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Beyond the Best Interests: Embedding the Child's Voice in India's Mediation Landscape

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ABSTRACT

Family law mediation is commonly used throughout India, yet its present structure centers mainly on adults while keeping children and their interests out of the resolution process. Indian legal systems uphold the “best interests of the child” principle as established law, yet the implementation of this doctrine in mediation conflicts remains nominal and does not involve child participation. This document evaluates the distinction between judicial statements and practical mediation procedures by advocating for direct child input during institutional processes.

The study is driven by three core questions to evaluate how the Indian legal system supports children's viewpoints during family dispute settlement procedures. The paper analyzes if the Mediation Act of 2023, as well as other existing legal provisions, provide sufficient support for child-inclusive mediation approaches.

The research examines Indian legal frameworks by reviewing “K. Srinivas Rao v. D.A. Deepa” and “Perry Kansagra v. Smriti Madan Kansagra” and “Mohan Kumar Rayana v. Komal Mohan Rayana” alongside other case law. The analysis of practical child voice exclusion and its outcomes uses the case of “Mohan Kumar Rayana v. Komal Mohan Rayana”.

Through a doctrinal and comparative research method, the paper analyzes legal texts along with court decisions, as well as international agreements and international best practices. The Mediation Act 2023 lacks child protection features, while insufficient accredited counsellor knowledge, limited resources, and negative community attitudes form major obstacles for child participation. This paper recommends reforming Indian mediation practices according to institutional child representation frameworks from South Africa, coupled with capacity development programs, legislative modifications, and cultural awareness programs.

The research establishes a strong normative structure through its proposed mediation framework for India because it demonstrates that child inclusion becomes necessary for achieving genuine judicial solutions throughout family law cases.

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I. INTRODUCTION

Family disputes with children become emotionally challenging because they combine intricate legal aspects. Conventional adversarial litigation creates both interpersonal damage between separating parents and enduring emotional damage to children who become part of these disputes. Family mediation has surfaced around the globe as an alternative dispute resolution method which provides impartial facilitators to help separating parties develop solutions through cooperative negotiations outside traditional judicial processes. The approach operates through principles that protect participant autonomy and ensure privacy and foster teamwork for settling differences. When parents use mediation to resolve child custody and visitation matters the process leads to lower hostile interactions along with improved parental connections and superior child well-being than what happens during lengthy court procedures.

The adoption of mediation as an alternative dispute resolution system in India has increased rapidly throughout the last two decades³. The shift began when the “Code of Civil Procedure” introduced “Section 89”⁴ alongside judicial mediation facilities making it possible to establish a system for alternative dispute resolution beyond adversarial methods. The “Family Courts Act 1984” granted legal authority to courts to conduct both conciliation programs and counselling as well as mediation practices. The “*Afcons Infrastructure Ltd. v. Cherian Varkey Construction (2010)*”⁵ judgment declared that matrimonial conflicts along with custodial matters should be suitable for mediation. The system demonstrated positive development although various problems including structural inconsistency along with untrained staff and unclear procedures prevented unified operations. The “Mediation Act 2023” was finally created from these advancements to establish mediation as a primary dispute resolution method through its requirement of mandatory pre-litigation mediation in various civil and commercial matters. However, despite this robust legal and institutional infrastructure, a critical stakeholder in family mediation—the child—remains largely invisible.

Indian law, through statutes such as the “Guardian and Wards Act, 1890” and the “Hindu

³ “Ministry of Law and Justice, ‘Government of India at Forefront to Promote Alternative Dispute Resolution Systems’ (PIB Delhi, 8 February 2024) <https://pib.gov.in/PressReleasePage.aspx?PRID=2002255> accessed 21 April 2025

⁴ Code of Civil Procedure 1908, s 89”

⁵ “*Afcons Infrastructure Ltd v Cherian Varkey Construction Co (P) Ltd (2010) 8 SCC 24*

Minority and Guardianship Act, 1956”, places the child’s welfare as the paramount consideration in custody and guardianship disputes. “Family Courts Act 1984” underlines the necessity of mediating even child custody matters through “Section 9⁶”. The Supreme Court delivered its verdict in “Nil Ratan Kundu v. Abhijit Kundu (2008)”⁷ as part of judicial precedent. It explains that courts should evaluate a child’s preferences when they achieve enough maturity and age. The principles established by law frequently do not succeed in generating practical mediation procedures. The existing family mediation systems of India primarily deal with adult conflicts yet they ignore children’s perspectives and protection in mediations.

Indian family mediation practices differ drastically from international standards since children remain completely invisible in this system. European regions plus Canada along with Australia have developed child-inclusive mediation (CIM) systems which involve specialist assessment for children and specific consultation processes through which children can express their views during child custody arrangements. Such models prove that appropriate child involvement increases both agreement strength and ensures lasting mental health benefits for children.

Development of mediation have come a long way, from traditional practices such as Gram Panchayats and Shantidoots, to statutory frameworks like “Section 89 CPC⁸” and the “Family Courts Act”. This research promotes a new direction for Indian family mediation that starts with placing children’s interests at its core instead of centred on adults and presents an adaptable child-focused mediation framework appropriate for India’s modernizing legal system.

In this backdrop, this paper is divided into seven major sections. The first section introduces the problem and outlines the need for reform. The second section explains what Child-Inclusive Mediation entails, supported by international literature and empirical findings. The third section critically analyses the current gaps in the Indian legal and policy framework. The fourth section outlines the primary challenges including the silence of the Mediation Act, mediator training issues, and cultural barriers. The fifth section draws lessons from South Africa’s institutionalized approach to child representation in mediation. The sixth section analyzes Indian case law to reveal how structured child participation could have impacted outcomes. Finally, the seventh section offers recommendations for implementing a structured,

⁶ Family Courts Act 1984, s 9

⁷ Nil Ratan Kundu v Abhijit Kundu (2008) 9 SCC 413

⁸ Code of Civil Procedure 1908, s 89”

culturally grounded CIM model in India.

II. WHAT IS CHILD INCLUSIVE MEDIATION?

It is a well-known fact that despite children being among the most emotionally affected individuals during family breakdowns, they continue to be structurally sidelined in the mediation process⁹. Traditional mediation frameworks tend to revolve around parental rights and disputes, often treating children as passive subjects : “*spoken for, but not spoken to*”. In India, mediation often includes children only when they're either seen as "old enough," Or when their views are solicited as a formality and sidelined when inconvenient. This tokenistic approach presents the illusion of inclusion, ultimately undermining the core needs of the child. Thus, this imbalance isn't just procedural but also an ethical gap that calls for serious reconsideration in the Indian context.

Child-Inclusive Mediation (CIM) seeks to assist children by giving them the space and support to express their experiences of family separation in a secure and age-appropriate setting¹⁰. This pilot program was developed in Australia by psychologist Jennifer McIntosh¹¹. It should be noted that CIM isn't about burdening children with the weight of decision-making, but it's about ensuring their realities and needs are no longer background noise in a room full of adults making life-altering decisions¹².

At its core, the “Child-Inclusive Mediation (CIM)” process integrates the expertise of trained mediators, the involvement of parents, and the insights of a child consultant. These consultants are typically psychologists or social workers with specialized knowledge in child development. The procedure can be understood through the following four meticulously structured stages¹³:

1. **Shifting The Parental Lens:** The first mediation session focuses merely on reorienting parents toward the emotional needs of their child. The purpose of the same is to ensure that parents understand the emotional impact of the dispute on the child.

⁹ “Gaurav Kumar, ‘Mediation in Family Disputes: Examining its Impact on Children’s Rights’ (TaxGuru, 18 April 2024) <https://taxguru.in/corporate-law/mediation-family-disputes-examining-impact-childrens.html> accessed 20 April 2025

¹⁰ Brunilda Pali and Sandra Voet, Family Mediation in International Family Conflicts: The European Context (Leuven Institute of Criminology, KU Leuven 2012)” “<https://www.law.kuleuven.be/linc/english/publications/family-mediation-international-conflicts.pdf> accessed 20 April 2025

¹¹ Jennifer McIntosh, ‘Child-Inclusive Divorce Mediation: Report on a Qualitative Research Study’ (2007) 18 Conflict Resolution Quarterly 55

¹² Bill Hewlett, ‘Accessing the Parental Mind through the Heart: A Case Study in Child-Inclusive Mediation’ (2014) 13 Journal of Family Studies 94

¹³ Vianney Sebayiga and Christine Njane, ‘Enhancing Child Participation in Family Disputes Through Child Inclusive Mediation in Kenya’ (1 May 2024) SSRN <https://ssrn.com/abstract=4851586> accessed 20 April 2025”

2. **Listening To The Child:** It should be noted that if both parents consent and the context of the dispute is appropriate, then the consultant meets the child separately in a relaxed setting. The goal isn't just to ask direct questions involving who the child prefers to live with, but to also gently understand their day-to-day experiences. This could be regarding school, sleep, worries etc. The psychologist here uses tools like drawing, role-play, or storytelling to create a comfortable environment.
3. **Translating Emotion Into Insight:** The next step involves consultant report . This report contains his/her insights over how the child is coping, what they fear, and what they miss. At this stage, the aim is to help parents understand the conflict through their child's eyes.
4. **Incorporating The Child's Needs Into The Final Plan:** Based on the feedback, the mediation proceeds with a new layer of emotional intelligence. Where necessary, the child consultant may continue to participate in subsequent sessions to ensure that the final parenting agreement authentically prioritizes and reflects the child's best interests.

This process is particularly transformative not just because of the child's inclusion but also because of the respect it shows¹⁴. The child is no longer being talked about in absentia. They are part of the conversation, with safeguards in place to protect their mental and emotional safety.¹⁵ According to the “**Healthy Relationship Transitions (HeaRT) study**”¹⁶, children who were included in even a single session felt more secure and experienced lower levels of anxiety. The study observed that while children were not the ultimate decision-makers, they felt as though they had influenced the decisions. That sense of involvement was significant for their mental wellbeing¹⁷.

“**Article 12 of United Nations Convention on the Rights of the Child (UNCRC)**”¹⁸ affirms the right of children and that they are “*capable of forming their own views*” freely in any matter affecting them. The convention also stated that such views be given “due weight” in

¹⁴ “Jennifer McIntosh, Yvonne Wells, Bruce Smyth and Caroline Long, ‘Child Focused and Child-Inclusive Divorce Mediation: Comparative Outcomes from a Prospective Study of Postseparation Adjustment’ (2008) 46 Family Court Review 105 <https://doi.org/10.1111/j.1744-1617.2007.00186.x> accessed 20 April 2025”

¹⁵ Sue McArthur, ‘Child Inclusive Mediation: The Importance of Giving a Child a Voice’ (EMG Solicitors, 29 January 2025) <https://emgsolicitors.com/child-inclusive-mediation-the-importance-of-giving-a-child-a-voice/> accessed 20 April 2025

¹⁶ Anne Barlow and Jan Ewing, *Children's Voices, Family Disputes and Child-Inclusive Mediation: The Right to Be Heard* (Bristol University Press 2024) ch 5 <https://doi.org/10.56687/9781529228939-011> accessed 20 April 2025

¹⁷ Nyaata, Vivian, Zaal, Frederick Noel, & Pete, Stephen Allister. (2024). Including Children's Views in Divorce Mediation: Comparative Analysis and Recommendations for Kenya. *Potchefstroom Electronic Law Journal*, 27, 1-35.

¹⁸ UN Committee on the Rights of the Child, *Convention on the Rights of the Child* (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, art 12”

line with the child's maturity¹⁹. However, the realization of this right hinges on genuine participation, as interpreted by the Committee on the Rights of the Child. According to the Committee, participation should not just be limited to verbal expression alone. Non-verbal cues including silence, eye contact, and drawings, must also be acknowledged as valid and meaningful expressions of a child's will²⁰.

It should be further noted that if such participation is lacking, then the consequences can be deeply psychological. Children left outside these conversations often internalize guilt, helplessness, or confusion²¹. When a child sees two people they love in conflict and is denied even a voice, it creates an emotional vacuum²². Studies have shown that children who are not included in mediation are more likely to exhibit behavioural issues and emotional withdrawal during and after parental separation.²³ Moreover, children in countries like **Norway and Australia**, where child participation is part of the mediation structure clearly showed higher emotional adjustment and greater trust in post-separation arrangements.²⁴

In India, judicial precedents have always reflected the need for child participation. In **T.S. Ramesh v. V. Krithika**²⁵, the Madras High Court noted that children should not be collateral damage in marital disputes. The Court recommended that all children above the age of ten should be given an opportunity to express their views in legal and mediated processes. While this is definitely a welcome gesture, it remains a standalone observation without broader procedural enforcement or policy backing. The system still lacks a coherent, institutional model for child-inclusive mediation.

Therefore, even though international frameworks have laid down the path, psychological research has validated the benefits, and even our judiciary has laid down precedents that support them, what is now required is structured and enforceable reform that moves from mere recognition to meaningful implementation and from being an exception to becoming the norm.

¹⁹ "Robert Emery, 'Children's voices: Listening—and deciding—is an adult responsibility' (2003) 45 Arizona Law Review 621

²⁰ Centre for Human Rights, University of Pretoria, *Study on Child Participation in Development Frameworks in Africa* (Pretoria University Law Press 2022)

²¹ Marian Roberts, 'Children's Voices, Family Disputes and Child Inclusive Mediation: The Right to Be Heard' (2025) 6 *Amicus Curiae* 443

²² Hazel Genn et al, *Twisting Arms: Court Referred and Court Linked Mediation under Judicial Pressure* (Ministry of Justice Research Series 1/07, May 2007)

²³ Jeanne M Weaver and Thomas J Schofield, 'Mediation and Moderation of Divorce Effects on Children's Behavior Problems' (2015) 29 *J Fam Psychol* 39

²⁴ Olav Bertin Tveit, Kristin Gustavson, and Maren Sand Helland, 'Children's Participation in Post-Divorce Decision-Making: The Role of Conflict and Attachment' (2023) 28 *Child & Family Social Work* 712 <https://doi.org/10.1111/cfs.12997> accessed 20 April 2025

²⁵ *T.S. Ramesh v V. Krithika* OSA No 282 of 2017 (Madras HC)"

III. REVIEW OF LITERATURE

- **Roberts (2024)**²⁶ evaluates how adopting foreign terms with excessive focus on child rights creates a distortion between theoretical concepts and actual child participation in family mediation. She demonstrates that difference exists between high-level policy ideals and mediation's practical capacity to resolve disputes. The article showcases support from professional guidelines for child involvement but finds that practice exhibits ambiguity while exceeding practical limitations with direct participation expectations. **Research Gap:** A research opportunity exists in India's mediation framework because, the researcher stops short of explaining how these models could be adjusted for Indian legal systems given their developing mediation framework.
- **Sonakshi Agarwal (2024)**²⁷ authored a dissertation that examines alternative dispute resolution (ADR) methods during child custody disputes concerning legal standards alongside mediation protocols and mediator responsibilities and relevant court decisions. The document presents a clear explanation of how mediation benefits child welfare yet its main focus remains on procedural and institutional aspects. **Research Gap:** This paper neglects both the extent of child participation through family judicial processes and the actual utilization of children's opinions for determining custody decisions. The presented work addresses a precise void by assessing how children disappear from Indian family mediation procedures followed by an introduction to a structured child-centric framework.
- **Dubey and Saxena (2025)**²⁸ assess the rising significance of ADR and its mediation component for handling family conflicts across India. The paper emphasizes three main components which include legislative structures alongside judicial backing and issues affecting institutions through non-uniform mediator training and cultural challenges to acceptance. The paper explains structural advantages of mediation well yet lacks an examination of how children's voices integrate into real practice under the “best interests of the child” principle. **Research Gap:** Analysis involving direct involvement of children in mediation procedures is missing from this research study. This paper offers a child-focused mediation model which specifically incorporates children's views within Indian mediation systems.

²⁶ “Marian Roberts, ‘Children in Family Mediation: A Rights Approach or the Right Approach?’ (2024) 5(2) *Amicus Curiae*, Series 2, 256

²⁷ Sonakshi Agarwal, ‘The Effectiveness of ADR Methods in Resolving Child Custody Disputes’ (2024) Dissertation, Unitedworld School of Law, Karnavati University

²⁸ Abhijatya Dubey and Juhi Saxena, ‘The Effectiveness of Alternative Dispute Resolution in Family Disputes in India’ (2025) 8(2) *International Journal of Law Management & Humanities* 3134 <https://doi.org/10.10000/IJLMH.119413>”

- **Dhanushree's (2023)²⁹** work offers a thorough discussion about Child Protection Mediation (CPM) functioning as a human-oriented collaborative method in India's developing child safeguarding framework. The paper describes global and domestic protocols alongside essential mediation principles and proven program solutions. **Research Gap:** This paper details CPM policies and institutional elements but does not analyze how child voices operate during mediation or assess their practical right to participate. The research fills this void through examination of child participation in family mediation practice in India before putting forward an organized formal framework for child-inclusive guardianship arrangements.
- The study by **Khandelot et al. (2024)³⁰** evaluates the effectiveness between mediation and arbitration in Indian family law through analysis of data collected from 180 respondents. The study validates mediation as a fast solution that saves costs and challenges adversarial courtroom procedures although it presents challenges regarding enforceability and possible bias. **Research Gap:** The study provides statistical evidence about adult opinions regarding ADR but does not investigate children's perspectives during these processes. The paper addresses this research gap by performing a critical analysis of how children disappear from Indian family mediation while developing a child-focused model based on participatory justice.
- **Pali and Voet (2012)³¹** offer an in-depth study of international family mediation within Europe, focusing on cross-border disputes involving children. The report highlights challenges such as cultural conflicts, parental abduction, and the evolving role of children in mediation. While it outlines diverse models of child participation and debates their merits, its scope remains Eurocentric and program-focused. **Research Gap:** The research does not address how these insights might inform child-inclusive mediation models in legally pluralistic, non-Western contexts like India. This paper fills that gap by contextualizing global lessons into India's mediation framework and proposing a culturally grounded, child-centered model.
- **Anna Nylund (2018)³²** evaluates the Norwegian child custody mediation system using dispute systems design theory to analyze both its general mediation definition and its

²⁹ "Dhanushree P, 'Child Protection Mediation: The Potential Role of ADR in Child Welfare Reform' (2023) 10(6) Journal of Emerging Technologies and Innovative Research 383

³⁰ Gouri Suresh Khandelot and others, 'The Role of ADR in Family Law Cases: Benefits and Challenges' (2024) 4(4) International Journal of Emerging Technologies and Innovative Research 218

³¹ Brunilda Pali and Sandra Voet, Family Mediation in International Family Conflicts: The European Context (Leuven Institute of Criminology, KU Leuven 2012)"

³² "Anna Nylund, Kaijus Ervasti and Lin Adrian (eds), Nordic Mediation Research (Springer 2018)

insufficient mediation triage process as well as its structural problems within its three-stage model. The assessment studies systemic deficits throughout family mediation and family needs but does not evaluate child involvement in or influence on mediation dynamics. **Research Gap:** Children have standing as affected stakeholders in this context yet researchers have not thoroughly explored their level of independence. The proposed paper fills this recognized gap by designing a child-focused mediation framework which embeds children's views while respecting Indian legal practices and cultural peculiarities.

- **Nyaata, Zaal and Pete (2024)**³³ analyzed child involvement in divorce mediation between Kenya, South Africa and Australia which demonstrated a separation between Kenyan practices and international standards. The study delivers strong evidence alongside suggestions which lead to better legal transformation. **Research Gap:** The paper identifies weaknesses in Kenyan procedural processes and lack of training yet fails to recommend an operational framework for child-focused mediation practice. This research establishes a specific framework to match Indian social-legal needs by creating operational steps which transform children from mere recipients into active mediation participants.
- The article by **Sharpe and Reingold (2024)**³⁴ illustrates what leads family law mediations to fail by interviewing experienced U.S. mediators. Their analysis covers attorney preparedness, mediator selection, emotional dynamics, and good faith negotiations. The article includes extensive practitioner perspectives yet neglects child participation in mediations about child custody thus focusing mainly on the conduct of attorneys and mediators. **Research Gap:** The authors do not investigate the effects that child involvement and rejection of such involvement create for mediation success rates. This paper fills this knowledge gap through an assessment of Indian mediation practices regarding child inclusion as well as a proposed system focused on child-centered mediation.
- The article by **Paleker**³⁵ evaluates the use of mediation clauses in South Africa's Children's Act 38 of 2005 because it changed family conflict settlement processes from

<https://doi.org/10.1007/978-3-319-73019-6>

³³ Vivian Nyaata, Frederick Noel Zaal and Stephen Allister Pete, 'Including Children's Views in Divorce Mediation: A Comparative Analysis and Recommendations for Kenya' (2024) 27 Potchefstroom Electronic Law Journal 1 <https://doi.org/10.17159/1727-3781/2024/v27i0a14416>

³⁴ Lisa Ann Sharpe and William B Reingold Jr, 'Why Do Mediations Fail? Perspectives, Concerns, and Advice from Mediators' (2024) 37 Journal of the American Academy of Matrimonial Lawyers 201"

³⁵ "Mohamed Paleker, 'Mediation in South Africa's New Children's Act: A Pyrrhic Victory' (Asia-Pacific Mediation Forum Conference, 2008) <http://www.mediate.com/apmf2008>"

traditional courtroom methods to modern alternative dispute resolution practices. The research reviews provisions for mandatory and optional mediation under the Act including the aspects of parenting plans and unmarried fathers' rights as well as lay forum referrals. **Research Gap:** No research exists to evaluate the effects of implemented mediation systems after their launch. The article emphasizes the importance of creating formal accreditation standards for mediators as well as standardized judicial education because both elements can maximize mediation success rate in child-focused legal matters.

IV. CRITICAL ANALYSIS: THE NEED FOR CHILD-INCLUSIVE MEDIATION IN INDIA

It is a well-known truth across cultures that when a family breaks down, it is the child who suffers the most: emotionally, psychologically, and developmentally³⁶. In India, the divorce rate may seem statistically low at 1%.³⁷ However, this number masks a growing trend. Rising educational levels, changing gender roles, increased financial independence, and shifting expectations within marriages are all contributing to an increase in separation and custody disputes³⁸. This growing trend is reflected in family court pendency which records a rise in petitions related to marital breakdown and child custody battles³⁹.

In India, this vulnerability has received some institutional recognition. In **2024**, “**the Ministry of Women and Child Development**” constituted a “**Mediation Cell**” within the “**National Commission for Protection of Child Rights (NCPCR)**” to address parental disputes⁴⁰. This included even sensitive cases such as child abduction amid marital discord. The aim is to resolve such matters in the best interest of the child, ideally through mutual consent and minimal emotional disruption. While these are commendable and significant steps in the right direction, they remain limited in both scope and structure.

Considering the above developments, child-inclusive mediation must not be seen as a utopian ideal, but as an urgent and non-negotiable evolution of the Indian family justice system. Following are three primary needs that justify the integration of child consultation in India's

³⁶ “B D’Onofrio and R Emery, ‘Parental divorce or separation and children's mental health’ (2019) 18(1) World Psychiatry 100.

³⁷ Chinki Sinha, ‘Will the Surge in Divorces and Single Living Reshape Indian Society?’ India Today (New Delhi, 12 March 2025) <https://www.indiatoday.in/lifestyle/society/story/will-the-surge-in-divorces-and-single-living-reshape-indian-society-2692247-2025-03-12> accessed 20 April 2025.

³⁸ H Kondamudi and A Kadaverugu, ‘Increasing Divorce Rate in India: A Critical Analysis from Psychological Perspective’ (2024) 12(6) IJCRT a618

³⁹ District & Sessions Court Gurugram, Total Pendency of Family Court for the Month of January-2025 (January 2025) <https://cdnbbsr.s3waas.gov.in/s3ec02326fb04c3abf030fe3f4e341f39b/uploads/2025/02/2025020667.pdf> accessed 20 April 2025.

⁴⁰ Press Information Bureau, ‘Legal Services Authorities are Working for the Common Man: Justice Sanjiv Khanna’ (PIB, 14 April 2024) <https://pib.gov.in/PressReleaseIframePage.aspx?PRID=2040951> accessed 20 April 2025.”

mediation processes:

A. Ensuring the Best Interests of the Child

At the heart of any child custody or parental dispute lies a principle that transcends legal jargon: the *best interests of the child*. The **UN Committee on the Rights of the Child** clarifies that the best interest principle is not just a lofty ideal, but a **threefold legal standard**: it is a substantive right, a guiding interpretative principle, and a procedural rule⁴¹.

As a substantive right, it means that the child's welfare must be the *primary consideration*⁴². As an interpretative principle, it directs courts to prefer interpretations of law that most align with the child's wellbeing⁴³. Lastly, procedurally, any decision impacting a child must include a documented assessment of how it affects them⁴⁴.

Yet, in India, while courts routinely refer to the "best interests" standard, there is no uniform, structured mechanism to determine what a child actually needs or wants. In "*Nil Ratan Kundu v. Abhijit Kundu (2008)*"⁴⁵, the Supreme Court recognized that mere financial capacity or personal preference is not enough. Custody of a child must align with the emotional and developmental needs of the child.

This is where Child-Inclusive Mediation (CIM) becomes not just relevant, but necessary. Instead of relying solely on parental arguments or judicial assumptions, CIM introduces a direct line to the child's perspective. Therefore, making the "best interest" standard more than just a legal phrase.

B. Realising India's Constitutional and International Commitments

India has ratified the "**United Nations Convention on the Rights of the Child (UNCRC)**", where "**Article 12**"⁴⁶ enshrines the child's right to express their views in matters affecting them. Yet, our current family mediation frameworks fall significantly short of fulfilling this obligation. Moreover, the Indian Constitution as well as the judicial interpretation, has long

⁴¹ "UN Committee on the Rights of the Child, General Comment No 14: The Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art 3, Para 1), 29 May 2013, UN Doc CRC/C/GC/14

⁴² UN Committee on the Rights of the Child, General Comment No 14: The Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art 3, Para 1), 29 May 2013, UN Doc CRC/C/GC/14, para 6(a).

⁴³ UN Committee on the Rights of the Child, General Comment No 14: The Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art 3, Para 1), 29 May 2013, UN Doc CRC/C/GC/14, para 6(b).

⁴⁴ UN Committee on the Rights of the Child, *General Comment No 14: The Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art 3, Para 1)*, 29 May 2013, UN Doc CRC/C/GC/14, para 6(c).

⁴⁵ Nil Ratan Kundu v. Abhijit Kundu, AIR 2009 SC (Supp) 732.

⁴⁶ UN Committee on the Rights of the Child, Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, art 12

recognised the best interest of the child as a paramount concern⁴⁷.

It is to be noted that there is no dedicated protocol, no training mandate for mediators, and no clarity on how the child's voice is to be recorded, relayed, or weighed in final decisions. Therefore, if India is to meaningfully honour both its international obligations and constitutional ethos, it must move from a parent-centric to a child-sensitive mediation culture.

C. Reducing Post-Separation Conflict And Legal Pendency

One of the most compelling reasons for child-inclusive mediation in India is its potential to alleviate the burden on already stretched family courts. According to the **National Judicial Data Grid (NJDG)**, lakhs of family disputes, especially child custody and visitation cases, remain unresolved for years⁴⁸. This is further fuelled by recurring litigation and mistrust between parties. Much of this litigation stems not from legal disagreement, but emotional dissatisfaction. This is particularly when children feel unheard and outcomes appear one-sided⁴⁹.

Studies from jurisdictions like **Australia** demonstrate that child participation significantly reduces re-litigation⁵⁰. When children are included, parents are more likely to cooperate, and the terms of custody and visitation are followed more faithfully, as decisions feel more inclusive and transparent. For a country like India, where access to timely justice is already fragile, this reduction in re-litigation is essential.

V. CHALLENGES – TOWARD A CHILD-INCLUSIVE MEDIATION FRAMEWORK IN INDIA: WHAT NEEDS TO CHANGE

Today, if India is serious about fulfilling its constitutional commitment to child welfare and its obligations under the UNCRC⁵¹, then it must pivot from ad hoc practices to a structured, enforceable model of Child-Inclusive Mediation (CIM). The following recommendations is drawn from international models, judicial trends, and policy analysis.

⁴⁷ Gaurav Nagpal v. Sumedha Nagpal, 2008 AIR SCW 7687, (2008) 72”

⁴⁸ “Dhananjay Mahapatra, ‘63 Lakh Cases Pending in Lower Courts Due to “*Lack of Counsel*”, Says National Judicial Data Grid’ The Times of India (New Delhi, 23 January 2023) <https://timesofindia.indiatimes.com/india/63-lakh-cases-pending-in-lower-courts-due-to-lack-of-counsel-says-national-judicial-data-grid/articleshow/97233574.cms> accessed 20 April 2025.

⁴⁹ Priyanka P Nambiar, Kavita V Jangam and Shekhar P Seshadri, ‘Psychosocial Perspectives on Child Mental Health in Custody Disputes: A Qualitative Study from Urban Bengaluru’ (2024) Indian Journal of Social Psychiatry <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC11572429> accessed 20 April 2025.

⁵⁰ Jennifer E McIntosh, Yvonne D Wells and Caroline M Long, ‘Child-Focused and Child-Inclusive Family Law Dispute Resolution: One Year Findings from a Prospective Study of Outcomes’ (2007) 13(1) Journal of Family Studies 8.

⁵¹ UN Committee on the Rights of the Child, Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.”

A. Omission in the Mediation Act, 2023

The *Mediation Act, 2023*⁵² remains silent on family-specific processes, let alone child-inclusive practices. Its uniform provisions do not differentiate between civil-commercial and family disputes, thereby ignoring the emotional, psychological, and participatory needs of children in custody or guardianship matters.

For example, while the Act establishes confidentiality as a default⁵³, it makes no exception when disclosure is necessary for the child's welfare. Likewise, it does not mandate the appointment of child counsellors, or outline protocols for child consultation. These gaps leave practitioners unsure of when and how to involve children.

Author's Recommendation: To address this, India should introduce a separate chapter or schedule in the Mediation Act dedicated to family and child-related disputes. This framework should:

- Mandate child-inclusive consultation in custody and visitation disputes.
- Require appointment of trained child consultants (psychologists or welfare officers).
- Provide clarity on how children's views are to be recorded and relayed.
- Include an override clause on confidentiality when it hinders the child's best interest.

The *Perry Kansagra*⁵⁴ ruling has already created judicial precedent for prioritizing child welfare over procedural rules. Therefore, codifying this into the Act would bring clarity and consistency.

Furthermore, India can also draw from South Africa's OFA model⁵⁵ where family advocates work alongside psychologists to represent the child's interests in every custody case, is a functional and rights-based model India can draw from.

B. Inadequate Mediator Training And Infrastructure Deficits

In practice, most mediators in India are retired judges or legal professionals with minimal exposure to child psychology or trauma-informed practices. The “**Vidhi Centre for Legal Policy (2020)**” found that over 80% of mediators in family courts had no formal training in handling children during mediation⁵⁶. This results in:

⁵² “Mediation Act 2023 (India)

⁵³ Mediation Act 2023 (India), s 22

⁵⁴ Perry Kansagra Vs Smriti Madan Kansagra [2019]3SCR991

⁵⁵ Melanie Botha, ‘The Voice of Children in Divorce Proceedings: A Critical Consideration of the Provisions in the Mediation in Certain Divorce Matters Act 24 of 1987 and the Role of Family Advocate in Divorce Proceedings. Is It Not Time for an Overhaul of This Act?’ (2015) 18 Potchefstroom Electronic Law Journal 324”

⁵⁶ “Vidhi Centre for Legal Policy, *Strengthening Mediation in India: A Report on Court-Connected Mediations*

- Superficial or harmful questioning.
- Over-reliance on adult narratives.
- Misinterpretation of a child's silence or reluctance as consent.

In addition to the above, family court infrastructure often lacks⁵⁷:

- Private child-friendly rooms for interviews.
- Tools like drawings, toys, or role-play methods used internationally.
- Digital or written formats for recording children's perspectives sensitively.

Author's Recommendation: The Mediation Act should be followed by a **National Mediation Training Protocol** with mandatory modules on:

- Child psychology and communication.
- Trauma-informed interviewing techniques.
- Recognizing manipulation or signs of distress.

India could also adopt South Africa's model where each case under the OFA involves a multidisciplinary team including lawyers, psychologists, and social workers⁵⁸. Such collaborative practice not only improves the quality of feedback but reduces the risk of a single professional overlooking a child's distress.

Infrastructure-wise, both Legal Services Authorities and High Courts should be mandated to establish child-friendly mediation spaces and assign budgets for the same. Without this foundational support, even the most well-intentioned legal reforms will struggle to take effect.

C. Cultural and Social Barriers to Child Participation

The Indian family unit is deeply hierarchical⁵⁹. In many custody battles, children are not seen as rights-bearing individuals, but as dependents to be protected or fought over. Judges and mediators often assume that children are either too young to contribute meaningfully or fear

(2020) <https://vidhilegalpolicy.in/research/2017-7-17-strengthening-mediation-in-india-a-report-on-court-connected-mediations/> accessed 20 April 2025

⁵⁷ Kerala State Commission for Protection of Child Rights, *Make family courts child-friendly, says child rights panel* (The New Indian Express, 28 February 2025) <https://www.newindianexpress.com/cities/thiruvananthapuram/2025/Feb/28/make-family-courts-child-friendly-says-child-rights-panel> accessed 20 April 2025

⁵⁸ Melanie Botha, 'The Voice of Children in Divorce Proceedings: A Critical Consideration of the Provisions in the Mediation in Certain Divorce Matters Act 24 of 1987 and the Role of Family Advocate in Divorce Proceedings. Is It Not Time for an Overhaul of This Act?' (2015) 18 Potchefstroom Electronic Law Journal 324"

⁵⁹ "Patricia Uberoi, 'The Family in India: Beyond the Nuclear versus Joint Debate' (2006) 38(47) Economic and Political Weekly 4911

that they may be manipulated.⁶⁰

Author's Recommendation: A statutory framework must be culturally sensitive but not culture-bound. To counter the presumption that children lack the maturity to express themselves, India should adopt models like **Hart's Ladder of Participation**⁶¹, which recognizes that meaningful input from children can take verbal and non-verbal forms.

Judicial officers and mediators should be trained to distinguish between genuine expression and parental coaching. This is where **Lundy's model of participation**⁶² becomes useful: by ensuring children are (1) *given safe space*, (2) *adequately informed*, (3) *heard*, and (4) *taken seriously*, the mediation process becomes both participatory and protective.

Furthermore, we can also explore institutional partnerships with schools, child psychologists, and child rights NGOs to develop localized tools for eliciting child input in culturally appropriate ways.

VI. LEARNING FROM SOUTH AFRICA: A CASE FOR INSTITUTIONALIZED CHILD REPRESENTATION IN MEDIATION

There are only few systems have institutionalized the child's voice with as much clarity and legal precision as South Africa's "*Office of the Family Advocate (OFA)*". This is created under the "**Mediation in Certain Divorce Matters Act, 1987**"⁶³. At the heart of this model lies a multidisciplinary philosophy: *children are not legal footnotes in custody disputes; they are independent rights-bearers*⁶⁴.

The OFA's operational backbone is formed by teams of family advocates and family counsellors.⁶⁵ This particular team actually opens up a structured pathway for the child's voice to be acknowledged. The process involves explaining roles, the nature of mediation, and the purpose of the intervention to both parents and children. Here, children are interviewed in an emotionally safe environment, and their perspectives are taken into consideration and presented to court in the required legal framework⁶⁶.

Furthermore, the OFA also has legal flexibility to bring in external specialists like mental

⁶⁰ Hadeel Al-Alosi, 'Will Somebody Please Think of the Children?! Child Focused and Child Inclusive Models in Family Dispute Resolution' (2018)

⁶¹ Harry Shier, 'Pathways to Participation: Openings, Opportunities and Obligations' (2001) 15(1) Children and Society 107

⁶² Laura Lundy, "Voice" is Not Enough: Conceptualising Article 12 of the United Nations Convention on the Rights of the Child' (2007) 33(6) *British Educational Research Journal* 927.

⁶³ Mediation in Certain Divorce Matters Act 24 of 1987, s 4.164

⁶⁴ Veerashnie Srikison, 'Mandatory Child-Inclusive Mediation – A Possibility in South Africa' (LLM dissertation, University of Pretoria 2019)"

⁶⁵ "Department of Justice and Constitutional Development, *Annual Report 2008/2009* (RP189/2009)

⁶⁶ Mediation in Certain Divorce Matters Act 24 of 1987, s 4

health experts, faith leaders, or educational professionals depending on the social context of the case⁶⁷. This adaptability is crucial in a country as diverse as South Africa, and the model holds valuable lessons for multicultural societies like India.

Another important concept is the *enquiry process*. If any kind of concerns arise, an official enquiry can be initiated, and the case essentially pauses until the child's welfare is fully investigated⁶⁸. This function goes beyond conflict resolution; it is protective in nature, a safeguard built into the legal architecture.⁶⁹ In cases of suspected neglect or abuse, the OFA has the power to escalate the matter and seek court intervention⁷⁰.

It should be noted that initially, the OFA's services were restricted to children of married parents litigating in High Courts. This exclusion created systemic inequality. However, with the advent of "**South Africa's Children's Act, 2005**"⁷¹, the mandate of the OFA expanded dramatically. Now, children born out of wedlock and those entangled in parental disputes outside of marriage also fall under its protective ambit. Notably, the Act requires that any co-holders of parental responsibility first attempt mediation with the help of a family advocate, social worker, or child psychologist before seeking judicial redress. This mandatory pre-litigation step reinforces the centrality of the child's emotional and psychological welfare. India should take serious cues from the South African model, which is explored in next part of the article.

VII. RETHINKING JUDICIAL APPROACHES: WHAT THESE CASES REVEAL ABOUT THE NEED FOR CHILD-INCLUSIVE MEDIATION?

The Indian courts have increasingly shown willingness to refer family disputes to mediation⁷². The analysis of following landmark cases reveals that the process still lacks consistent, child-focused safeguards. As per author analysis, most court-directed mediations continue to view the dispute as primarily between the spouses, failing to accommodate the child's voice in any meaningful or structured way. The following judgments highlight not only the judicial endorsement of mediation but also expose the missed opportunities where a Child-Inclusive Mediation (CIM) model. The inclusion of such a model could have significantly improved

⁶⁷ Felicity Kaganas and Debbie Budlender, 'Family Advocate' (1991) 2 South African Journal on Human Rights

⁶⁸ Mediation in Certain Divorce Matters Act 24 of 1987, s 4

⁶⁹ Vianney Sebayiga and Christine Njane, 'Enhancing Child Participation in Family Disputes Through Child Inclusive Mediation in Kenya' (1 May 2024) SSRN <https://ssrn.com/abstract=4851586> accessed 20 April 2025

⁷⁰ *ibid*

⁷¹ Children's Act 38 of 2005 (South Africa)"

⁷² "Dipti Jain, 'Court Backlog, Rising Costs Push Business Families to Mediation Tables' The Economic Times (New Delhi, 19 April 2024) <https://economictimes.indiatimes.com/news/company/corporate-trends/court-backlog-rising-costs-push-business-families-to-mediation-tables/articleshow/120367148.cms> accessed 20 April 2025.

both the process as well as outcome especially for such children caught in the conflict.

- **“K. Srinivas Rao v. D.A. Deepa”⁷³**

Facts: The present case involved a bitter divorce battle involving allegations of mental cruelty, dowry harassment, and domestic tension. Furthermore, the tension between the couple also escalated beyond repair. The conflict became so deeply entrenched that both parties were completely alienated over a decade-long separation.

Court’s Decision: The Supreme Court acknowledged that the prolonged litigation had exacerbated the animosity and mental trauma. It emphasized the potential of mediation to resolve such matters early and recommended setting up pre-mediation assistance centres under Section 9 of the Family Courts Act⁷⁴.

Author’s Opinion: In the present case, the court’s suggestion to institutionalize mediation is commendable. However, the judgment reveals a larger lacuna. The focus remained solely on reconciling or separating the couple; there was no attention paid to any children involved, or their emotional state during the prolonged conflict. Therefore, if CIM had been a structured part of the proceedings, a trained child consultant could have informed the court and parents about the child's perspective. Early inclusion of their voice might have helped de-escalate the dispute by shifting parental focus back to shared responsibilities rather than mutual blame.

- **“Perry Kansagra v. Smriti Madan Kansagra”⁷⁵**

Facts: This case involved a complex cross-border custody dispute involving a child who held both Kenyan and British passports. The parents engaged in lengthy litigation across jurisdictions. The child was required to be present at the centre of multiple custody and visitation arrangements. During the proceedings, a court-appointed counsellor conducted sessions with the child to assess his psychological and emotional well-being. These reports which as a part of the mediation process, became the focus of contention between the parents.

Court’s Decision: In this case, the mother objected to the inclusion of the counsellor’s report in court. It was cited that confidentiality of mediation proceedings should be respected. However, the Supreme Court ruled in favour of admitting the reports, stating that confidentiality cannot override the best interests of the child. The Court emphasized that custody battles fall within the “*parens patriae*” jurisdiction, and that safeguarding the child’s welfare must take precedence over procedural limitations.

⁷³ K. Srinivas Rao vs D.A. Deepa AIR2013SC2176

⁷⁴ Family Courts Act 1984, s 9”

⁷⁵ “Perry Kansagra Vs Smriti Madan Kansagra [2019]3SCR991

Author's Opinion: This case shows that Indian courts are willing to stretch procedural boundaries for the sake of the child's welfare. However, the very fact that the mother objected to the inclusion of counseling reports reflects the fragility of current safeguards around child participation. Therefore, If a formal CIM model had been adopted, the child's voice could have been more systematically. Furthermore, such a model would also ensure that feedback shared by the child is not exploited or weaponized by either parent.

- **“Mohan Kumar Rayana v. Komal Mohan Rayana”⁷⁶**

Facts: This case involved a custody battle between estranged parents over their daughter. The Family Court while taking a progressive step, appointed three trained counsellors. The counsellors namely, Ms. Chavan, Ms. Tulalwar, and Ms. Italia met with both parents. Furthermore, they also conducted home and school visits, and personally interacted with the child to assess her emotional and psychological state.

Court's Decision: While both parents were found to be loving and concerned, the Bombay High Court gave considerable weight to the counsellors' feedback, noting that their grounded, empathetic observations offered a much more comprehensive understanding of her well-being than abstract medical records. Their insights ultimately played a decisive role in shaping the Court's conclusion regarding custodial responsibility.

Author's Opinion: This case clearly illustrates the value of including child-specific insights in custody decisions. However, it also exposes a significant gap: the process of involving trained counsellors was discretionary, not mandatory. The decision to appoint child experts rested entirely with the judge, and there was no institutional mechanism ensuring such child-focused consultations in every custody dispute. Therefore, if there had been a formal Child-Inclusive Mediation (CIM) model, that is backed by statutory authority or guidelines under the Mediation Act, 2023, the inclusion of child's voice would not have been an exception but a procedural norm.

VIII. CONCLUSION

In conclusion, it is stated that while the concept of **Child-Inclusive Mediation (CIM)** has gained recognition globally for its transformative impact on children navigating parental separation, India has yet to meaningfully embrace this model. Despite various judicial observations and international obligations under the **UNCRC**⁷⁷, the Indian legal system

⁷⁶ Mohan Kumar Rayana v. Komal Mohan Rayana, AIR 2010 SC 1659”

⁷⁷ “UN Committee on the Rights of the Child, Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.”

continues to treat children's voices as optional rather than essential. This absence of institutional frameworks and policy mandates means that child participation, if it occurs at all, is inconsistent and largely symbolic. Thus, it is high time we shift from a parent-centric to a child-sensitive mediation model, one that does not just speak about children, but listens to them, understands them, and includes them with care.

Implementing Child inclusive model in India would not only align with global best practices and human rights obligations, but also **strengthen the credibility and humanity** of our mediation system. True inclusion is not just about giving children decision-making power, but also respecting their experiences, valuing their perspectives, and safeguarding their emotional wellbeing in processes that deeply affect their lives.

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