duration of imprisonment, the pre-incarceration relationship with the caregiver, and single or repeated incarceration (with first-time incarceration of the mother having a profound effect on the child). There are circumstances where the child is uninformed about the parental arrest which can have adverse effects on the mental

¹⁰³ O. Grinstead et al., The Financial Costs of Maintaining Relationships with Incarcerated African American Men: A Survey of Women Prison Visitors, 6 J. AFR. AM. MEN 59, 59–69 (2001).

¹⁰⁴ Available at <https://timesofindia.indiatimes.com/city/delhi/hope-floats-for-kids-of-convicts-facing-hardships/articleshow/79318083.cms> , Accessed on February 1, 2025.

¹⁰⁵ PRAYAS, Forced Separation: Children of Imprisoned Mothers (An Exploration in Two Cities) (2002).

and emotional stability. The non-disclosure can lead to the feeling of betrayal among the children.

Research has found that parental incarceration in childhood can lead to mental illness in adulthood. Causal explanations of mental health problems in adult children of prisoners are, therefore, quite distinct from causes that may provoke depressive responses in childhood.¹⁰⁶ The lack of shared interaction with the parents could impair their acquisition of capabilities necessary for healthy long-term physical, socio-emotional, and cognitive development resulting in a lifelong vulnerability to mental illness. A study that was conducted on youth with incarcerated mothers reported that 75% of the children had symptoms characterized as trauma-related stress. These reactions included trouble in sleeping, concentrating, and signs of depression. Some children become withdrawn, are affected by increased health problems and regressive behavior such as bed-wetting, suffer worsening performance and attendance rates at school or display increased aggression, antisocial or criminal tendencies.¹⁰⁷

Some children experience post-traumatic stress, which is similar to children whose parents have died. Stress due to incarceration is much more difficult than separation due to death because the former is ambiguous. Children are confused about their feelings as to how to grieve the loss of a parent who is physically and emotionally absent.

3.3.4 Education

Education suffers a significant setback. Lack of funds to cover school fees, uniforms, books, and other necessities, or even to offer additional academic support, can make it difficult for children to stay enrolled in school. Temporary educational interruption may also come from residential changes brought on by parental incarceration. It has also been found that these children develop disciplinary issues at school, which increases the risk of suspension and expulsion. Article 26 of the UDHR affirms that “everyone

¹⁰⁶ Gaston, S., The Long-Term Effects of Parental Incarceration: Does Parental Incarceration in Childhood or Adolescence Predict Depressive Symptoms in Adulthood? 43 CRIM. JUST. & BEHAV, 1056–75 (2016).

¹⁰⁷ Ann Cunningham, Forgotten Families – The Impacts of Imprisonment, 37(2) FAM. MATTERS 37 (Winter 2001).

has a right to education.”¹⁰⁸ All children are equally entitled to education irrespective of the status of their parents.

Agnew conducted a study on students with incarcerated parents and students with parents who have not been incarcerated will be compared. He concluded that parental imprisonment has an impact on young students’ misbehavior, such as receiving failing grades, missing class, and negativity about education as a whole.¹⁰⁹ Children who experience parental incarceration tend to have lower IQs and unsatisfactory standardized test scores than children who are not introduced to this familiarity. Further, the extension of period of imprisonment can be linked to a greater likelihood and incidence of truancy-a key predictor of academic failure.¹¹⁰

For children 3-to-5 years old, parental incarceration reduces multiple measures of school readiness: early learning skills, self-regulation, social-emotional development, and physical health and motor development.¹¹¹ During elementary and middle school, parental incarceration is associated with lower cognitive skills and behavioral problems. When the children reach adolescence, they have lower grade point averages.

3.3.5 Intergenerational Crime and Delinquency

The association between parental imprisonment and children’s adulthood offending risk has been one of the oldest foci in the parental imprisonment literature.¹¹² Most of the research in this area suggests that there is a gendered reaction among children to the incarceration of parents. In a study conducted by Dallaire, children of incarcerated mothers were two-and-half-times more likely to be incarcerated as adults than children with incarcerated fathers.¹¹³ Children tend to act more aggressively in their social relationships. There have been studies that proved that boys reacted differently and

¹⁰⁸ Universal Declaration of Human Rights art. 26, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948).

¹⁰⁹ Samantha Kassen, Incarcerated Parents’ Effect on Children’s Education and Mental Health Explained by Agnew’s Strain Theory, 29 Scholars: McKendree Univ. Online J. Undergrad. Res (2017). Available at <https://www.mckendree.edu/academics/scholars/kassen-issue-29.pdf>, (last accessed on Jan. 12, 2025).

¹¹⁰ H.V. Miller & J.C. Barnes, The Association Between Parental Incarceration and Health, Education, and Economic Outcomes in Young Adulthood, 40 Am. J. Crim. Just. 765 (2015).

¹¹¹ Anthony Testa & Dylan B. Jackson, Parental Incarceration and School Readiness: Findings from the 2016 to 2018 National Survey of Children’s Health, 21 ACAD. PEDIATRICS 534, 534–41 (2021).

¹¹² Murray, Joseph, and David P. Farrington. “The Effects of Parental Imprisonment on Children.” CRIME AND JUSTICE 37, no. 1 (2008): 133–206.

¹¹³ Danielle H. Dallaire, Incarcerated Mothers and Fathers: A Comparison of Risks for Children and Families, 56 FAM. REL., 440–53 (2007).

more physically than girls whose parent(s) were incarcerated. Girls tend to be more distressed and internalize their emotions about their mother's incarceration.

Long -term victimization plays a massive role in internalizing criminal behavior. Oppression and labelling, along with long-term trauma, can lead to juvenile and adult criminality later in life.¹¹⁴ In addition, adolescents may express their emotional and psychological trauma by engaging in minor crimes and delinquency, participating in inappropriate sexual activity, harming themselves, acting aggressively towards others, or engaging in substance use/abuse.¹¹⁵

3.4 The plight of children inside prisons

Children inside prisons become secondary victims of the criminal justice system. They get there either along with their parents or when they are born there. The limit of age and maximum stay differs from country to country.¹¹⁶ In India, children can be with their mothers until they are six years-old. According to the Prison Statistics of 2022, there are 1,537 women prisoners with 1,764 children as of 31st December 2022. Among these women prisoners, 1,312 were undertrial prisoners who were accompanied by 1,479 children and 198 were convicted prisoners who were accompanied by 230 children. Uttar Pradesh has the highest number of women prisoners with children. Kerala has the least number of women prisoners with children (three women with three children).

In 2005 the UN released a report titled "Babies and Small Children Residing in Prisons" which studied about the children inside the prisons in several countries. The Report highlighted that the information on children residing in prisons is not systematically recorded, no agreed practices exist on how to manage the children's affairs, and children are not sufficiently considered when organizing prison facilities and activities.¹¹⁷ Children inside the prison live in more restrictive conditions. They are subjected to differential treatment and bias. They are most often considered criminals even when

¹¹⁴ Kirstie S. Weyland, *Parental Incarceration and Juvenile Delinquency: The Role of Gender* (2021) (unpublished thesis, Brigham Young Univ.), Theses and Dissertations 9021.

¹¹⁵ *Id* at 112.

¹¹⁶ European Action Research Committee on Children of Imprisoned Parents, *Children of Imprisoned Parents: Family Ties and Separation, Report on the Situation in Eight European Countries* (1996).

¹¹⁷ United Nations, *Babies and Small Children Residing in Prisons* (2011).

they are only accidental victims of crime. They have limited opportunities for development.

3.4.1 Overcrowding of prisons

Overcrowding of prisons is the result of criminal justice policy, which does not allow the prisons to meet the basic human needs of prisoners and children who live with their parents in those prisons. India's prison system faces numerous challenges, including overcrowding, trauma genic conditions, and inadequate facilities.¹¹⁸ These concerns affect women more than men in a harsh way. There are frequent instances of children getting transferred due to overcrowding with their mothers from one prison to another, which leads to their uprooting and unsettling. Such children become violent and aggressive or, alternatively, show withdrawn behavior in prison. They also become victims of physical beatings by their mothers, who sometimes take out their frustrations on their loved ones.¹¹⁹ These children are only exposed to police and prison officials and often show fear of men. The prison often lacks separate rooms for female inmates and children, impacting their development. The research revealed that the lack of a family environment has a detrimental effect on the social development of children, as they are deprived of the chance to engage in playing with siblings and learn and adopt familial values and norms, particularly in correctional facilities.¹²⁰ These children often show signs of difficulty in recognition of alphabets and numbers. They also show difficulty in communicating and understanding age-appropriate instructions. The overcrowding also causes health and hygiene issues among children.

For example, Chaibasa and Hazaribagh Jails in India are extremely crowded. It is housing almost three times more than its capacity to hold prisoners. The women prisoners in those jails have to live in an apparent disassociation from their families, once she is imprisoned or under trial. Children are allowed to stay with their mothers till the age of six, and most women are completely unaware about the whereabouts of their children. The conditions inside the prison does not favour the positive development of children who are taken inside the prisons with their parents. Most of

¹¹⁸ https://www.mha.gov.in/en/divisionofmha/Women_Safety_Division/prison-reforms(last accessed on 5th February, 2025).

¹¹⁹ PRAYAS, Forced Separation: Children of Imprisoned Mothers (An Exploration in Two Cities) (2002).

¹²⁰ Neelam Sukhramani & Shivangi Gupta, Children of Incarcerated Parents, 57 INDIAN PEDIATRICS, 199 (2020).

the children were not expressive, some because they were unable to express and because they had meagre communication skills, some children missed their family members, and that they did not like their food as it was meant for adults and there were too few playthings.¹²¹ The other big problem was that the children faced several health problems such as allergies, stomach aches, and often, the medication was not adequate or timely. The biggest problem of dealing with children was that they were 'dressed up' when visitors came and were gently handled, but at other times, they were dealt with harshly.

3.4.2 Lack of special facilities

In prison, facilities to ensure the safety, health, and development of a child are often lacking or inadequate, whilst a number of countries have 'open' prison for mothers with young children, in most cases, children in prisons are unable to interact regularly with the outside community and other family members.¹²² The children must be given appropriate vaccinations and medical care. The prisons must have all the facilities that a nursing mother would typically have in the community and should provide the children with a stimulating and safe environment; mothers should have access to facilities to prepare food for their children. The provisions of running, managing, and administering prisons in India fall under the domain of states¹²³ as per Schedule VII of the Indian Constitution. Thus, the state governments have the monopoly to adopt Model Prison Manuals in accordance with the state's needs and considerations. According to the prison manual, birth in prisons must be avoided, and if not, the service of a midwife must be provided for the mother. If the matron is not trained in midwifery, or when she recognizes additional help, then the maternity and child welfare center authorities shall be requested to depute a midwife to attend any case of confinement in the female ward.

There are various challenges that imprisoned mothers and children face inside the *bachha barrack*, the colloquial Hindi term describing the facility in which incarcerated women live with their children.¹²⁴ Most of these children come from rural families. These children were looked after by their mothers because of the lack of trained

¹²¹ Penal Reforms and Justice Association (PRAJA), *Mental Health and Care of Women and Children in Prison in Andhra Pradesh* (Oct. 2002).

¹²² Bureau of Police Research & Development, *Model Prison Manual for the Superintendence and Management of Prisons in India* (2003).

¹²³ India Const. art. 246.

¹²⁴ Nitasha Natu, "Behind Prison Walls, 'Freedom' for Inmates' Kids," *THE TIMES OF INDIA*, Feb. 25, 2019.

wardens. Only a few jails were provided with creche and nursing facilities. But certain jails had better facilities compared to the rest. Jails in Andhra Pradesh had educational facilities for both women and children which were located outside the jail premises. They had milk provisions and food which suited the children.¹²⁵

A study was conducted in 2016 by the India Vision Foundation called "*Impact Study on Children of Vulnerable Families Project*" in Delhi, which reported the following:

Most children felt helpless in several ways, which leads made their lives even more difficult in a number of ways. (a) The families from where they belong are poor. (b) Even inside the prison premises, they do not get subjected to any preparation for life outside of prison because of their difficult and oppressive upbringing environment. (c) As soon as they touch the age of 6 years, they are again directed back to their houses, outside and into an environment without mothers, or probably any family, which makes it more difficult for them to survive and often results in the absence of any psychological support or any other kind of nourishment.¹²⁶

3.5 Visitation

Prisons make provisions for visitation. The policies for visitation vary from jurisdiction to jurisdiction. Any family visits, which may also include any conjugal kind of visits, are recognized as natural and a right that is there for the prisoners, which cannot be snatched away from them. Some prisons have child- friendly policies for visitations, some fail in providing a nurturing environment for maintaining family contact. Children are not always favored when it comes to visiting policies, and in some cases, they are targeted for exclusion.¹²⁷ For example, New York has a proper standard uniform visiting policy even in high- security prisons. In certain prisons, they offer a child-friendly visiting program called the Family Reunion Program.¹²⁸ The Honourable Supreme Court in *Anuj Chaturvedi v. Jyoti*¹²⁹ said that ‘a child has a right to the affection of both his parents.’ The Court directed the family court ‘to ensure that visitation rights are fixed in such a manner that the child gets to know and love his father.’ The Model Prison

¹²⁵ JAYASREE LAKKARAJU, WOMEN PRISONERS IN CUSTODY (KAVERI BOOKS, 2008).

¹²⁶ Children of Vulnerable Families Project – India Vision Foundation, <https://aws.indiavisionfoundation.org> (2022).

¹²⁷ *Overton v. Bazetta*, 539 U.S. 126, 133 (2003).

¹²⁸ N.Y. Dep't of Corr. Serv., Directive No. 4500, Family Reunion Program, Jan 28, 2009.

¹²⁹ MANU/SC/1725/2019.

Manual reads, ‘Every prisoner shall be allowed reasonable facilities for seeing or communication with their relatives/friends...’¹³⁰

The waiting rooms for children should be child- friendly spaces where they can play with the imprisoned parent. “It is practically impossible for prisoners to talk through the mesh,” he said. “The set-up is so chaotic that mothers never get to speak to their children. So, an arrangement is being made to enable direct contact. We are modifying the present system into a more human-friendly one.”¹³¹ Prison administration should ensure that links between inmates and children outside prison are maintained throughout her incarceration. The place of interaction between inmates and their children living outside prison should be one where easy conversation can take place in a positive environment, where physical contact is possible between mother and child. Overnight visits for minor children living outside the prison to maintain a bond with their mothers must be allowed at least once every quarter. A separate area with a positive homely environment must be provided within the prison for the purpose of this stay with the mother.

Nell Bernstein, in his book, has quoted Dr. Barbara Howard, where she says:

*For babies and small children, window visits (with fiber glass) are more than unsatisfying; they are largely incomprehensible. Touch is more than just a nice thing for a relationship. It is basic to the nurturing process. If you are talking about children under a year of age, your main means of communication is touch. A baby looking through a plate of glass at his incarcerated mother would really be looking at his reflection in the window, not making a connection with the parent at all.*¹³²

Visitation does not always ensure positive effects. Sometimes, visitation can cause emotional trauma and pain. One instance is when a child remarked, “I want to see my father, but I don’t want to see him in prison”.¹³³ Another instance is where a child

¹³⁰ Prison Manual at rule 8.01.

¹³¹ Sukanya Shantha, Growing up in Indian Prisons: Children of Undertrials and a Case of Widespread Neglect, The Wire (May 26, 2016), Available at <https://thewire.in> (last accessed on March 1, 2025).

¹³² Nell Bernstein, All Alone in the World: Children of Incarcerated 14 (The New Press, U.S.A, 2005).

¹³³ Joyce A. Arditti, “A Family Stress-Proximal Process Model for Understanding the Effects of Parental Incarceration on Children and their Families” 5 CFPRP 75 (2016).

remarked, “I’d go visit my father and then had it all taken away from me when I had to leave. It’s traumatic”.¹³⁴

Other than the physical visitations, letters are another method through which the family communicates. Letter writing is considered cost-effective because most families are not able to finance the visits. The Model Prison Manual has incorporated a provision that states that ‘All female prisoners should be permitted, assisted, and encouraged to write letters.’ The word ‘assisted’ has been further elaborated by adding ‘Uneducated or semi-educated female inmates should be provided help in writing letters.’¹³⁵

3.6 Re-entry and Re-integration

Re-entry is one of the most challenging phases after incarceration. A few of the challenges that they face include finding housing, employment, and health care. Many obstacles make it difficult for family members to return to support roles after an inmate returns home, especially for those who have suffered during their absence. Amidst this, restoring the parent-child relationship after incarceration can be particularly complex. The lack of contact during imprisonment adds to the turmoil. Family relationships may have changed as a result of structural alterations. Additional stressors could be brought on by societal stigma associated with incarceration and feelings of shame.

Many fathers also intend to have an active parenting role when they return to the community following incarceration. But this process is not as easy as it seems. In many cases, incarceration seems to result in the irreversible breakup of family bonds, while in other cases, it weakens parent-child connections. Various family and social circumstances influence reunification and connections between detained parents and their children after release. The precise number of parents who lose permanent legal custody of their children while incarcerated is unknown since child welfare organizations do not routinely gather and publish this data.

A study was conducted by the Urban Institute from 2001–2006 about incarcerated individuals’ reintegration following release from state prisons in Maryland, Illinois, Ohio, and Texas. The analysis concluded that the fathers who communicated with their

¹³⁴ *Ibid.*

¹³⁵ Bureau of Police Research and Development, “Model Prison Manual” (2016), Chapter XXVI, Rule 26.97. Available at: Model Prison Manual: Bureau of Police Research and Development, Government of India (bprd.nic.in) (last visited on Aug 25, 2022).

children during their months in prison (including visits and letters) were more engaged in their children's lives following release from prison.¹³⁶

3.7 Conclusion

Children are severely impacted by parental incarceration and become collateral victims of the legal system. The mental distress, social disgrace, financial instability, and educational difficulties they face may have a long-term adverse effect on their well-being and future prospects. The necessity for focused interventions is highlighted by theoretical frameworks like attachment theory, social learning theory, strain theory, and labelling theory, which offer insightful information on how children respond to a parent's incarceration-related absence. There is still a significant gap in providing these kids with complete protection and assistance, even if various government policies and social programs try to address these issues. Analyzing the Indian scenario highlights the legal gaps in the current criminal justice system that makes these children vulnerable than the rest of the population.

¹³⁶ Urban Institute, *Returning Home: Understanding the Challenges of Prisoner Re-entry* (2001–2006).

CHAPTER 4

INVISIBLE VICTIMS: ADDRESSING THE CURRENT LEGAL GAP

4.1 Introduction

*"Convicts are not by mere reason of the conviction denuded of all the fundamental rights which they otherwise possess. Imprisonment in itself is the punishment."*¹³⁷

The Indian criminal justice system frequently ignores the collateral harm done to the families of people who are jailed, especially their children, in favor of concentrating on crime, punishment, and the rehabilitation of offenders. The legal system lacks explicit tools to evaluate or lessen the impact of a parent's incarceration on their children, who endure severe social, emotional, and financial challenges. These children, who are frequently referred to as the 'Cinderella of penology'¹³⁸, endure tremendous psychological trauma, loss of parental care, and displacement, but they are mainly ignored by legal and policy frameworks. Long-term effects include social shame, a lack of educational possibilities, and heightened susceptibility to exploitation when their needs are not met in an organized manner.

The interaction of criminal justice and child welfare is still largely undeveloped in current law and policy, making an analysis of the Indian situation essential. India does not have a unified framework that acknowledges and defends the rights of children impacted by parental incarceration, in contrast to many other jurisdictions where child-sensitive procedures have been incorporated into criminal proceedings. Therefore, to identify the systemic legal and procedural gaps, evaluate the degree of child-sensitivity in laws and institutional practices, and identify areas in need of legislative and administrative reforms, a thorough analysis is required. In addition, it facilitates contextual comprehension grounded in India's distinct institutional and socioeconomic environment, guaranteeing that any suggested actions are both efficacious and pertinent to the local context.

¹³⁷ Sunil Batra (II) versus Delhi Administration 1980 AIR 1579

¹³⁸ G.J. Robinson, The Cinderella Complex: Punishment, Society and Community Sanctions, 18 Punishment & Soc'y 95 (2016).

4.2 Children of Prisoners in India

The population of India is 1.4 billion. Even though India's incarceration rate is lower than that of the US, it still ranks fourth globally in terms of the total number of inmates; some estimates have the country's jail population at about 573,220 in 2024.¹³⁹ In India, COIP can be classified into two groups. There are children who remain in prison along with their mothers for a period of up to six years¹⁴⁰, as well as children who are left behind when one or both of their parents are incarcerated. There may also be a third group of children who were born inside a prison but were forced to leave once they turned six. Every group of these children faces unique difficulties unique to their situations.

4.3 Rights of COIP in India

4.3.1 Constitution of India

The Constitution of India guarantees children certain rights. The Supreme Court has observed in *Laxmikant vs Union of India* that "It is obvious that in a civilized society, the importance of child welfare may not be over-emphasized, because the welfare of the entire community, its growth, and development, depend on the health and well-being of its children."¹⁴¹ Children are a supremely important national asset, and the future well-being of the nation depends on how its children grow and develop.¹⁴² There is a state enabling provision under Article 15(3), which permits the state to create particular measures for children.¹⁴³ By creating an exception to Article 15(1)¹⁴⁴ general non-discrimination principle, this Article permits the State to implement affirmative action policies tailored to the needs of women and children. It provides the constitutional basis for several protective legislation and regulations, including particular clauses pertaining to healthcare, education, and nutrition. Article 21A states that all children between the ages of six and fourteen must receive free, obligatory

¹³⁹ "Incarceration Rates by Country 2024," World Population Review (last accessed on March 7, 2025). Available at: <https://worldpopulationreview.com/country-rankings/incarceration-rates-by-country>

¹⁴⁰ *R.D. Upadhyay v. State of A.P. & Ors.*, AIR 2006 SC 1946.

¹⁴¹ *Laxmikant vs Union of India* AIR 1984 SC 469.

¹⁴² *Id.*

¹⁴³ India Const. Art.15(3): "Nothing in this article shall prevent the State from making any special provision for women and children."

¹⁴⁴ India Const. art. 15(1): "The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, or place of birth or any of them."

education from the state.¹⁴⁵ This Article was inserted under the 86th Constitution Amendment Act, 2002, to give explicit recognition to the right to free and compulsory education for all children between the ages of six and fourteen years. According to Article 39(e) of the Constitution, the State is required to make sure that children of a young age are not mistreated and that they are not coerced into engaging in activities that may not be appropriate for their age and strength because of financial need.¹⁴⁶ The State is required by Article 39(f) to ensure that children are provided with the resources and opportunities they need to develop in a healthy way. Together, Article 39(e) and (f) instruct the State to focus its policies on ensuring that children and young people are shielded from exploitation as well as from material and moral desertion. The Honourable Supreme Court, in the case of *Laxmi Mandal vs Deen Dayal Harinagar Hospital*¹⁴⁷ has held that “motherhood and childhood are entitled to special care and assistance and all children providing for the right to nutrition and medical care of the newly born child including breastfeeding”. According to Article 45, the state is directed to provide early childhood care and education for all children until they complete the age of six years. The states have a primary responsibility to improve public health and raise the standard of life and nutrition of their citizens.¹⁴⁸ It is the duty of the parents to make educational possibilities available to their ward or kid between the ages of six and fourteen.¹⁴⁹

4.3.2 The National Policy for Children, 1974

Children are a nation’s supremely important asset. The Indian government and civil society have worked to fulfill international commitments and guarantee fundamental rights for children by implementing a number of policies and initiatives. This policy starts with a goal-oriented preambulatory introduction, as follows:

"The nation's children are a supremely important asset. Their nurture and solicitude are our responsibility. Children's programmes should find a prominent part in our national plans for the development of human resources, so that our children grow up to become robust citizens, physically fit, mentally

¹⁴⁵ India Const. art. 21.

¹⁴⁶ India Const. art.39(e).

¹⁴⁷ *Laxmi Mandal vs Deen Dayal Harinagar Hospital W.P. (C) Nos. 8853 of 2008*

¹⁴⁸ India Const. art.45.

¹⁴⁹ India Const. art.51A.

alert and morally healthy, endowed with the skills and motivations needed by society. Equal opportunities for development to all children during the period of growth should be our aim, for this would serve our larger purpose of reducing inequality and ensuring social justice."

By granting kids the fundamental rights of survival, safety, development, and participation, these programs seek to foster children's childhood.¹⁵⁰ The policies include¹⁵¹:

- (i) All children shall be covered by a comprehensive health programme
- (ii) Programmes shall be implemented to provide nutrition services with the object of removing deficiencies in the diet of children.
- (iii) Programmes will be undertaken for the general improvement of the health and for the care, nutrition and nutrition education of expectant and nursing mothers
- (iv) The State shall take steps to provide free and compulsory education for all children up to the age of 14 for which a time-bound programme will be drawn up consistent with the availability of resources. Special efforts will be made to reduce the prevailing wastage and stagnation in schools, particularly in the case of girls and children of the weaker sections of the society. The programme of informal education for pre-school children from such sections will also be taken up
- (v) Children who are not able to take full advantage of formal school education should be provided other forms of education suited to their requirements
- (vi) Physical education, games, sports and other types of recreational as well as cultural and scientific activities shall be promoted in schools, community centers and such other institutions
- (vii) To ensure equality of opportunity, special assistance shall be provided to all children belong to the weaker sections of the society, such as children belonging to the Scheduled Castes and Scheduled Tribes and those belonging to the economically weaker sections, both in urban and rural areas

¹⁵⁰ Gov't of India, Dep't of Soc. Welfare, National Policy for Children, No. 1-14/74-CDD (Aug. 22, 1974).

¹⁵¹ *Ibid.*

- (viii) Children who are socially handicapped, who have become delinquent or have been forced to take to begging or are otherwise in distress, shall be provided facilities of education, training and rehabilitation and will be helped to become useful citizens
- (ix) Children shall be protected against neglect, cruelty and exploitation
- (x) No child under 14 years shall be permitted to be engaged in any hazardous occupation or be made to undertake heavy work
- (xi) Facilities shall be provided for special treatment, education, rehabilitation and care of children who are physically handicapped, emotionally disturbed or mentally retarded
- (xii) Children shall be given priority for protection and relief in times of distress or natural calamity
- (xiii) Special programmes shall be formulated to spot, encourage and assist gifted children, particularly those belonging to the weaker sections of the society
- (xiv) Existing laws should be amended so that in all legal disputes whether between parents or institutions, the interest of children are given paramount consideration
- (xv) In organizing services for children, efforts would be directed to strengthen family ties so that full potentialities of growth of children are realised within the normal family, neighbourhood and community environment.

4.3.3 National Charter for Children, 2003

India adopted the National Charter for Children to make sure that every law, policy, program, and administrative system adheres to the principles of child rights as stated in the Indian Constitution and the 1992 United Nations Convention on the Rights of the Child.¹⁵²

There are provisions in place to safeguard children's survival, life, and liberty. Both the State and the community bear responsibility for safeguarding the aforementioned. The community and the state should take the necessary action to

¹⁵² Gov't of India, Ministry of Women & Child Dev., National Charter for Children, 2003 (Feb. 9, 2004).

combat infanticide and feticide, especially against girls.¹⁵³ The state must take action to guarantee that each child has the best possible health and offer preventive and therapeutic services at all levels, including immunization and the prevention of micronutrient deficiencies.¹⁵⁴ The state must take action to safeguard children from any activities that could harm their bodily or emotional well-being. The State and the community will work together to offer social security for kids, particularly for homeless and abandoned children.¹⁵⁵ In addition to providing infrastructural and material support in the form of shelter, education, nourishment, and recreation, the state and community must work to eliminate the underlying reasons that lead to abandoned children and children living on the streets.

4.3.4 National Policy for Children, 2013

The Policy reaffirms the Government's commitment to the realization of the rights of all children in the country. It recognizes every person below the age of eighteen years as a child and that childhood is an integral part of life with a value of its own, and a long- term, sustainable, multi-sectoral, integrated, and inclusive approach is necessary for the harmonious development and protection of children.

- (i) every child has universal, inalienable and indivisible human rights
- (ii) the rights of children are interrelated and interdependent, and each one of them is equally important and fundamental to the well-being and dignity of the child
- (iii) every child has the right to life, survival, development, education, protection and participation
- (iv) right to life, survival and development goes beyond the physical existence of the child and also encompasses the right to identity and nationality
- (v) mental, emotional, cognitive, social and cultural development of the child is to be addressed in totality
- (vi) all children have equal rights and no child shall be discriminated against on grounds of religion, race, caste, sex, place of birth, class, language, and disability, social, economic or any other status

¹⁵³ National Charter for Children, 2003, art 1.

¹⁵⁴ National Charter for Children, 2003, art 2.

¹⁵⁵ National Charter for Children, 2003, art 4.

- (vii) the best interest of the child is a primary concern in all decisions and actions affecting the child, whether taken by legislative bodies, courts of law, administrative authorities, public, private, social, religious or cultural institutions
- (viii) family or family environment is most conducive for the all-round development of children and they are not to be separated from their parents, except where such separation is necessary in their best interest.

4.4 Indian Criminal Justice System

When a crime is committed, the criminal justice system comes into motion. Those suspected of committing the crime are detained or summoned for further investigation after the police start their investigation. The accused is placed under police custody following their arrest. Within twenty-four hours of making an arrest for a non-bailable offense, the investigating officer (I.O.) would go to the proper court to award police or judicial custody, depending on the investigation's needs. Following the conclusion of the investigation, a charge sheet is filed, and the trial starts. The accused is convicted and given a sentencing date if they are found guilty during the trial. Following sentencing, the convicted individual must serve a prison term. The three new criminal laws in India are the Bharatiya Nyaya Sanhita (BNS), Bharatiya Nagarik Suraksha Sanhita (BNSS) and the Bharatiya Sakshya Adhinyam (BSA). The Delhi High Court brought attention to the predicament of children of incarcerated parents in *Brindavan Sharma vs. State*¹⁵⁶ noting that these youngsters frequently become indirect victims of both the crime their parents committed and the punishment they received. The Court observed that even though these children have done nothing wrong, they are regularly denied any financial, social, or emotional help by the State. The Court ordered the State, including the relevant Ministries and Departments, to develop a comprehensive plan to address the needs of these children in light of the lack of a formal support system.

4.4.1 Arrest

Many children come into contact with the police when the parent is arrested. The term 'Arrest' means the taking or detaining in custody by authority of law.¹⁵⁷ Thus, the arrest

¹⁵⁶ *Brindavan Sharma vs. State* 1(2007) DMC 581.

¹⁵⁷ <https://www.merriam-webster.com/dictionary/arrest> (last visited on February 19, 2025).

is a stage of incarceration where the police apprehend or take into custody a person, usually because she/he has been seen or suspected of committing a crime.¹⁵⁸ Chapter V of the BNSS deals with Arrest and the procedures. The arrest brings anxiety, shock, and trauma to the children. These children are the most vulnerable at the point of arrest. Many of the 36 children who watched their mother's arrest experienced symptoms of post-traumatic stress disorder, according to a qualitative study of the children.¹⁵⁹ It was observed that these children had regressed in their development and had developed guilt related to witnessing their mother's arrest. They also displayed signs including altered eating and sleeping patterns, hostile behaviour, and withdrawal.¹⁶⁰

When a person is arrested, the police should inform the arrested person of the full particulars of the offense for which he is arrested or other grounds for such arrest.¹⁶¹ The police officials most often, fail in their duty to inform the children of the arrestee about the reason for the arrest. Every police officer or other person making any arrest under this shall forthwith give the information regarding such arrest and place where the arrested person is being held to any of his relatives, friends or such other persons as may be disclosed or nominated by the arrested person.¹⁶² A research conducted by Asha Bhandari on the women prisoners and their dependent Children of Jaipur and Jodhpur Central Jails in Rajasthan showed that seventy percent of women, i.e., 21, from each jail interviewed said that the authorities were not sensitive towards the presence of their children at the time of the arrest and the arrest would have had a distressful effect on the children.¹⁶³ In the interview conducted by her, many women prisoners stated that they were dragged by their hair in front of their children, which left them traumatized. In the detailed study conducted by PRAYAS, one of the respondents talked about her experience of getting arrested in front of her impressionable young children. She was concerned about her children's welfare throughout her incarceration, including their access to food, shelter, and other necessities.¹⁶⁴ The Supreme Court has laid down in

¹⁵⁸ Available at: <https://en.wikipedia.org/wiki/Arrest> (last visited on February 28, 2025).

¹⁵⁹ The Osborne Association, "Report of the New York Initiative for Children of Incarcerated Parents" (2011).

¹⁶⁰ Jerry Jo M. Gilham, "A Qualitative Study of Incarcerated Mothers' Perceptions of the Impact of Separation on their Children" 27 SWPH 90 (2012).

¹⁶¹ Bharatiya Nagarik Suraksha Sanhita, 2023, S. 47 (India).

¹⁶² Bharatiya Nagarik Suraksha Sanhita, 2023, S. 48 (India).

¹⁶³ Asha Bhandari, Women Prisoners and Their Dependent Children: A Study of Jaipur and Jodhpur Central Jails in Rajasthan, 65 SOCIOLOGICAL BULL. 357, 357–79 (2016).

¹⁶⁴ Tata Institute of Social Sciences, "Forced Separation: Children of imprisoned mothers (An exploration in two cities)" 3 (2002) Available at <https://www.tiss.edu/uploads/files/Dharmadikari.pdf>

Sheela Barse vs State of Maharashtra has laid down the following guidelines to be followed by the police while arresting Women:

(v) the cops must avoid arresting pregnant women and choose the option only if there is no other option as it is not just the matter of the arrested woman but also the safety of the foetus which could get damaged in hustle - bustle. Also, labouring women must never be restrained.¹⁶⁵

The Human Rights Commission in Kerala (KHRC) noted an incident where a person was arrested for a 10-year-old 'simple hurt' case when he was taking his five-year-old son and six-year-old nephew to a dentist. For about an hour and a half, the two little children were left in agony in the car until their grandfather arrived and picked up them.¹⁶⁶ The Human Rights Commission, in its order, directed all police officials to be mindful of the rights of the children while arresting a parent or guardian in their presence. This incident shows that the police who make arrests in the first place themselves do not keep track of these children while effecting arrest. Many times, the arrested person will be illiterate about the legal rights available to them. Women were not aware of the fact that they could take their children along with them when they were arrested. Women arrested in Punjab state were in 2003, allowed to bring children under five years old with them when being arrested, but police regularly arrest them 'without allowing women to communicate with their families. As a result, children (living outside prison) have sometimes spent days alone, unaware that their mother is in prison. The justification given for this was that women were well aware of their rights and did not need to be informed of them at the time of arrest.'¹⁶⁷

Even if they are aware of their rights, sometimes, they are not given a chance to prepare their child before the arrest. In a study, a mother said, 'My younger one was just in his underwear. It was cold, and I had to take him to the police station just like that.'¹⁶⁸ This points out the lack of a robust official protocol to make arrangements for children at the time of arrest. Sometimes, the police take the children unlawfully into custody to force their parents to surrender. The facts of Saheli, A Women's Resource v. Commissioner

¹⁶⁵ Sheela Barse vs State Of Maharashtra AIR 1983 SC 378.

¹⁶⁶ <https://www.newindianexpress.com/states/kerala/2025/Mar/01/kasaragod-woman-gets-triple-talaq-on-whatsapp-after-dowry-torture> (last visited on March 1, 2025)

¹⁶⁷ <https://thewire.in/women/india-women-prisoners-rights> (last visited on March 3, 2025).

¹⁶⁸ Tata Institute of Social Sciences, "Forced Separation: Children of imprisoned mothers (An exploration in two cities)" 3 (2002).

of Police¹⁶⁹ also show that police officers took Kamlesh Kumari's children to the police station and threatened her with their continued detention unless she vacated the premises. The children were only released later after the intervention of her lawyer. However, later the nine-year-old who tried to protect her mother died at the hands of police abuse. In the classic case of *Afzal and Another v. State of Haryana and Others*,¹⁷⁰ the police at the Ambala cantonment illegally detained two minors, Afzal and Habib, in order to get Rahim Khan, the father of one of the boys and a suspect in fraud and forgery cases, to turn himself in. The Court observed that law enforcement officials, who are supposed to be trustworthy and disciplined, had acted in this way with "compunction," demonstrating a serious lack of regard for their responsibilities. In addition to highlighting the need for law enforcement to respect moral and legal norms without violating the rights of minors, this case highlights the judiciary's role in defending children's rights, particularly those impacts of their parents' legal circumstances.

Different police stations have different Arrest Memos. The Arrest Memos provide details of the arrestee, his place of residence, time and date of arrest, name of the witness and the relation of that witness to the arrestee. These details are common in all arrest memos. It is to be noted that none of them ask for information about the arrestee's children. In the case of *the High Court on its own Motion v. The State of Maharashtra*¹⁷¹, the High Court tackled the crucial matter of protecting the rights of children whose mothers are incarcerated. The court underlined how important it is for law enforcement to keep track of children's locations when their mothers, especially those who are awaiting trial, are placed in judicial custody. The need for inclusion of the dependent's details in the arrest memo is essential to reduce the negative effects. Therefore, it is imperative that Indian state governments create a standard operating procedure (SOP) that specifies how law enforcement personnel should handle the children of the arrested parent both during and after the arrest.

The Police officials are not trained on how to deal with children before and during the arrest. The Model Prison Manual, 2016, aims to reflect the Supreme Court's rulings, the Constitution's provisions, and other laws and regulations controlling prison administration. It also reflects the best practices from prisons around the nation. While

¹⁶⁹ *Saheli, A Women's Resource v. Commissioner of Police* (1990) 1 SCC 422.

¹⁷⁰ *Afzal and Another v. State of Haryana and Others* 1996 SCC (7) 397.

¹⁷¹ *High Court on its own Motion v. The State of Maharashtra* MANU/MH/1886/2016.

it emphasizes training for prison officials, it does not mandate training for police officers on child-sensitive arrest procedures. The Bangkok Rules and the UN Convention on the Rights of the Child (CRC) are two examples of international norms that place a strong emphasis on reducing the pain that children experience when their parents are arrested. Nevertheless, these clauses are absent from the Model Prison Manual, nevertheless.

4.4.2 Police Lock-Ups

The children who accompany their mother or father to prison are forced to stay in overcrowded and unhygienic conditions. They are not provided proper amenities and are treated like the arrested. The provision states that the authorities must treat the children of women who are being held in custody as innocent and must consciously protect their rights and privileges. The Manual states that if a woman is arrested while carrying a child, the child should be permitted to stay with the mother and arrangements should be made to see to the child's and mother's medical needs, with the assistance of any non-governmental organization, the government's welfare department, or the appropriate department of government.

Children who are taken by their parents to the police lock-ups should be provided with basic amenities. The National Commission for Protection of Child Rights (NCPCR) has published recommendations supporting the establishment of police stations that are friendly to children.¹⁷² These recommendations specify that children must never be handcuffed, restrained, or confined in lock-ups under any circumstances. They further stress that children should not remain at police stations overnight and must be given sufficient resources to guarantee their welfare during any required interactions.

In a judgment, Rule 114- A was inserted in the Bombay Police Manual.¹⁷³ Sub Rule (3) (4) lays down as follows:

"(3) If any woman is arrested and taken into custody by the police for remand along with her child, which needs breastfeeding, then the fact that the accused

¹⁷² National Commission for Protection of Child Rights, Guidelines for Establishment of Child-Friendly Police Stations: Laws Prescribing 'Child-Friendly' Procedures, Processes, Conduct and Establishment (2017). Available at: https://ncpcr.gov.in/uploads/165753842162cc07750a4a2_guidelines-for-establishment-of-child-friendly-police-stations-911-kb.pdf

¹⁷³ Criminal Writ Petition No. 38 of 1984, Bombay High Court.

has a suckling child should be invariably mentioned in the arrest Panchnama, remand yadi, and other relevant police records.

(4) While such a child is in Police custody along with its mother, all reasonable care should be taken for the welfare of the suckling child by providing milk, food, required clothes, clothing, bedding, etc., and the necessary medical aid."

The established policies and regulations are not being fully implemented as intended. In our country, we tend to advocate for extensive legislation while minimizing actual enforcement. The key issue lies in the execution of policies, which highlights the shortcomings of the entire legislative process. In our society, there is no system in place that ensures checks and balances for the enforcement of laws or programs. There is no organization responsible for the oversight of those tasked with enforcement. This situation arises from a combination of inadequate political commitment, negligence by governmental bodies, and society's overall attitude towards children.

4.4.3 Pre-Trial

A parent's arrest does not imply that they will be imprisoned. Suspects are not always charged and prosecuted after an arrest. Not every prosecution proceeds to trial. Not every trial ends with a guilty verdict. Furthermore, not every conviction leads to jail time. At every level, officials can evaluate which solutions will best protect the child's best interests and prevent any future harm associated with the (alleged) offense. Those who are arrested and accused may be subject to pre-trial measures during the time between their arrest and trial or sentencing. They could be released from custody pending trial or permitted to live in the community (with or without limitations). In addition to the fact that childcare duties may be a sign that alleged perpetrators are unlikely to flee and that restrictive measures (such as pre-trial imprisonment) are therefore unneeded, the effect of such restrictions on children is rarely taken into account. It is crucial that any community-based, non-custodial measures account for childcare obligations.¹⁷⁴ In some countries, alternatives to pre-trial detention are allowed when a woman has children or childcare responsibilities.

¹⁷⁴ U.N. Office on Drugs & Crime, Toolkit on Gender-Responsive Non-Custodial Measures (2021).

4.4.4 Court and Sentencing

The penalty imposed and the verdict of a trial can significantly impact the offender's children, both those who later reside in jail alongside the parent who was found guilty and those who are still out. Given this and the duty under international law to consider the child's best interests in all decisions pertaining to them, several nations either mandate or provide judges the authority to consider the needs and best interests of the children when determining appropriate sentences. When sentencing, some courts will consider the impact of a sentence on any children, while others do not, for a variety of reasons. In India, the magistrate is not required by Bharatiya Nagarik Suraksha Sanhita (BNSS) to verify if the accused has dependent children or to look out for their wellbeing. Due to judicial discretion, children may be ignored in court cases unless an arrestee expressly brings up the matter. In the event that the magistrate issues additional police remand or judicial custody, he shall, if required, provide the police officers with the proper instructions about the arrestee's children. Many women, particularly those from underrepresented groups, are unaware that they have the right to voice concerns regarding the care of their children while they are being tried. In the case *State of Himachal Pradesh v. Nirmala Devi*,¹⁷⁵ two mitigating circumstances were pressed into service by the respondent, one of which is that she is a woman and has three minor children.¹⁷⁶ The trial court awarded a simple sentence of two years imprisonment for each of the three offenses, to be served concurrently.

In 2014, PRAYAS was named an Amicus Curiae in the Suo Moto Public Interest Litigation (PIL) over the treatment of female inmates' children that was filed in the Bombay High Court. In its contributions, Prayas emphasized the need for improved facilities, safety, and welfare for both children incarcerated and those who are left outside. The court's 2017 ruling included a number of recommendations for guaranteeing the rights and well-being of female inmates and their offspring. The High Court ordered that the charge sheet and station journal contain information regarding the arrested woman's property, including her home and land. If the arrested lady has no family to care for her home or property, the police should notify the remand or trial court and lock down the area until the woman is released from detention or gives

¹⁷⁵ *Nirmala Devi v. State of H.P.*, SLP (Crl.) No. 9777 of 2022.

¹⁷⁶ *State of Himachal Pradesh v. Nirmala Devi*, MANU/SC/0411/2017.

permission for someone else to utilize her land or property. These highlight that the minimal efforts by the judiciary and police can make a long-lasting impact on reducing the sufferings of the children of incarcerated parents who fall victim to the criminal justice system. Children of incarcerated parents must meet their parents in the degrading environments of prison and courtrooms, where they are unable to touch, feel, hear, or discuss their issues with their parents without fear of being scrutinized by hundreds of pairs of eyes. On the other hand, family courts are being redesigned globally to provide kids with friendly, understanding, and encouraging environments.¹⁷⁷ Visiting courtrooms is challenging for young children.

The Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter referred to as 'JJ Act'), which is considered the comprehensive law on child care in India, does not explicitly define children of incarcerated parents as a distinct category, but it indirectly includes them under the definition of CNCP. According to Section 2(14) of the Juvenile Justice (Care and Protection of Children) Act, 2015, a child is deemed to be in need of care and protection if they are without any home or settled place of abode and without any means of subsistence, or are found living with a person who has injured, exploited, abused, or neglected them, or who is unfit or unable to care for them.¹⁷⁸ The definition also includes children who are orphaned, abandoned, surrendered, or have parents or guardians who are unfit or incapacitated to take care of them. According to Section 27 of the Act, a child may fall under this description and be placed under the care of the Child Welfare Committee (CWC) in situations where a single parent is incarcerated and no appropriate guardian is available.¹⁷⁹ In the case of *Smt. Rekha vs State Of U.P.*,¹⁸⁰ the Allahabad High Court emphasized that the children of prisoners who live in jails with the imprisoned parent are also liable to be produced before the CWC and the jail authorities and the police authorities fall within the description of "any public servant" under the provision.¹⁸¹ Nevertheless, there is no automated system in place to guarantee that each child impacted by parental detention is located and given the proper care. Unlike in some jurisdictions where courts and

¹⁷⁷ Smriti Singh "Family Court Soon in Dwarka", Times of India, April 26, 2009. <https://timesofindia.indiatimes.com/city/delhi/family-court-soon-in-dwarka/articleshow/4449390.cms> (last accessed on Feb. 28, 2025)

¹⁷⁸ Juvenile Justice (Care and Protection of Children) Act, 2015, § 2(14) (India).

¹⁷⁹ Juvenile Justice (Care and Protection of Children) Act, 2015, § 27 (India).

¹⁸⁰ *Smt. Rekha vs State Of U.P.*, CrI. Rev No. 1537 of 2021

¹⁸¹ Juvenile Justice (Care and Protection of Children) Act, 2015, § 31 (India).

police are required to immediately notify child protection agencies when a sole caregiver is arrested, the JJ Act lacks a mandatory process for identifying and assisting such children. This gap often results in children being left in vulnerable and unmonitored conditions, sometimes even ending up in child labor or human trafficking networks.

The other highlights of the order which was passed in the Suo Moto PIL filed by Prayas are as follows:

- Department of Welfare of Children's Development (DWCD) to take steps to recognize at least one NGO in each district to work with women prisoners and their children left outside.
- DWCD shall appoint one full-time lady Probation Officer in all women's sections of Central Prisons and major District Prisons like Byculla and Kalyan.
- Government may consider increasing the budgetary allocation of grant-in-aid scheme for released prisoners from Rs. 12 lakhs per annum to at least Rs. 2 crores per annum. Government may consider increasing the grant amount under the Bal Sangopan Yojana (under DWCD) from the current Rs. 425/- per child per month, to Rs. 1,000/- per child per month.
- Installation of refrigerators in the women's sections to keep milk for children of female prisoners.
- The state is directed to consider creating a post of DIG Prison (Welfare and Rehabilitation) in the Prison Department, to look into the welfare and rehabilitation needs of prisoners and their children, and take necessary action in the near future.
- It is directed that women prisoners should be transferred to the district where their children are living, at least once in every three months so that they can meet their children. Accordingly, the State should take steps to make effective changes to the Prison Manual.
- At the time of an under-trial woman being transferred from police to judicial custody, the police should specify details about the location and address of her children's residence or the name and address of institution where they are admitted.

- These details should be entered in the station diary and charge sheet. At the time of arrest of a parent who is accused of the murder of his/her spouse, and if a child is a witness to the murder, the police should inform a DLSA lawyer or Probation Officer to remain present during questioning of the child.

4.4.5 Prisons

In India, issues pertaining to children are included in the "Concurrent" list, whilst "prisons" are included in the "State" list. The management and administration of Prisons fall exclusively in the domain of the State Governments and are governed by the Prisons Act of 1894 and the Prison Manuals of the respective State Governments. Thus, States have the primary role, responsibility, and authority to change the current prison laws, rules, and regulations. The Model Prison Manual 2016 was drafted by the Bureau of Police Research and Development, Ministry of Home Affairs, Government of India, which the states are supposed to adopt with necessary modifications (as per their local context). The suggestions in the Manual relating to children of prisoners are as follows:

- A crèche and nursery school should be set up in every prison where children are present.
- Once the child crosses the age limit of 6 years, he/she should be placed in care of the family of the prisoner or in protective custody at an appropriate children's home.
- The process of removal of the child from the mother's care must be done with sensitivity towards the needs of the child and only after ensuring that adequate alternative arrangements for the child have been made.
- Prison administration should ensure that their facilities are tailored towards children living under their care.

The rights of these vulnerable groups were not considered until the Honourable Supreme Court released guidelines in the R.D. Upadhyay case. The Apex Court, after carefully examining the neglected attitude of governments, had rendered a landmark verdict that recognizes the children of prisoners as a distinct group. The Hon'ble Supreme Court has recognized certain rights of pregnant women prisoners, which includes the following:

- Before sending a woman, who is pregnant to a jail, the concerned authorities must ensure that jail in question has the basic minimum facilities for child delivery as well as for providing pre- natal and post-natal care for both, the mother and the child.
- When a woman prisoner is found or suspected to be pregnant at the time of her admission or at any time thereafter, the lady Medical Officer shall report the fact to the superintendent. As soon as possible, arrangement shall be made to get such prisoner medically examined at the female wing of the District Government Hospital for ascertaining the state of her health, pregnancy, duration of pregnancy, probable date of delivery and so on. After ascertaining the necessary particulars, a report shall be sent to the Inspector General of Prisons, stating the date of admission, term of sentence, date of release, duration of pregnancy and possible date of delivery.
- Gynaecological examination of female prisoners shall be performed in the District Government Hospital. Proper pre-natal and post-natal care shall be provided to the prisoner as per medical advice.
- As far as possible and provided she has a suitable option, arrangements for temporary release/parole (or suspended sentence in case of minor and casual offender) should be made to enable an expectant prisoner to have her delivery outside the 10 prisons. Only exceptional cases constituting high-security risk or cases of equivalent grave descriptions can be denied by this facility.

Further, the Hon'ble Supreme Court, inter-alia, observed as follows:

- Births in prison, when they occur, shall be registered in the local birth registration office. But the fact that the child has been born in the prison shall not be recorded in the certificate of birth that is issued. Only the address of the locality shall be mentioned.
- As far as circumstances permit, all facilities for the naming rites of children born in prison shall be extended.
- Female prisoners shall be allowed to keep their children with them in jail till they attain the age of six years.

- Children in jail shall be provided with adequate clothing suiting the local climatic requirement for which the State/U.T. Government shall lay down the scales.
- State/U.T. governments shall lay down dietary scales for children keeping in view the calorific requirements of growing children as per medical norms.
- A permanent arrangement needs to be evolved in all jails, to provide separate food with ingredients to take care of the nutritional needs of children who reside in them on a regular basis.
- Separate utensils of suitable size and material should also be provided to each mother prisoner for using to feed her child.
- Clean drinking water must be provided to the children. This water must be periodically checked.
- Children shall be regularly examined by the Lady Medical Officer to monitor their physical growth and shall also receive timely vaccination. Vaccination charts regarding each child shall be kept in the records. Extra clothing, diet and so on may also be provided at the recommendation of the medical officer.
- In the event of a woman prisoner falling ill, alternative arrangements for looking after any children falling under her care must be made by the jail staff.
- Sleeping facilities that are provided to the mother and the child should be adequate, clean and hygienic.

However, the truth is that most of the jails fail to comply with these guidelines. However, children's growth and development are not supported in the prison environment. Due to overcrowding and a lack of sanitary facilities, clean water, and sufficient food, the jail atmosphere is dangerous for the children. The absence of play, learning, and socialization opportunities in prisons impairs the children's cognitive and locomotor development. The Supreme Court directed each State Government/Union Territory to set up a committee consisting of several government functionaries. It further issued a notice in an application to include the senior most lady judicial officer in the district and Women's Jail Superintendent, wherever possible as part of this Committee to give a fair assessment of the available security measures, hygiene

measures, health care infrastructure, welfare of women prisoners and facilities for children lodged with their mothers in jails in each district.¹⁸²

The Allahabad High Court made a significant advancement in protecting the welfare of female inmates and their offspring in *Bachchey Lal v. State of Uttar Pradesh & Ors.*¹⁸³ The court underlined the necessity of consistent medical care and nutritional support, acknowledging the vulnerability of women in prison and their wards. The court sought to close the healthcare service gap for female detainees and their children living in prisons by ordering the Secretary (Health) to schedule weekly or biweekly visits by female physicians. But the reality is distorting. Asha described her experience in Gurugram jail, where breakfast was served at 7 a.m. and lunch between 8 and 9 a.m.¹⁸⁴ The inmates had to preserve the food to eat when they were hungry. She also stated that during pregnancy, she was given just an extra banana in addition to the regular diet. After delivery, mothers were given an extra 1.25 liters of milk daily for the mother and child, but the milk was not even boiled, and often, it would split by evening. Telangana has come a long way in realizing the special needs of these children through its reforms. “Balamrutham” is the weaning food introduced under ICDS to provide improved supplementary nutrition to children between 7 months to 3 years. The weaning food is a preparation of wheat, chana dal, milk powder, oil, and sugar. It is fortified and thus provides 50% of iron, calcium, vitamins, and other RDA that children require per day.

The National Commission for Protection of Child Rights (NCPCR), set up under the Commissions for Protection of Child Rights (CPCR) Act, 2005, decided to conduct a research study on the ‘Educational Status of Children of Women Prisoners in India.’ To realize this aim, Section 13 (g) of the said Act mandates the Commission to “undertake and promote research in the field of child rights.” Also, Section 31 of the Right of Children to Free & Compulsory Education (RTE) Act¹⁸⁵ and Section 109 of the Juvenile

¹⁸² In Re: Inhuman Conditions In 1382 Prisons, IA 36553/2024, Order dated 16 February 2024.

¹⁸³ *Bachchey Lal vs State of U.P. & Others*, Crl.Writ No. - 2357 of 1997

¹⁸⁴ Sreehari Palliath & Preety Acharya, ‘Living With Imprisoned Mothers, Children Struggle for Normal Childhood’ <https://www.indiaspend.com/8-women-prisoners-children-live-with-them-heres-how-the-system-fails-them> (last accessed on Mar. 1, 2025).

¹⁸⁵ The National Commission for Protection of Child Rights constituted under section 3, or, as the case may be, the State Commission for Protection of Child Rights constituted under section 17, of the Commissions for Protection of Child Rights Act, 2005 (4 of 2006), shall, in addition to the functions assigned to them under that Act, also perform the following functions, namely: -

(a) examine and review the safeguards for rights provided by or under this Act and recommend measures for their effective implementation;

(b) inquire into complaints relating to child's right to free and compulsory education; and

Justice Act¹⁸⁶ has mandated the Commission to monitor the implementation of the provisions of this Act. Given the present living conditions, jails are not the appropriate environment for a child's development. Even if a child is residing with their mother in prison, then the State shall ensure that children enjoy the rights entitled to them, such as, necessary educational facilities, appropriate and wholesome meals, and a typical nurturing environment available to them. These children live in isolation with no communication with the outside world and are forced to live within the prison, surrounded by other female prisoners. Under such circumstances, their mental growth and development tend to get affected. There are states that have developed certain schemes for providing financial assistance for the children of incarcerated parents. The Government of Kerala has an annual budget of Rs 20 lakhs for the financial assistance for education of children of prisoners, Rs 15 lakhs have been sanctioned for the assistance of their basic education and Rs 5 lakh as aid for their professional studies.¹⁸⁷ Special scholarships are being given to the meritorious children of women convict prisoners, in the State of Telangana. The first Anganwadi for children living in prison was set up in Byculla Prison outside the prison premises in 2012 under the Integrated Child Development Scheme (ICDS).

Another issue is that most of the children face difficulties in visiting their parents who are in prison. Chapter VIII of the Model Prison Manual speaks of family visits, mulaqat rules, and efforts to maintain prisoners' links with families. The prisoner shall be allowed to have interviews with his/her family members, relatives, friends, and legal advisers once a fortnight. It recommends child-friendly visiting areas, but compliance is weak across states.¹⁸⁸ The Supreme Court emphasized creating child-friendly visiting areas and facilitating regular interaction between prisoners and their children, especially in the case of women prisoners. Under TADA, 1987, Nalini Sriharan, a defendant in the 1991 Rajiv Gandhi assassination case, was first given the death penalty. But in 2000,

(c) take necessary steps as provided under sections 15 and 24 of the said Commissions for Protection of Child Rights Act.

¹⁸⁶ The National Commission for Protection of Child Rights constituted under section 3, or as the case may be, the State Commission for Protection of Child Rights constituted under section 17 (herein referred to as the National Commission or the State Commission, as the case may be), of the Commissions for Protection of Child rights Act, 2005, shall, in addition to the functions assigned to them under the said Act, also monitor the implementation of the provisions of this Act, in such manner, as may be prescribed.

¹⁸⁷ PTI. (2020). Kerala government grants Rs 20 lakh aid for education of children of prisoners. The New Indian Express. <https://www.newindianexpress.com/states/kerala/2020/nov/07/kerala-government-grants-rs-20-lakh-aidfor-education-of-children-of-prisoners-2220639.html>

¹⁸⁸ Rule 8.01 of Model Prison Manual (2016).

after Sonia Gandhi pleaded for mercy and emphasized that no child should suffer because of a state action, her sentence was reduced to life in prison. In 1992, Nalini, who was pregnant when she was arrested, gave birth to her daughter, Megara, while incarcerated. Megara, who was denied visits for two years, struggled as a child in prison before being transported overseas in search of a better life. This case emphasizes how important it is for children to stay in touch with their parents who are incarcerated. Deep emotional anguish can result from separation during a child's formative years, which emphasizes how crucial visiting rights are to promoting their wellbeing.

The National Crime Records Bureau (NCRB) publishes annual data on prisoners, including statistics on women prisoners who have children living with them inside jail. The Model Prison Manual, 2016, directs the prison authorities to maintain data on the details of the children of female prisoners (both brought inside and those left outside the prison premises) including their names, ages, location, and custody status.¹⁸⁹ However, not all the states have uniformly adopted the directions given in the Manual. The Prison Statistics of 2021 does not include the data on the number of children left outside by the female inmates. The dearth of data is one of main challenges that the criminal justice system faces when protecting the rights of these children. Another issue is that upon admission into the prison, the names of the inmate's family members, including the number of children, their ages, location, and custody/guardianship status, should be entered into the prisoner file management system. However, in India, there is no uniform legal mandate requiring prison authorities to collect and maintain this data systematically.

4.5 Schemes for children of incarcerated by different states

India's various states have developed creative and varied programs to protect the rights and well-being of children whose parents are incarcerated. Although these state-level programs differ in their conception and execution, they show an increasing understanding of the particular risks that these kids confront. Every state has made a specific effort to end cycles of neglect and social exclusion, from Rajasthan's Paalanhaar scheme, which guarantees financial support through guardianship, to

¹⁸⁹ Bureau of Police Research and Development, "Model Prison Manual" (2016). Available at: Model Prison Manual: Bureau of Police Research and Development, Government of India (bprd.nic.in). Chapter XXVI, Rule 26.06.

Odisha's thorough classification of children living in prison or the community, and Andhra Pradesh's model of integrating inmate children into mainstream schools. The necessity for a single national framework that builds on state innovations while guaranteeing universal protection is highlighted by the gaps that still exist in coordination, uniformity, and statewide standardization despite these encouraging advancements.

Table 4.1 Schemes for children of incarcerated by different states

Sl. No	State	Scheme	Eligibility
1	Rajasthan	Paalanhaar Yojana	Children between 0-18 years of parent serving life imprisonment
2	Kerala	Educational Assistance to Children of Prisoners (Pursuing Professional Courses)	Children of prisoners sentenced to life imprisonment or death, belonging to BPL category, with at least 70% marks in Higher Secondary exams.
3	Delhi	Scheme for Financial Sustenance, Education and Welfare of Children of Incarcerated Parents	Children of incarcerated parents in Delhi.
4	Andhra Pradesh	Educational Integration for Inmate Children	Children of incarcerated mothers
5	Maharashtra	Nanhe Kadam Crèches	Children up to six years of age residing in prisons in Pune, Mumbai, Nasik, and Nagpur.
6	Uttar Pradesh	Integrated Child Protection Scheme (ICPS)	Children in need of care and protection, including children of incarcerated parents.
7	Tamil Nadu	Sathya Ammaiya Ninaivu Government Children Homes	Destitute, deserted, and abandoned children, and provisions for children living with their mothers in prisons

The "Paalanhaar" scheme, falls under the Social Justice and Empowerment Department, Government of Rajasthan, for children requiring special assistance and protection between the ages of 0 and 18, particularly children of mother/father serving a sentence of life imprisonment. Under the scheme, a close relative or family member is responsible for the protection and sustenance of these children.¹⁹⁰ An innovative

¹⁹⁰ Social Justice and Empowerment Department, Government of Rajasthan. Palanhaar Yojana (2005).

approach to educate the children of female inmates has been started by Andhra Pradesh Government. The Department has introduced a new strategy whereby inmate children attend schools outside of prison to finish their primary education, ensuring that they receive a regular education in a secure setting and protecting them from punishment for the transgressions of their parents. Karnataka Government established creches and nursery schools catering to the children of imprisoned parents, children of prison staff and children residing in close proximity to the prison. These initiative aims to prevent social isolation among children living in prisons by allowing interaction with children from the local community. It is crucial for creche supervisors (which includes mothers who are imprisoned) to make sure that children of prisoners do not experience stigma from children of communities.¹⁹¹

Recently, the Odisha government released guidelines for the welfare of children whose parents are incarcerated addressing the detrimental effects of parental incarceration on the rights and well-being of their children who are denied many rights and necessities and are stigmatized by society.¹⁹² According to the scheme, children up to six years old who live in prisons with their incarcerated parent have been categorized as ‘children residing in prison’. These children will receive the benefit of the Integrated Child Development Scheme (ICDS). Children whose parent(s) have been incarcerated for at least 60 days and are staying outside jail, have been categorized as ‘children of incarcerated parents residing in the community.’ Children in the age group of 0-6 years residing in prison will be linked to a nodal Anganwadi center (AWC) near the jail and will be provided with supplementary nutrition and immunization facilities in accordance with integrated child protection schemes. Children residing outside the jail will be produced before the Child Welfare Committee (CWC). If the CWC considers the child as a Child in Need of Care and Protection (CNCP), she/he will be provided security and support under different institutional and non-institutional care mechanisms. Children in jail aged six years will also have the same support. The guidelines also state that necessary support will be provided to continue education in government institutions. Necessary support may also be leveraged from the Juvenile

¹⁹¹ U.N. Off. on Drugs & Crime, Handbook on Women and Imprisonment (2d ed. 2014), *Available at* https://www.unodc.org/documents/justice-and-prisonreform/women_and_imprisonment_-_2nd_edition.pdf.

¹⁹² <https://www.thehindu.com/news/national/other-states/odisha-frames-guidelines-for-children-of-incarcerated-parents/article65255492.ece> (Last accessed on March 15, 2025)

Justice Fund for this purpose based on the recommendation of the district magistrate concerned. Even though guidelines have been released, there are many challenges still persisting.

The Ministry of Women and Child Development of the Government of India developed Mission Vatsalya with the goal of protecting and assisting children who are at risk, especially those whose parents are incarcerated. In order to guarantee their mental stability, education, and general well-being, it offers both institutional and non-institutional care.¹⁹³ One of the most significant provisions is the creation of Specialized Adoption Agencies (SAA) on or close to prison premises. These organizations offer care and shelter to children under six who are legally available for adoption. SAAs guarantee the provision of essential care and services to children who need protection but are not up for adoption. Child Care Institutions (CCIs) offer institutional care to children in need, especially those whose parents are incarcerated. According to the needs of the children, these facilities are divided into categories like Open Shelters for short-term care and Children's Homes for long-term rehabilitation. While their parents are serving their sentences, this guarantees that children will have access to food, housing, education, and emotional support. The Aftercare Support program offers support to children who turn 18 while in institutional care until they are 21 years old. Offering financial aid, higher education possibilities and vocational training assists young adults in making the move to independent living and guarantees they have the skills needed to create a stable future.

The Delhi government, in the year 2014, lodged a Scheme for Financial Sustenance, Education and Welfare of Children of Incarcerated Parents. The period of incarceration of a parent whose child is intended to avail of the benefit under the Scheme should not be less than 30 days. The Delhi Commission for Protection of Child Rights launched the 'Scheme for Financial Sustenance, Education & Welfare of Children of Incarcerated Parents'¹⁹⁴ which allocates Rs.3,500 per month for the first child and additional assistance of Rs.3,000/- for the second child. In case of three or more children, the maximum amount granted shall not exceed Rs.6,500 per month. Every child shall be

¹⁹³ Ministry of Women & Child Dev., Gov't of India, Mission Vatsalya, No. CW-II-22/6/2022-CW-II (2022).

¹⁹⁴ Scheme for Financial Sustenance, Education & Welfare of Children of Incarcerated Parents, 2014, s. 5.

entitled to receive assistance till she/he attains the age of 18 years or the parent is/are released from incarceration, whichever is earlier. However, if a child is placed with a fit institution, then such a child will not be entitled to receive financial assistance under the said Scheme. In addition to the financial assistance, the Scheme also promises free education, a protective environment, welfare measures including the passing of orders for sending the child to a fit institution, and free medical and legal aid. The Scheme provides that in order to be eligible, the child's only surviving parent or both parents should be in jail. The presence of either of these two criteria makes the child automatically eligible for the Scheme. A written application has to be made for availing the benefits of the said Scheme. This application can be filed by the child or parent/parents or guardian/fit person along with supporting documents in duplicate. The said application has to be filed either before the office of the Prison Welfare Services being run in jails under the control of the Chief Probation Officer (CPO) or the Legal Services Clinics being run by Delhi State Legal Services Authority (DSLISA) at jails and other places in Delhi or before a court of law where the trial of the incarcerated person is going on. On receipt of such application the prison welfare officer will be informed, who will then gather information from the concerned inmate in the prescribed format and submit it to the Child Welfare Committee (CWC) of the area where the family of such person resides. Upon receiving the application, the CWC (within three working days) will call for a Home Study Report through the Protection Officer (Institutional / Non-Institutional Care) or Legal-cum-Probation Officer in DCPU or Welfare Officer/Social Worker engaged in a government run Child Care Institution. The said report shall reach the CWC within a week of receipt of the order. The CWC shall preferably dispose of the application within 15 days of its filing.

If we examine this process, we can see that it involves the trial court, CWC, DCPU, DSLISA, CPO, and prison welfare officer, among others. However, none of the clauses address how these agencies can work together effectively or how to coordinate with one another. Neither a requirement that one agency notify the other about the status of the case nor a provision for holding regular meetings is present. This lack of coordination slows down the process and makes it impossible for different bodies to work together smoothly. Noting that the current scheme for providing financial assistance to the children of parents who are in jail was unsatisfactory, inaccessible, and lackadaisical, the Delhi Commission for the Protection of Child Rights (DCPCR) has recommended

a slew of amendments to the Scheme. In 2020, the Delhi Commission for the Protection of Child Rights (DCPCR) submitted a special report to the Delhi Women & Child Development Minister, Rajendra Pal Gautam, recommending amendments to the Scheme.¹⁹⁵

The Sathya Ammaiyar Ninaivu Government Children Homes in Tamil Nadu are a state-run initiative aimed at providing comprehensive care and protection to vulnerable children, including those of incarcerated parents. These homes offer free shelter, food, clothing, medical care, and education to orphaned, deserted, destitute, and abandoned children. Specifically, children of prisoners are eligible for admission under this scheme. Girls between the ages of 5 and 18 are eligible, and those without both parents can be admitted up to the age of 21 for pursuing higher education. Boys are admitted up to the 5th standard. The scheme has an annual income cap of ₹24,000 for eligibility. Residents receive uniforms, textbooks, notebooks, footwear, bedding, and other essential support. Applications can be submitted through the District Social Welfare Officer, with supporting documents like age proof and income certificate. By including children of prisoners in its eligibility criteria, the scheme ensures that this particularly vulnerable group is not left without care or opportunities for a stable future.

Foster care may continue to be an unattainable goal for children of incarcerated parents if the recognized orphans have not yet been rehabilitated through foster care or sponsorship support as required by the Juvenile Justice Act. To overcome such obstacles, targeted awareness efforts, significant financial investments, and responsive implementing procedures would be required. This can be made possible by improving collaboration between the judiciary and police to speed up the procedure. As a temporary solution, the district legal service authority should be more proactive in granting bail to those who are eligible. Committees established to visit prisons in accordance with these principles must behave tactfully. Committee members must be sufficiently informed about children's challenges and accessible resources for assistance. This would help them keep an eye on things and hold people accountable. In the case of children living outside of jails, it is the duty of the police or the jail

¹⁹⁵ Delhi Commission for the Protection of Child Rights, “Recommendations for Protection of Child Rights for Amendments in Scheme for Financial Sustenance, Education & Welfare of Children of Incarcerated Parents, 2014” (Women & Child Development Minister, Rajendra Pal Gautam, 2020).

administration to gather information, evaluate the care options for the children, and take the mother or parent into custody.

Even with various Indian state attempts to mitigate the challenges vulnerable children face due to parental incarceration, gaps and lack of coherent policies still exist. A cohesive National policy is lacking which results in stark differences between the levels of support given in different states. While Paalanhaar in Rajasthan and ICDS in Odisha along with Delhi's Financial Sustenance Scheme are strides in the right direction, their eligibility requirements are to meet baseline criteria. The criteria include an incarceration period of 30 to 60 days, which leaves a huge gap for a majority of children to escape the benefits. Children living outside of prison tend to receive, pay greater attention than those residing within, with less social exclusion. The absence of mechanisms assessing the impacts of policies on children illustrates the lack of a child-impact approach guiding policy formulation and implementation.

Coordinated collaboration and communication between agencies and departments is a notable gap. With Child Welfare Committee (CWC), District Child Protection Unit (DCPU), Delhi State Legal Services Authority (DSLISA) and prison welfare officers individually involved, real-time communication and collaboration systems lack. These circumstances bring about administrative stalling, absence of responsibility, and denial of timely support even to the child on the affected tier. Moreover, many officers participating in the care process do not possess the adequate level of training at the sensitive child and trauma-informed level. There are also no periodic checks, reviews, or audits, which retails to poor implementation of these schemes. Even though non-institutional and foster care supports are provided for under the Juvenile Justice Act, they are still unavailable due to ignorance and inadequate institutional readiness, as well as bureaucratic hurdles.

Effectiveness of service delivery is also constrained by insufficient financial resources, and lacking infrastructure. While non-institutional and institutional care is provided under Mission Vatsalya shelters, whose aim is to serve the entire nation, restrictions on the budget and uneven distribution of Mission Vatsalya's serves from region to region has severely limited its scope. Models of education in Andhra Pradesh as well as prison crèches in Karnataka are optimistic policies, yet they lack long-term strategy, trained

caregivers as well as monitoring systems. Most notably, none of the schemes require the consideration of protecting the child's right during the trial or sentencing stages.

4.6 Conclusion

In the Indian criminal justice system, children of incarcerated parents continue to be a neglected and vulnerable group, despite constitutional safeguards and policy frameworks aimed at their welfare. The absence of a structured mechanism to assess and mitigate the adverse effects of parental imprisonment on children has resulted in widespread neglect and systemic failures. Even though a number of states have implemented specific programs, the rights of these children are nevertheless hampered by inconsistent implementation, a lack of agency cooperation, and inadequate oversight. A child-sensitive approach must be taken by law enforcement, the courts, and social welfare organizations to make sure that the best interests of children are taken into consideration during the arrest, trial, and sentencing processes. Analyzing the laws and regulations of other jurisdictions offers significant insight into how India could address the current legal gaps pertaining to children of incarcerated parents.

CHAPTER 5

INSIGHTS FROM OTHER JURISDICTIONS: A COMPARATIVE ANALYSIS

5.1 Introduction

Most jurisdictions require police personnel to make arrests as gently as possible while maintaining the dignity of the arrestee and other people present. Though this is a good beginning, formal standards are required that clearly define what can be done before, during, and after an arrest involving not only the police but also social welfare, educational, and medical agencies. The creation of this policy presented a problem in addressing the highly customized nature of each arrest. A policy shouldn't be so wide that it becomes ambiguous, unfocused, and ineffectual, nor should it be so specific that it only applies to particular jurisdictions and arrest scenarios. The researcher analyzed countries such as the USA, Germany, Scandinavian nations, the UK, Croatia, and Poland to explore diverse legal, policy, and institutional approaches toward protecting children of incarcerated parents (COIP).

Significant gaps still exist in Indian legal system in guaranteeing uniform legal safeguards, organized support networks, and alternative sentencing models. By including child impact evaluations in sentence decisions, improving prison visitation rights, extending community-based punishment for caregivers, and guaranteeing state-funded childcare and education programs, India could incorporate international best practices into system. A more child-centered approach to criminal justice will better protect the rights and welfare of children impacted by parental incarceration and bring India's legal system into compliance with international norms.

5.2 United States of America

All citizens, including children, are guaranteed certain rights under the U.S. Constitution. In the 1967 Supreme Court ruling in *re Gault*, it was decided that children were granted the same rights as adults, including the Equal Protection and Due Process provisions of the 14th Amendment. Additionally, the United States is obligated by international agreements that guarantee human rights to all individuals, such as the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the International Covenant on Civil and Political Rights (ICCPR). The CRC, which is now the most important treaty pertaining to child rights, has not been

ratified by the United States, despite the Senate's majority decision in 2002 to sign and ratify both of its Optional Protocols.¹⁹⁶

5.2.1 The Bill of Rights

In 2003, the San Francisco Partnership for Incarcerated Parents published the following Bill of Right for children of incarcerated parents. The Bill of Rights recognizes that children's needs extend well beyond physical comfort and security. This bill of rights is based on work originally done by Gretchen Newby of Friends; a California organization that addresses the special needs of families affected by incarceration. The following are excerpted from the Bill of Rights:

1. I have the right to be kept safe and informed at the time of my parent's arrest.
2. I have the right to be heard when decisions are being made about me.
3. I have the right to be considered when decisions are being made about my parent.
4. I have the right to be well-cared for in my parent's absence.
5. I have the right to speak with, see, and touch my parent.
6. I have the right to support as I face my parent's incarceration.
7. I have the right not to be judged, blamed or labelled because my parent is incarcerated.
8. I have the right to a life-long relationship with my parent.

5.2.2 Arrest

In July 2014, the International Association of Chiefs of Police (IACP) and the U.S. Department of Justice, Bureau of Justice Assistance (BJA) published a model policy aimed at safeguarding children, both physically and emotionally, during parental arrests.¹⁹⁷ The Model Policy offers police executives the specific methods and processes to incorporate into agency policy for the protection of children of arrested parents. The

¹⁹⁶ Child Rights Campaign, The Facts (2012), <http://childrightscampaign.org/the-facts> (last accessed Mar. 21, 2025).

¹⁹⁷ <https://bja.ojp.gov/sites/g/files/xyckuh186/files/Publications/IACP-SafeguardingChildren.pdf> (last accessed on Mar. 25 2025)

Model Policy mentions about pre-arrest, during arrest and post-arrest procedures to be followed by the police officers. Firstly, the Model compels that the police officers who are involved in arresting must be introduced to the concepts and protocols regarding the appropriate response to children of arrested parents. It is much more probable that officers will embrace and implement these norms and concepts as a normal part of their law enforcement duties if they are introduced to them early in their careers. Therefore, it is the responsibility of law enforcement personnel to inform their partner organizations about the rules, regulations, and departmental and legal requirements that govern their operations. These partner groups may be able to support and integrate into law enforcement activities with the help of this fundamental understanding.

5.2.3 Pre- Arrest

When a parent is being arrested, one crucial step that law enforcement can take to protect the child is to ascertain whether the youngster is present at the arrest site or is likely to be there. In certain instances, when timing is not a major concern, an arrest may be delayed to avoid taking place in front of the child. If a delay is not feasible, plans should be made beforehand to have more law enforcement officers, CWS officials, and/or representatives from relevant partner organizations on call or at the scene. Decision making in this regard is based on a number of factors that must be weighed collectively before determining the best approach for conducting the arrest, considering law enforcement requirements, the safety of the community and the interests of the child.¹⁹⁸ Officers should receive training on how to identify symptoms of childhood trauma and the significance of preventing additional psychological injury. This involves teaching officers how to use age-appropriate language when speaking with children and how to reassure them in challenging situations.

5.2.4 Making an Arrest

A parent should have the chance to talk to the child, explain the situation, and reassure them that plans will be put in place to ensure their safety and well-being. When available, an officer or trained representative from a partner agency, such as a social worker, caseworker, or victim advocate, should console and inform the child if the parent is unable or unwilling to do so. Officers should ask about the child's specific

¹⁹⁸ *Ibid.*

requirements, including any allergies, physical limits, mental or medical health issues, developmental disorders, and any drugs or treatments required for these diseases.

In the case of *White v. Rochford*¹⁹⁹, drag racing had led to the arrest of the children's uncle. Unable to get assistance, the kids wandered the highway until they came across a phone to call their mother, who was unable to come rescue them because she didn't have a car. Hours later, a neighbour finally located them. The cops were held accountable by the court for the children's psychological and bodily suffering. The 7th Circuit Court ruled that officers who left three children unattended in a car on a highway side at night were guilty for gross negligence and reckless endangerment. In another case, two children, aged 11 and 13, stayed at a friend's house when law enforcement arrested the mother on narcotics charges, leaving the children without adult supervision. Despite the potential exposure to a drug environment, the court ruled that the officers were not negligent.²⁰⁰ Unlike a previous case, the children were inside a building with access to a telephone to contact a responsible adult, making the situation less foreseeably dangerous. Thus, the courts were inconsistent in applying rules. There was a need to formulate a proper guideline that ensures that the rights of children were protected during the parental arrests.

The ideal situation for a child is usually with another parent or legal guardian, especially if the youngster is able to stay in their own house. Here, the parents have the right to express their preference in where they would like their child to be housed and the person(s) who should provide care and supervision. Unless the arrest is for child abuse or neglect, the arrested parent who has sole custody of the child should be given a fair chance to choose a caretaker. But there are instances where the parent do not choose the best option for the child. CWS in some cases check with the temporary caregiver to ensure the child's wellbeing.

States across the country are taking steps to improve the co-ordination of services among the courts, correction homes, human services, and child welfare agencies. To protect children while a parent or caregiver is being arrested, the Austin, Texas, Police Department established a child endangerment/child-in-need-of-supervision checklist. The checklist outlines procedures for the child's safe placement as well as Austin Police

¹⁹⁹ *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979)

²⁰⁰ *Valita M. v. City of Chicago*, 1986 WL 15133 (N.D. Ill. 1986).

Department officers' contact and follow-up with child protective services if needed. The California Peace Officer Standards and Training (POST) Commission—the statewide body responsible for establishing professional standards and training protocols for law enforcement agencies—has developed guidelines for keeping children safe when a parent is arrested, published guidelines and training topics for use by law enforcement agencies, and created a training DVD that is mandated for inclusion in all peace officers' training in California, *How to Ensure Child Safety at the Time of Parental Arrest*.²⁰¹

5.2.5 Programs to train parent-child relation

The Boys and Girls Club of Benton County, Arkansas, organizes the Become-a-Star program, also called Club Buddies, to offer mentoring services to kids whose parents are incarcerated. The Achieving Baby Care Success (ABCS) nursery was established by the Ohio Department of Rehabilitation and Correction (DRC) in the state's Reformatory for Women in 2001. The child-in-residence programs at other state correctional facilities, including as those in New York, Nebraska, and Washington, served as the blueprint for the nursery, according to corrections officials. Up to 20 women and their kids can stay at ABCS. Mothers who are eligible for the program must be incarcerated for a brief period of time for a nonviolent offense. Program mothers and their infants are housed in a different section of the prison and get practical parenting training. The program's requirements guarantee that the mothers and babies depart the facility together. The Lovelady Center, a Birmingham-based organization, offers Alabaman women an alternative to jail. Women take part in a faith-based program that offers parenting seminars, career training, and substance abuse treatment for nine to twelve months. Children who reside with their parents may participate in childcare, bible study, and summer camps.

Though there are still obstacles in ensuring uniform application across all jurisdictions, the United States has made great strides in recognizing and defending the rights of children of incarcerated parents through legal frameworks, child-sensitive arrest procedures, and rehabilitation programs. As the long-term effects of parental incarceration on children become more widely recognized, there is an increasing

²⁰¹ IACP Code of Ethics, adopted 37 Tex. Admin. Code § 1.112.

emphasis on preserving parent-child interactions, helping caregivers, and taking family factors into account when determining sentences.

5.3 Germany

Germany has ratified UNCRC in 1992 and is committed itself to respecting, protecting and fulfilling the rights of children as set out in the Convention. The three additional protocols to the UN Convention on the Rights of the Child are also binding law in Germany. Since 2001, there has been an increase in study on the consequences of parental incarceration on children in Europe.²⁰² It has been estimated that on any given day circa 100,000 children in Germany have a parent who is in prison. One of the first studies in this field was the COPING project (2010–2012), a global study funded by the EU.

5.3.1 Right to Contact

The Federal Constitutional Court of Germany has ruled that a child's right to contact with their parents is not just a parental right, but that the child's right to contact with their parents is derived from Article 6(2) of the Basic Law (Grundgesetz, the German Constitution), in addition to the child's right to personality protection under Articles 2(1)²⁰³ and 1(1)²⁰⁴. In the Federal Constitutional Court's view, a child's personal relationship with her or his parents and their care, help and affection contribute significantly towards the child's ability to develop into a person who knows that she or he is respected and learns to respect both herself or himself and others. The Court also stresses that parents owe it to their child to be guided by the best interests of the child and that children have a right to expect their parents to care first and foremost for them.²⁰⁵

The UN Committee on the Rights of the Child carried out its most recent review of Germany's implementation of the Convention from 2019 to 2022.²⁰⁶ Among the recommendations issued by the Committee at the end of this review was one concerning

²⁰² Cunningham, Anne (2001): "Forgotten families – the impact of imprisonment". FAMILY MATTERS 59 (winter 2001): pp. 35–38.

²⁰³ Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.

²⁰⁴ The dignity of man inviolable. To respect and protect it is the duty of all state authority.

²⁰⁵ Federal Constitutional Court, ruling of 1 April 2008, 1 BvR 1620/04, guiding principle 2.

²⁰⁶ Interim report of the National Coalition - Network for the Implementation of the UN Convention on the Rights of the Child regarding the child rights situation in Germany 2023.

contact between children and their incarcerated parents: The Committee recommends that the State party:

(a) Ensure the visitation rights of children of incarcerated parents, including by increasing the frequency and duration of visits and supplementing visits with remote contact on a regular basis, in line with the recommendation of the Council of Europe Committee of Ministers concerning children with imprisoned parents (2019);

(b) Evaluate, with the participation of children of incarcerated parents and their families, existing policies regarding visitation rights of children, with a view to developing federal standards for ensuring that such children can maintain personal relations with their parents and have access to adequate services and appropriate support.

5.3.2 Rights of children inside prison

According to Section 142 of the German Prison Act of 1976, facilities must be provided in women's prisons to house mothers incarcerated with their children.²⁰⁷ The Act states that a child may be housed with the imprisoned mother until the age of compulsory schooling with the approval of the person who has the authority to decide the child's place of residence and after consulting with the Youth Welfare Office, given it is for the child's welfare. Under section 79, in case of children born inside the prison, no mention of the penal institution or the mother's imprisonment, shall be made while registering their birth.²⁰⁸ According to Article 86 of the Bavarian Penitentiary Act, 2007, facilities must be provided in women's prisons to house mothers incarcerated with their children.²⁰⁹ The Act states that a child may be housed with the imprisoned mother until the age of compulsory education with the approval of the person who has the authority to decide the child's place of residence and after consulting with the Youth Welfare Office, provided it is for the welfare of the child. The individual responsible for the child's upkeep is responsible for paying for all living expenses, including medical treatment.

²⁰⁷ Strafvollzugsgesetz [StVollzG] [Prison Act], § 142 (Ger.).

²⁰⁸ Strafvollzugsgesetz [StVollzG] [Prison Act], § 79 (Ger.).

²⁰⁹ Bayerisches Strafvollzugsgesetz [BayStVollzG] [Bavarian Penitentiary Act], art. 86 (Ger.).

5.3.4 Visitation

When the German Prisons Act (Strafvollzugsgesetz) was being drafted in 1977, similar concerns about children's well-being in the minds of German lawmakers led the Bundestag to create the possibility for children who have not reached school age to live with their incarcerated mothers in special facilities, if this is in the child's best interests.²¹⁰ The Act grants prisoners the right to communicate with persons outside the prison. The institutions themselves set certain guidelines for the number, duration, days, and times of these visits. The prisoners shall be allowed a minimum of one-hour interview per month.²¹¹ The visits range from one hour (in five federal states, including Bavaria and the Saarland) to four hours (in Brandenburg, Lower Saxony and Saxony). Eight federal states extend a prisoner's "standard visit time" (Regelbesuchszeit) when the prisoner is visited by his or her child (Berlin, Bremen, Mecklenburgvorpommern, North Rhine-Westphalia, RhinelandPalatinate, Saxony-Anhalt, Schleswig-Holstein and Thuringia). Some federal states provide for two additional hours for those cases (e.g. RhinelandPalatinate), others for one additional hour (Bremen, for example). A prisoner's family member can only be refused access with the justification that the institution's security or order may be jeopardized. A visit may be terminated on the infringement of the rules of this Act or of any order, however, prior warnings, in appropriate cases, shall be given before termination.²¹² At Celle and Tonna Prisons, convicted inmates (and, in rare instances, remanded offenders) may benefit from unsupervised visits from wives (and children) for up to several hours following a year in custody, provided they meet specific standards and pass a risk assessment.

Schleswig-Holstein amended its Prison Act in the period under report, introducing provisions on the "family-sensitive" execution of penal sanctions. Section 24(2) of the Schleswig-Holstein Prison Act now defines a concrete mandate for penal system with respect to the children of prisoners: the penal system should, in coordination with the youth services office, promote the maintenance of prisoners' relationships with their minor children and provide spaces suitable for visits and contacts. In Hesse, prisons have the authority to impose further visitation rules on inmates who have small children,

²¹⁰ Prison Act of 01 Jan. 1977 (StvollzG, Strafvollzugsgesetz), §§ 80, 142. Under these provisions, a child not yet of school age live with her or his incarcerated mother if this is in line with the child's best interests. The act provides for separate facilities to be set up for this purpose.

²¹¹ Strafvollzugsgesetz [StVollzG] [Prison Act], § 24 (Ger.).

²¹² Strafvollzugsgesetz [StVollzG] [Prison Act], § 105 (Ger.).

depending on the circumstances. Other federal states mentioned family visit rooms with toys (Berlin, Mecklenburg Western Pomerania, Saarland), regions designed to be kid-friendly, or unique visit areas where children and inmates can have physical contact (Bavaria). There are independent social service providers which provide programs and activities that allow children with an incarcerated parent to interact with other kids in similar circumstances (holiday camps, regular play groups, etc.) and assist in organizing children's visits with inmates. In Germany as well, the group BAG-S e.V. created a tool called "Bear Buddy" to assist young children visiting an imprisoned parent from the time of entry until their release. A picture book is given to the kids so they can read it while they wait to see their parents.²¹³ A picture book describes Bear Buddy, and pictures and paw prints can be found at different points in the prison. After their initial visit, children are then given a Bear Buddy. The goal of this program was to provide kids a reassuring object while they were there and to make prison appear less intimidating to them.

Under section 28, the inmates also have an unlimited right to send and receive letters. The same has been provided in Article 31 of the Bavarian Penitentiary Act, 2007. The Lower Saxony Prison Act, 2014, prisoner is allowed to send and receive letters. However, if the jail administration feels that the institution's security or order will be jeopardized, the same should be forbidden. In addition to the letters, the prisoners shall be permitted to dispatch and receive parcels. But this is subject to inspection by the jail administrator.

5.3.4 Roll of independent social service providers and civil society organisations

Even after all legal requirements have been fully implemented, the support that independent social service providers and civil society organizations offer to inmates and their families is crucial and will continue to be so; their involvement, which is specifically focused on preserving the bonds between inmates and their families, is essential. The Bundesarbeitsgemeinschaft Straffälligenhilfe e. v. (BAG-S e. v.: National Alliance for the Care and Resettlement of offenders) and religious counsellors frequently develop suggestions for family- and child-sensitive correctional system

²¹³Children of Prisoners Europe, Bear Buddy Programme, <https://childrenofprisoners.eu/database/bear-buddy/> (last accessed on 25 March 2025).

policies. They have long advocated for the criminal justice system to give inmates' families—especially the children—more consideration.

In Schleswig-Holstein (Germany), the Enforcement of Prison Sentences in Schleswig-Holstein and the Establishment of Legal Enforcement Data Protection bill²¹⁴ states:

(1) Family support programmes shall provide assistance to prisoners in coping with their family situation, in maintaining family relations and in exercising their parental responsibilities, including through counselling and parenting support. Children and partners of prisoners may be involved in planning this support.

(2) In agreement with the local Youth Office or relevant public authority, the prison shall support the relationship between prisoners and their dependent children, in particular where the children are in state or foster care.

(3) Suitable premises shall be made available for visits.

German laws use a child-centric approach rather than a prison-centric one, which makes them much stronger at defending the rights of children whose parents are detained. Under Article 6(2) of the Basic Law, the German legal system expressly acknowledges a child's right to continue communication with their detained parent as a fundamental right, guaranteeing that family ties are not severed by parental incarceration. Germany has more lenient laws regarding visits, including mandated collaboration with juvenile services, and extended and unsupervised visits in certain states. State-specific and frequently restricted visitation regulations exist in India, in contrast, and there is no legal requirement for prolonged visits based on parental status.

5.4 Scandinavian Countries- Norway, Denmark and Sweden

Children's rights have also played a significant role in the reforms in Sweden, Norway and Denmark, where the Children's ombudsmen (in Norway and Sweden) and The Children's council and the Danish Institute for Human Rights (in Denmark) have adopted this perspective on prisoners' children and argued how children's rights should be interpreted in that particular context. The prison services themselves have also, to

²¹⁴ Gesetz über den Vollzug der Freiheitsstrafe in Schleswig-Holstein und zur Schaffung eines Justizvollzugsdatenschutzgesetzes 1691/2016, 1 September 2016, paragraph 24.

varying degrees, characterized the reforms and efforts in Scandinavian jails as being driven and comprehended within a framework of children's rights.

The establishment of "children's officers" in Danish prisons, which "work on securing the rights and needs of children of imprisoned parents," is the result of a collaborative effort between the Danish Institute of Human Rights, the Department of Prison and Probation Service, and individual prisons. These "children's officers," who could be social workers or prison guards, are trained by experts in the fields of human rights, psychiatry, prisons, and the support of inmates' families. They also gain knowledge from trips to establishments that have established best practices. the Prison and Probation Service, is currently conducting a trial project installing mobile phones in the cells in an open prison.²¹⁵ In Sweden the use of parental study circles has been evaluated positively and in Norway the parents in prison participating in a parental guidance programme showed increasing emotional involvement in their children.²¹⁶ In Sweden, prisoners participate in group parenting courses, known as "study circles", which are led by prison officers with special training. Furthermore, mandatory "Child Talk" programmes are implemented in all Swedish prisons: NGO Buff meets with all imprisoned parents at the onset of their sentence to discuss their children and how to maintain contact.

One of the unique initiatives (a Family House) is situated in a Halfway House 'Pension Engelsborg' in Denmark. The 'Pension Engelsborg' belongs to the Danish prison service. Selected prisoners can stay in the house and children receive help and counselling from professional staff as appropriate on an individualized basis. After starting as a trial, the Family House has expanded to include two family therapists and is now an integral part of the Prison and Probation Service's re-entry program. Additionally, the Family House, which can accommodate five families at once, has a social worker and social educator on staff. Jyderup Prison is a public institution. Weekend visiting hours are from 9:30 am to 7:30 pm, and the inmate's room has amenities that allow families to prepare meals together, eat together, play together, watch TV, and more. During a visit, parents can also play with their kids in the prison's

²¹⁵ Children's Comm., Supplementary Report to Denmark's 3rd Periodic Report to the Commission on the Rights of the Child 18f (2005).

²¹⁶ Sherr, L., Skar, A-M. S., Clucas, C., von Tetzchner, S., & Hundeide, K. Evaluation of the Parental guidance program, Report to the Ministry of Children, Equality, and Social Inclusion (2011) 25.

accessible outdoor spaces. In Norway, every prison establishment has a designated Children's Ambassador monitoring the provisions for the needs of children visiting their relatives in prison. Ambassadors are currently operating in prisons in Sweden, where specially trained prison officers work with imprisoned parents to reinforce their identity as parents

Adult parents facing criminal sanctions are currently viewed and treated primarily as individuals at every stage of the criminal justice process, including arrest, charging, bail/remand, diversion, trial, sentencing, imprisonment, and post-release. Their role as parents or their dependent children receives little consideration unless the child was a direct victim of their parent's criminal behavior. Courts can play a decisive role at several important intervals. They make decisions about whether a parent is granted bail and allowed to return home, with or without conditions, or is remanded in custody pending trial, sentencing, or appeal.²¹⁷

Sweden's policy towards incarceration is to "avoid" the imprisonment of its civilians whenever possible.²¹⁸ Consequently, there aren't many children in this nation who are detained alongside their parents. Additionally, Sweden permits expectant and nursing mothers to defer serving their sentences for a "reasonable" period of time. A probation board considers an offender's social, economic, educational, and familial background while determining the proper sentence. Parole, community service, and electronic monitoring are examples of non-custodial sentencing alternatives. This method of punishment promotes community cohesion and mitigates some of the problems associated with jail.

5.5 Northern Ireland

The COPE Pan-European study of "children of prisoners" estimated the number of children in Northern Ireland who have a parent in prison to be more than 2,400. In Northern Ireland, children of incarcerated parents are entitled to certain rights and

²¹⁷ Catherine Flynn, Bronwyn Naylor, and Paula Fernandez Arias, "Responding to the Needs of Children of Parents Arrested in Victoria, Australia. The Role of the Criminal Justice System". Australian and New Zealand Journal of Criminology, 49(3) (2016): 351-369 at p. 360.

²¹⁸ Swedish Prison and Probation Services. (n.d.). Imprisonment. Available at <https://www.kriminalvarden.se/fangelsefrivard-och-hakte/fangelse/>; The Law Library of Congress. (2014, August). Laws on children residing with parents in prison. Available at <http://www.loc.gov/law/help/children-residing-with-parents-in-prison/children-residing-with-parents-in-prison.pdf>.

protections, primarily based on the Convention on the Rights of the Child (CRC) and the Children (Northern Ireland) Order 1995.

5.5.1 Law and Policies

Northern Ireland has three prison establishments: Maghaberry Prison, Magilligan Prison and Hydebank Wood Prison and Young Offenders' Centre. These are Prison Service establishments under the Department of Justice. Police powers of arrest are provided within the Police and Criminal Evidence (Northern Ireland) Order 1989. Section 5.1 of the Police Service of Northern Ireland (PSNI) Code of Ethics (2008) requires that arrest and detention be carried out 'in accordance with the provisions of the European Convention on Human Rights' and other relevant human rights principles. Police recruit and officer training includes elements dealing with children as victims, vulnerable witnesses, children and suspects and other children in contact with the law. According to Article 26 of the Police and Criminal Evidence Order 1989 (PACE), an arrest can only be made when it is "necessary," and using force during an arrest is only allowed when it is "necessary."²¹⁹ Officers making an arrest must create a "plan of search" that determines if children are likely to be present in the home, according to written guidelines on police arrest procedures.²²⁰ The Northern Ireland Prison Service Family Strategy (2010) identifies the need to 'mitigate the effect on children if they are in attendance when an arrest is made' and proposes that awareness be raised on this issue. Responsibility for taking action on this rests with the police service (PSNI), social services and Barnardos (an NGO). According to the Northern Ireland Prison Service Family Strategy (2010), courts provide families with informational booklets in a variety of languages and formats, along with helpful phone numbers for services like Family Links, a Northern Ireland Association for the Care and Resettlement of Offenders (NIACRO) service for inmate families.

Police guidance on "Children in the Company of Detained Persons Brought to Custody Suites" states that, where possible, arrangements for care should be made by the arrested person.²²¹ The child should only be taken to the custody suite with the

²¹⁹ Police and Criminal Evidence (Northern Ireland) Order 1989, SI 1989/1341, art. 26 (UK).

²²⁰ Moore, L., Convery, U., & Scraton, P. (2011). The Northern Ireland Case Study. In P. Scharff-Smith & L. Gampell (Eds.), *Children of Imprisoned Parents* (131). The Danish Institute for Human Rights, European Network for Children of Imprisoned Parents, University of Ulster and Bambinisenzasbarre.

²²¹ Police Service of Northern Ireland undated Guidance on Children in the Company of Detained Persons Brought to Custody Suites (March 2016).

individual who is being held after "all reasonable steps have been taken" and failed. As soon as a child is placed in detention with an adult, authorities get in touch with social services to determine the child's requirements. If it is deemed safe and no suitable substitute has been identified, child may stay with the person in custody who will be in charge of their care (e.g., feeding, changing diapers). In 2009, the Criminal Justice Inspection (NI) reported that police custody staff 'showed a caring approach to those who had dependency obligations. Children whose parent was arrested were kept out of the custody suite and looked after by other staff until a relative or representative from social services arrived'.²²²

In Maghaberry Prison, child-centred visits are offered to selected long-term prisoners to enable prisoners to have personal contact with their children or grandchildren. These visits operate over lunchtime on Saturdays, with families on the scheme allocated one visit each month. Family Support Officers and Quaker employees assist with child-centered visits. Inmates can play with their children in the visitation room and play area after the routine visit. Mothers and carers meet with family support officers in a separate room and are given lunches. Children are welcome at any age, and visitors are allowed to bring toys, books, and photos that are also screened for drugs. Despite being well-planned, these visits are mostly appropriate for smaller kids. The Safeguarding Children Framework and Guidance covers three topics: child inmates in Hydebank Wood; handling visits where the inmate may be a risk to children; and children visiting prisons. In April 2010, the Northern Ireland Prison Service unveiled "Safeguarding Children: Policy and Practice," a new child protection policy. Each prison staff member was given the responsibility of serving as a child protection coordinator. Their position in regard to child protection may have been diminished by the combination of the coordinator's role with the staff members' preexisting responsibilities. In Northern Ireland, prisoners at H.M.P. Magilligan are given access to Skype for personal video calls to family in a move to foster rehabilitation and reintegration back into their family and community.

The "Visitor and Inmates Recognition Bookings System" currently logs "name, age, address, and nature of relationship of child to prisoner," which could eventually enable the creation of more thorough data. This information can be used to analyze

²²² Criminal Justice Inspection Northern Ireland (CJINI) (2009b) Police Custody: The detention of persons in police custody in Northern Ireland. Belfast: CJINI para. 5.8.

demographic trends, track the long-term effects of parental incarceration, and develop targeted policies and programs for child welfare, education, and mental health support. By linking this data with social services and juvenile justice systems, authorities can better allocate resources and identify children at higher risk of poverty, trauma, or delinquency. Additionally, such a system can inform legal reforms, such as alternative sentencing for parents, to mitigate the adverse effects of incarceration on families.

5.5.2 Consideration of child's interest while sentencing

In the case of *R v Doyle*²²³, the defendant who pleaded guilty to the manslaughter of her former husband, Kevin Doyle, father of her four children was considered by the Court. The defendant's attorney contended that, considering the defendant's unique personal circumstances, a non-custodial sentence would be suitable. She emphasized that the defendant had four young children, one of whom has autism, and that their mother's incarceration would probably have a major negative impact on all of them. According to reports submitted to the court, the children would be much more distressed if they were separated from their mother, especially because they had already experienced the loss of their father. In deciding on an appropriate sentence, Justice Treacy took into consideration the impact on the children but gave a custodial sentence of three years imprisonment. Justice Loughran sentenced a woman who stabbed her ex-partner seven times with a kitchen knife to a year in prison in May 2010 at Belfast Crown Court. However, due to the possible impact on her child, she was only required to serve four months of the sentence in prison and the remaining months on licence in the community.²²⁴

In the case of *Queen v Attuh-Benson*²²⁵, while sentencing a Ghanaian national woman involved in drug trafficking who gave birth in prison and been separated from the baby, and also had children living at home in Ghana, the court reduced her prison sentence from 10 to eight years, stating that:

“Given this appellant's particular difficulties which we do not need to rehearse in any greater detail, and given the way in which she has behaved within the

²²³ *R v Doyle* [2010] Neutral citation number NICC 26.

²²⁴ Belfast Telegraph 5 May 2010

²²⁵ *R v. Attuh-Benson*, [2005] 2 Crim. App. R. (S.) 11 (Eng.).

prison system and her medical condition, we are satisfied that, as an act of mercy, some modest reduction in the sentence passed upon her is possible.”

5.5.3 Support from Non-Governmental organisations

The childcare workers at NIACRO, which oversees the visitors' centres in Magilligan and Hydebank Wood, assist the kids in the play areas while they are there. The Family Links program of NIACRO provides helpful family support as well as financial and relocation guidance. NGOs in conjunction with the Northern Ireland Prison Service also have produced an invaluable range of information for children, parents and prisoners, including pamphlets written in child-friendly format, DVDs and e-learning packages.²²⁶ In every institution, Barnardos, an NGO, provides a variety of parental assistance programs. These are designed to teach inmates positive parenting techniques and enhance their ability to fully engage in the role of parent.

5.6 Poland

In Poland, arrest procedures lack specific reference to children present, however it does state that “searches should be conducted in a way that respects the dignity of persons who are present” and without causing “unnecessary material losses or unnecessary inconvenience”.²²⁷ The general Police Guidelines on how officers should deal with children apply to arrest situations:

1. Police officers should use such vocabulary as can easily be understood by the child and which is appropriate to his or her age.
2. Police officers should refrain from any actions which would be stressful for the child, for instance trying to rush the child.
3. Police officers should not display any behavior that would be demeaning to the child.
4. If there is a need for the child to be questioned, such questioning should be conducted in a sensitive manner, and questions should be formulated in a simple

²²⁶ Barnardo's NI, Children Affected by the Imprisonment of a Family Member: A Handbook for Schools Developing Good Practice (May 2015).

²²⁷ Martynowicz, A., Holden, K., & Gauders, N. (2011). The Polish Case Study. In P. Scharff-Smith & L. Gampell (Eds.), Children of Imprisoned Parents (192). The Danish Institute for Human Rights, European Network for Children of Imprisoned Parents, University of Ulster and Bambinisenzasbarre.

way, avoiding any jargon, and providing descriptive explanations appropriate to the child's age if necessary.

In Poland, the Code of Criminal Procedure explicitly states that remand may not be appropriate if the person has sole custody of a child or if he or she is the only person providing financial means to the family. When police are unable to find someone to take custody of the children right away after making an arrest, they are required to transport the child to the closest children's home or emergency care facility, which is managed by social services. They also have a duty to notify social services about the child's circumstances. The Family Code 1964 (Kodeks Rodzinny i Opiekunczy) places the responsibility on family courts and other public authorities to assist parents in cases where the state's help is needed to ensure that parental responsibility can be discharged in an appropriate manner.²²⁸ If parents are unable to fulfill their caregiving responsibilities, they can specifically ask the Family Court to set up interim care for the child. In these situations, social services must be notified of the need to support the child and the family by the Family Court and any other public authorities involved in the case.

There are various women- child Units in Poland. Regardless of the mother's security classification and nature of offense, women are permitted to remain in the Unit with their children. The Mother and Child Unit offers specialized medical care, including a small maternity unit where inmates can give birth with the help of nurses, midwives, neonatal specialists and other medical specialists. The prisoners can access the spacious balconies in their bedrooms. They have access to the kitchen, laundry rooms, and other areas and the unit is set up in such a manner that women can do their everyday responsibilities. The restrooms are child-friendly and have amenities for babies and newborns. With the mother's consent, staff members can take the kids to stores, parks, and other locations outside the prison (which is in the heart of the city) while dressed in civilian clothes.

5.7 Croatia

In 2008, the office of the Children's Ombudsperson of Croatia organized an expert panel meeting entitled "The Rights of Children of Incarcerated Parents." Beginning in

²²⁸ The Family Code 1964 Article 100 para. 1.

2006, the Office has been working to enhance the lives of children whose parents are incarcerated, and this project was part of that effort. In order to improve these children's rights and general well-being, the panel convened a range of stakeholders to talk about and address the difficulties they encounter. This work by Children's Ombudspersons built on work started in Scotland with the report "Not seen. Not heard. Not guilty." For instance, following the recommendations, Lepoglava Penitentiary provides activities for children and their parents and publishes prison publications covering a wide range of topics, including the problem of children whose parents are incarcerated.

In 2020 the Deputy Ombudsperson for Children led workshops on the rights of children whose parents are in conflict with the law in a basic training course for judicial police officers at the Ministry of Justice Training Centre. An instance is where the police were going to arrest a mother and father. In the process of considering tactics and gathering information about suspects they realised (most likely from social welfare centre) that there were two children of preschool age in the family and that the children went to kindergarten every morning. The police decided to arrest the parents when the children were at kindergarten and asked the teacher (in collaboration with the social welfare centre) to accompany the children later that day to the police station where the parents were detained. The family didn't have a car, and children were delighted to drive in the car with a siren and rotating lights (and no other signs of the police). The boy asked the policeman: 'Who gave you this car?' 'My boss' - answered the policemen. 'You have a good boss' – the boy concluded."²²⁹

Concerning communication between the child and the prison inmate which might be the father or mother, Croatia has introduced 'prison-parent support' for the children. Letters are one of the primary forms of communication between the child and the parent. Children frequently require the assistance and support of other family members while writing to their parents. A prisoner-parent can help their child by communicating with them often, using capital letters, simple language, and pictures to make reading easier. They can recommend reading the same book for a later discussion, make interactive games like incomplete drawings for the youngster to finish, and encourage the child to share postcards, letters, or pictures. The parent can foster a deep emotional

²²⁹ Office of the Ombudsman for Children, Croatia, Available at <https://dijete.hr/en/homepage-ombudsman-for-children> (last accessed on 28 March 2025).

bond and help the child feel appreciated by taking an interest in the child's everyday activities, avoiding criticism, and writing even when the youngster doesn't respond.

5.8 Italy

Until the 1990s, there were no laws in Italy concerning the rights of children and adolescents with imprisoned parents. General arrest procedures in Italy are governed by regulations laid down in the Italian Penal Code.²³⁰ The family has always been valued in Italy. Prison Reform Law 354, which was passed in 1975, stated that jail treatment must "facilitate suitable contacts with the outside world and family relations."²³¹ It also allowed for the possibility of working outside the prison and returning at night.²³²

5.8.1 Alternate Custody

During the sentencing phase, the court can consider alternative sanctions to custody,¹² particularly where the defendant is a mother. The Simeone-Saraceni Law made it automatic for offenses carrying prison terms shorter than four years to qualify for alternative punishments.²³³ This law made it possible for pregnant women and mothers of children under ten to be placed under house arrest for family or health-related reasons. Fathers who served as the primary caregiver were also subject to the law. In order to allow imprisoned mothers to keep their children with them until they turn three, this law also set minimum standards for play facilities that operate in prisons or women's quarters. The Finocchiaro Law introduced special house arrest for mothers with children under the age of 10, even for sentences of less than four years, provided that there is no identified risk of the offender committing further crimes and that they have served at least one-third of their sentence. But there is certain restriction on the category of mothers who can be placed in house arrest.

5.8.2 Community programmes and interagency networks

A program called the ICAM Project is designed especially for mothers who are incarcerated and have children younger than three. Mothers must actively participate in

²³⁰ Italian Penal Code (Codice die procedura penale) Titolo VI art. 380-381-382-384-385-386-387.

²³¹ Codice Penale [C.P.] art. 15 (It.).

²³² Codice Penale [C.P.] art. 21 (It.).

²³³ Simeone-Saraceni Law (Law No. 168 of 27 May 1998).

the program, which aims to develop personal responsibility through an ongoing process of personal growth.

5.9 England

The Mother and Baby Units (MBUs) Instruction (the Instruction), which currently applies in England and Wales, contains detailed procedures and criteria for the admission of a mother and her baby in an MBU.²³⁴ The woman wishing to apply for a place in an MBU, must be referred to the Mother and Baby Liaison Officer, who will assist her in completing the application, and will give her advice. The mother needs – inter alia – to provide information about the situation of the father: whether the child lives with the father or whether the father has contact with the child, and whether the father supports the mother's application. The mother is also asked about the alternative arrangements she has made for the child, including if the child is to exit prison before her. Social services, security, medical, probation, and personal officers' reports are compiled into a file by the liaison officer. The Admission Board reviews these and the mother's application with her involvement. After that, the Board suggests a course of action to the prison's governor or director. If rejected, the mother can file an appeal with the court system and the Prisoner Complaints system. While doing that, the best interest of the child is not the sole criteria. Relevant factors to consider in such cases include “allowing the mother to form some relationship with the child for the future; allowing breast feeding (expressing may be an alternative); and giving time for alternative care arrangements to be made.”²³⁵

According to Department of Health rules (not social services), children who follow their mothers into prison are deemed "in need" and thus need "regular review of the child's and mother's progress on the unit." Planning must begin right once if separation is to take place. The mother's preferred caregivers will be given priority, as long as Social Services verifies their suitability and availability. Foster care must be set up if such care is not accessible. The governor or director is in charge of making sure that the person who receives the child is "suitable and appropriate to care for the child, and in particular, does not present a risk of harm to that child" if the child visits the community.

²³⁴ Ministry of Justice, PSI 54/2011, effective 1 October 2011 (expiry date 1 October 2015) <http://www.justice.gov.uk/offenders/psis/prison-service-instructions-2011> (last accessed on 26 March 2025).

²³⁵ *Ibid* at Para 2.2.12.

Regardless of whether they are family or not, anyone who offers to take the child out of prison or who the mother designates to look after the child in the community must be approved by prison officials.

5.10 Conclusion

The rights of children of detained parents are increasingly being recognized as a separate legal and policy problem, according to an examination of best practices from different countries. A dedication to striking a balance between criminal goals and child welfare considerations is shown by nations that have incorporated child-sensitive techniques into their criminal justice systems. Models for more comprehensive legal frameworks include South Africa's constitutional acknowledgment of children's rights, the United Kingdom's child impact evaluations, and Sweden's emphasis on preserving parent-child contact. One of the main conclusions drawn from this comparative study is that jurisdictions with clear laws guaranteeing visitation rights, alternative sentencing for primary caregivers, and institutional safeguards for children perform better when it comes to reducing the negative consequences of juvenile detention. On the other hand, systems that do not have these protections run the risk of making the emotional trauma and social marginalization cycles that afflict the children worse.

By incorporating child impact assessments into sentencing decisions, expanding non-custodial alternatives for primary caregivers, and ensuring structured rehabilitation programs for children of incarcerated parents, India can move closer to a more equitable justice system. The lessons learned from these best practices call for a more structured legal framework that explicitly protects the rights of children in such situations. The path forward necessitates a synergy between legislative reform, judicial sensitivity, and administrative policies to uphold the best interests of the child while preserving the integrity of the justice system.

CHAPTER 6

CONCLUSION AND SUGGESTIONS

6.1 Introduction

Incarcerated children usually experience considerable institutional and legal disregard even though they are not accused of doing anything wrong. The law pays largely no attention to the indirectly but heavily affected children of the accused or convicted. Yet, a series of legislative and constitutional provisions protect the child's rights such as the right to education, protection, and a life with dignity. The rights are commonly violated when the parent is jailed. These rights are usually undermined when a parent is in prison. Global treaties such as the UNCRC to which most nations are parties, emphasize that the best interests of the child must be a top priority in all matters affecting them, including parental imprisonment. The absence of a comprehensive legal framework for the rights and interests of children whose parents are incarcerated is a critical gap in policy and practice that calls for reforms that incorporate child welfare concerns in the criminal justice system.

The first chapter, 'Introduction', is a summary of the contents of the study. The chapter was divided into eight sub-headings, namely, the introduction, the scope of study, the statement of problem, research objectives, research questions, hypothesis, research methodology, chapterisation and literature review. This chapter gives an outset of what is to come. The introduction chapter of the study outlines the main topics and objectives. It begins by providing a brief overview of the topic, which is children of incarcerated parents, and concludes by highlighting how they are often ignored by the criminal justice system. The scope of the study includes an analysis of the current legal framework protecting the rights of these children and identifies the opportunities for reforming policies to safeguard the rights and well-being of children affected by parental incarceration. The chapter also provides a brief summary of the study's scope and context. The statement of the problem sets the stage for the study by highlighting the context in which it is being conducted. The research objectives identify the five main focus areas and the same is framed into research problems. The research methodology outlines how the study had to have been conducted and how it will provide conclusive answers to the questions being asked. The study was purely doctrinal and used books, articles, and other materials to form the conjecture. The study was divided

into five chapters that together form the core of the research. The literature review provides an overview of the books and materials referenced during the study.

The second chapter analyses the international legal framework on the rights of children of incarcerated parents. While the rights and vulnerabilities of children of incarcerated parents (COIP) are increasingly being recognized, an examination of the international legal framework shows that there is still a sizable lack of clear, comprehensive, and enforceable protections that are specifically suited to meet their particular needs. Fundamental child rights like the right to non-discrimination, survival and development, participation, family life, and protection from harm are recognized by instruments like the United Nations Convention on the Rights of the Child (UNCRC), the Bangkok Rules, the Nelson Mandela Rules, the African Charter on the Rights and Welfare of the Child, and the UN Guidelines for the Alternative Care of Children. However, these instruments typically approach COIP under the general heading of all children, frequently omitting specific protections that address the unique challenges encountered by children whose parents are incarcerated, like emotional trauma, stigma, and interruptions to care and education. Although the African Charter is notable for specifically mentioning children of incarcerated mothers and supporting non-custodial options, it nonetheless demonstrates gendered presumptions by emphasizing maternal incarceration. Though ideas like the child's best interests offer a strong foundation for interpretation and process, different legal systems still do not apply these concepts consistently. The chapter concludes that the lack of a robust criminal justice system calls for a comprehensive legal framework that addresses these challenges and requires a combined effort by the states, policymakers, and civil society. Such initiatives will reaffirm society's commitment to children's development and well-being by ensuring that no child is left to suffer the consequences of their parent's incarceration alone.

The third chapter highlights the theoretical framework of the consequences of parental incarceration. It portrays children as collateral victims of the criminal justice system and examines the complex effects of parental incarceration on children. It explores how a parent's incarceration affects children psychologically, socially, academically, and economically, using ideas such as attachment theory, social learning theory, strain theory, and labelling theory. These frameworks illuminate how emotional suffering, educational decline, and heightened susceptibility to criminal activity are caused by separation, stigma, financial difficulty, and disturbance in caregiving relationships. Due

to congestion, inadequate housing circumstances, and a lack of developmental resources, children incarcerated suffer additional difficulties. The hardships faced by children in prison as a result of their parents' incarceration are highlighted in this chapter. These children, especially those whose mothers are incarcerated, face constrained spaces, overcrowding, and limited access to medical care, education, food, and emotional support. Their development is hampered by the lack of infrastructure that is kid-friendly. After the age of six, the system frequently fails to prepare them for reintegration, leaving them without adequate support systems or care. To protect their future and well-being, the situation necessitates structural changes that create a caring, rights-based environment in prisons.

The fourth chapter critiques the Indian criminal justice system's failure to protect children's rights from parental incarceration. It uses legal analysis, empirical evidence, and international comparisons to highlight systemic gaps and the human cost of state inaction. The multidimensional approach examines constitutional provisions, court decisions, national and state-level policies, and on-ground realities. The chapter highlights how child rights are practically sidelined in criminal justice processes from arrest to imprisonment, with qualitative accounts and real-life case studies added for emotional depth. India needs to adopt a child-sensitive approach in law enforcement, courts, and social welfare organizations to ensure the best interests of children are considered during arrest, trial, and sentencing processes. Analyzing laws from other jurisdictions can help address legal gaps affecting children of incarcerated parents.

The fifth chapter analyses how different jurisdictions protect the rights of these children. Finding best practices and legal innovations that may be absent from one's own legal system is made possible by conducting a comparative study examination of various countries on the rights of children of incarcerated parents. Child-friendly prison visiting programs, alternative sentencing for primary caregivers, and child impact evaluations at sentencing are just a few examples of the kid-sensitive policies many nations have created and can serve as models for change. Researchers can identify legislative and policy gaps through comparison, especially in places where these children's needs and rights are not expressly acknowledged. The effectiveness of rights-based vs welfare-based approaches can be better understood by examining how state responses to incarceration and child welfare are shaped by cultural, political, and legal institutions. Furthermore, comparative studies make a significant contribution to

academic discourse and the development of international human rights standards, especially in light of the United Nations Convention on the Rights of the Child (UNCRC). Scholars can promote reforms based on both empirical data and normative frameworks by examining how various legal systems carry out or fail to carry out their international duties. Furthermore, these studies help build context-specific legal and policy responses by ensuring that borrowed practices are carefully adapted to the local socio-legal context rather than just transplanted. The development of more effective and compassionate institutions that acknowledge and defend the rights of children impacted by parental incarceration is ultimately supported by a comparative approach, which also fortifies the theoretical underpinnings of legal change.

The sixth chapter, titled "Conclusions and Suggestions," begins with an introduction that sets the context for the culmination of the research study. A couple of introductory paragraphs provide insight into the overall scope and objectives of the study, giving the reader a clear understanding of the journey undertaken. A comprehensive paragraph summarizing the main findings from each of the earlier chapters follows this introduction. The different facets of the study are condensed into a coherent whole in this section's succinct but perceptive analysis. This paragraph provides the reader with a comprehensive understanding of the research findings by emphasizing the key points from each chapter, enabling them to quickly understand the study. The chapter then moves into a section devoted to recommendations, in which the researchers offer recommendations derived from the thorough knowledge the study has provided. These recommendations act as a roadmap, presenting a potential course of action that the researchers think ought to be taken into account when tackling the intricate problems pertaining to the rights of children of incarcerated parents in India. Since it summarizes the main points of the study and offers a plan for further action, the "Conclusions and Suggestions" chapter can, therefore, be regarded as the most significant and well-organized portion of the research project.

The comprehensive analysis provided in these chapters provide strong support for the hypothesis that the implementation of child-centered legal reforms, which integrate the child's best interests into sentencing and correctional policies, will significantly lessen the detrimental effects of parental incarceration. The study emphasizes the vital need for a child-sensitive approach at every stage of the criminal justice process by looking at how the child's best interests are taken into account from the time of a parent's arrest

through pre-trial procedures, sentencing, incarceration, and finally post-release rehabilitation.

6.2 Suggestions

6.2.1 Police Level

- Police must be legally required to identify arrested individuals who are primary caregivers, with a mandatory Child Impact Assessment form integrated into arrest and remand procedures to safeguard the rights and well-being of minor children.
- A well-drafted SOP would serve as a comprehensive, inter-agency guideline ensuring that the rights and needs of these children are systematically addressed at every stage, right from the point of arrest, through judicial custody and trial, to incarceration.
- In order to reinforce sensitivity during the arrest, the Arrest Memo should also include instructions that discourage executing arrests in the child's presence unless unavoidable. An ideal Arrest Memo shall include basic information about the children of the arrestee. The researcher suggests that the following points should also be added to the arrest memo:

ARREST MEMO

1. District

2. Police Station

3. Crime No. if any

4. Section of Law

Date of Commission

5. Name and Address of Arrestee

6. Taken into custody

(a) By whom with Designation

(b) Date and Time

(c) Place

(d) Distance from Police Station

8. *Declaration regarding dependent children*

(a) *Number of dependent children the arrestee has*

(b) *Is there any child(ren) present at the time of the arrest*

(c) *If yes, the Name and Address of the child*

(d) *Immediate care arrangements, if needed*

8. Name and Address of Witness

1.

2.

9. Their relation to Arrestee

10. Information to relative of Arrestee, if any

Signature of Arrestee	Signature of Witness	Signature of Police Personnel
-----------------------	----------------------	-------------------------------

1

2.

3.

- Develop a common Arrest memo for the whole of the country.
- Regular capacity-building and training programs should be established to guarantee that police officers are prepared to handle situations involving the children of arrested individuals with tact and legal awareness.
- Specialized modules on child psychology, trauma-informed policing, and the legal requirements under the Juvenile Justice (Care and Protection of Children) Act, 2015 must be included in these programs in addition to fundamental procedural education.

6.2.2 Pre-trial and Sentencing

- In accordance with Article 3 of the UNCRC's best interest of the child concept, courts should give special consideration to bail for women or men who are the only caretakers, particularly in cases where the offenses are non-violent or subject to bond.
- During the remand phase, the magistrate ought to investigate the caregiving duties of the custodial parent and make sure that, if required, temporary guardianship or care orders are issued after consulting with the CWC.

When someone is brought before a magistrate under section 57 of the CrPC, they must:

- (a) Verify that the information in the arrest memo (about the COIPs) has been appropriately completed;
- (b) Verify the arrestee's accuracy of the same;
- (c) Check for compliance with section 50A;

- (d) If the magistrate grants additional police remand under section 167 CrPC, provide the police officers with the necessary instructions regarding the arrestee's dependents. After speaking with the arrestee and taking the situation into consideration, the aforementioned directions ought to be issued.
- At the pre-trial and sentencing phases, courts ought to mandate a Child Impact Statement. Probation officers or child protection officials would draft these statements, in line with Article 12 of the UNCRC, which guarantees a child's right to express views in matters affecting them.
 - India should follow sentencing standards, which force judges to determine if the accused is a caregiver and whether incarceration is truly necessary according to Rule 64 of the UN Bangkok Rules. When it comes to minor offenses, these frameworks support options like community service or deferred sentences, especially for mothers who have caregiving duties.
 - In cases involving non-violent, first-time offenders who are primary caregivers must consider deferring punishment in order to give the child more time to reach a less susceptible developmental stage (such as post-breastfeeding) or to arrange alternative care arrangements.
 - Furthermore, in cases when incarceration is necessary, periodic judicial assessments should draw inspiration from Scandinavian methods to see whether early release is feasible given the child's circumstances.

6.2.3 Prison

On entering the prison, the Prison Register must be filled in alignment with the Prison Manual Rules. The register must include details like:

- (a) Name of the Prisoner
- (b) Name(s) of the Child(ren)
- (c) Age
- (d) Address
- (e) Custody Status

- The data must be entered within 24 hours of prison admission, and it is advised to update the data as and when there is a change in the child's custody or welfare status. This information must be confidential and should be accessible only to authorised personnel.
- Periodic reviews must be initiated by the Jail Superintendent and the District Child Protection Unit. Digitalizing the data about both the children inside the prison and those left outside will enable the authorities to track the details about the children.
- A streamlined communication system between prison officials, Child Welfare Committees (CWCs), District Child Protection Units (DCPU), and Legal Services Authorities would be established by integrating this data with national platforms such as the Ministry of Home Affairs' e-Prisons portal and the Ministry of Women and Child Development's Track Child portal.
- States should align their prison manuals with the Model Prison Manual, 2016, especially Chapter 9, and incorporate explicit provisions for Mother-Child Units.
- In order to make visitations and communication more efficient, Custom-built prison video call services as well as platforms like Zoom and Skype, enable detained parents to routinely communicate with their children via scheduled video conversations.

6.2.4 Release of Children

In regard to protecting the rights of children who are released from prison after 6 years, the following recommendations are put forward by the researcher:

- (a) Mandatory Pre-Release Planning
 - (b) Declaration of child as 'Child in Need of Care and Protection'
 - (c) Oversight by DCPU
- After a child turns six, the required pre-release planning should start about six months prior to the child's release from prison in coordination with the District Child Protection Unit (DCPU) and prison officials.

- According to Section 39 of the Juvenile Justice (Care and Protection of Children) Act, 2015, these Assessments should consider the guardian's capacity to provide consistent care, their financial status, any prior criminal histories, and, if relevant, the child's preferences.
- The results must be properly documented and submitted to the Child Welfare Committee (CWC) for final decisions regarding placement, prioritizing the child's best interests and continuity of care.

6.2.5 Amendments to the JJ Act

The researcher proposes certain amendments be made to the Juvenile Justice (Care and Protection Act) to better align it with the international instruments. The following are:

- Section 2 of the Act should be amended to include ‘children whose parents are incarcerated’ under the category of “Children in Need of Care and Protection” and be brought under the periodic supervision of the local CWC under the JJ Act
- Section 45(2) lays down the criteria for sponsorship as under:
 - (i) where the mother is a widow or divorced or abandoned by family;
 - (ii) where children are orphans and are living with the extended family;
 - (iii) where parents are victims of life-threatening diseases;
 - (iv) where parents are incapacitated due to an accident and unable to care for children financially and physically.
- The researcher opines that sub-clause should be added to section 45(2). The same shall read as: *‘where the only surviving parent or both the parents is/are in jail.*

The current text of Section 32(1) is substituted with the following:

"Any individual, police officer, functionary of any organization, nursing home, hospital, or maternity home, upon finding a child separated from their guardian, shall immediately report such case to the nearest Child Welfare Committee (CWC). This includes cases where a child is left unattended due to the arrest or imprisonment of their parent or legal guardian."

6.2.6 Re-unification

- Within child welfare systems, establish a special reunification assistance program that provides family counselling, parenting classes, and psychosocial support throughout the reuniting process.
- Create interdisciplinary family support teams consisting of social workers, mental health professionals, and child welfare experts to provide holistic support to both the parent and child.
- Ensure that local communities and schools participate in the reunification process, supporting the parent's community integration and meeting the child's educational needs.

6.3 Other Recommendations:

- The government should officially acknowledge children who have an incarcerated parent as a key group for assessing their needs and outcomes in line with fundamental children's rights safeguards.
- Develop an integrated data base linking police, prisons, and CWCs to flag cases where an arrested person has minor children.
- Children of detained parents should get continuous psychological therapy both while they are in foster care or kinship care and after they are released back into society.
- Encourage the creation of collaborations among multiple agencies at both the local and national scales to enable coordinated service delivery strategies.
- Create and distribute informational and educational materials to confront the stigma often linked to having a parent incarcerated.

6.4 Conclusion

From the examination of the current legislations and their implementation, we can come to the conclusion that there are lacunas in the existing legislations and certain changes must be made in the current legislations to ensure that the child's rights are considered so that they don't become the invisible victims. It is thus essential to take into account

their best interest from the arrest of their parents to their imprisonment. To uphold the best interests of the child, a child-sensitive justice system must be in place, where decisions affecting parents are made with due regard to their children's well-being. This requires cross-agency cooperation, legal reforms, and judicial sensitivity.

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Name and Signature of the Candidate : Gayathri Ashish Nair

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*Report on plagiarism check with % of similarity to be attached.