

FOSTER CARE IN INDIA:  
POLICY BRIEF

Centre for Law  
and Policy  
Research



**FOSTER CARE INDIA**

**About the Paper:**

Foster Care India (“FCI”) commissioned Centre for Law and Policy Research (“CLPR”) in 2013 to undertake a policy review of the legal framework of foster care, with one project focusing on Rajasthan and another, for India. This paper is being published to share the findings of CLPR’s review and to stimulate debate and further research on this topic. The views expressed in this paper are those of the author and not necessarily those of FCI.

**About CLPR:**

CLPR is a non-profit organization based in Bangalore. CLPR aims to promote public policy research, litigation and legal education. As part of its policy work, CLPR has initiated projects in the form of pre-legislative recommendations to proposed legislations. The Centre undertakes intensive research projects and is also involved in litigation work in the High Court of Karnataka, Supreme Court of India and the sub-ordinate courts, mainly by way of public interest, in the areas of disability law, environment, public health and urban infrastructure development law.

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## EXECUTIVE SUMMARY:

This policy brief argues for the creation of a robust foster care system in India.

There is strong evidence in the international conventions, the Indian Constitution, legislative enactments and recent Supreme Court decisions that point to the perceptible shift that child rights jurisprudence in India has made towards family-based alternative care for children as opposed to institutional care. The time is therefore right, and the legal realm is fertile for a comprehensive legal regime pertaining to foster care in India. The Juvenile Justice (Care and Protection of Children) Act, 2005 (“JJ Act”) provides for foster care but, in practice, foster care has been limited only to pre-adoption foster care, which is a very restrictive remedy.

Based on an analysis of the current provisions of foster care in India, along with the rules and schemes on foster care framed by states in India, more specifically in Delhi and Goa, it makes recommendations to fill the gaps and shortcomings so as to move towards a comprehensive legal framework for foster care. It also includes analyses of the best practices of foreign jurisdiction to support the recommendations.

In this policy brief the following recommendations are made for India:

- A broader definition for foster care is required, which can be included in the JJ Rules.
- Foster care must be provided for juveniles in conflict with the law as well as children in need of care and protection. This can be done by reading Section 42 in conjunction with Section 15(e) of the JJ Act.
- Revise classification of foster care in order to include emergency care and other short-term care, as well as long-term care.
- Develop training standards and programs for foster families, government officials and other stakeholders involved in the process.
- Plan and implement an effective complaint and dispute resolution procedure.
- Prepare guidelines for termination of foster care.
- Define care for children with special needs of such as those with disabilities or those affected by HIV/AIDS.
- Engage voluntary organisations and NGO’s by giving them stronger decision making powers but backed by a framework of regulation, accountability and transparency
- Increase government involvement in the processes of budgetary allocation, awareness programs, mandatory quality checks and monitoring the effectiveness of the programs.

## **Introduction:**

India's total population is 1.2 billion, of whom 40% are children. How are all these children in India being cared for? The recent census in India found an increase in child labourers from 11.28 million in 1991 to 12.66 million in 2001; crimes against children increased 24% to a total of 33,098 cases of crimes against children reported in the country during 2011.<sup>i</sup>

Every child has the right to family care. This provision is found in the Convention on the Rights of the Child, 1989 ("CRC"), the UN Guidelines for Alternative Care 2009, the Indian Constitution and the jurisprudence of the Indian Supreme Court on child rights.

If the rights of the child to family care are to be provided, then the current methods in India, focusing largely on adoption are certainly not adequate and not in conformity with international conventions such as the CRC, or the UN Guidelines for Alternative Care, 2009. Another form of providing family care to children is through foster care, as well as informal methods such as kinship care. In order to support systems of alternative care for children as opposed to institutional care, a robust foster care program needs to be developed by state governments, which keep a central focus on the best interests of the child and the right to of a child to family care.

Foster care has had a long history in India, first initiated in the 1960's by the central government. The first non-institutional scheme was introduced in Maharashtra in 1972.<sup>ii</sup> The scheme was later revised in 2005 as the 'Bal Sangopal Scheme -- Non Institutional Services'.<sup>iii</sup> In the late 1990's Karnataka implemented a foster care scheme focused on destitute children. Emergency schemes were operational even in Gujarat, after the 2001 earthquake where around 350 children were rehabilitated with their relatives and neighbours in the community.<sup>iv</sup> However, although the JJ Act presently provides for foster care, it is not being implemented effectively. Very few state governments have developed foster care programs. Foster care is still largely used as a pre-adoption procedure, which is limiting the potential of this method to provide family care to children.

This policy brief reviews the law on foster care in India and positions foster care within the framework of the child's right to family care. In light of this, it analyses the provisions of the JJ Act relating to foster care, and studies the schemes and rules made by other states such as Delhi, Goa, Karnataka and Rajasthan, thus finally recommending the way forward for India, at the central as well as state level, to develop its Rules for providing an effective foster care program. In laying down these recommendations, this policy brief borrows

best practices on foster care from other jurisdictions, both nationally and globally.

### **The Child's Right to a Family:**

There is now an abundance of evidence globally to suggest how children in institutional care experience psychological and behavioural development delays.<sup>v</sup> The lack of one-on-one human contact, lack of play facilities, poor nutrition, overcrowding, and lack of access to medical care are commonly observed problems in institutional care. These deficiencies lead to physical, behavioural and cognitive problems of various kinds.<sup>vi</sup> Reports and studies of the past few decades point out how institutions consistently fail to meet children's developmental needs for attachment, acculturation and social integration.<sup>vii</sup>

Children in institutional care do not experience the continuity of care and attachment from a caregiver. Individual care is almost impossible, the result being that, all through childhood and adolescence, there are attachment problems.<sup>viii</sup> Institutions also become sites for other problems such as exploitation and human trafficking.<sup>ix</sup>

The need to shift from institutional care to family-based care such as foster care is also recognised in the legal framework. Child rights jurisprudence now recognizes the significance of alternative care based on family and communities. CRC focuses on five major principles: the best interests of

the child, non-discrimination, the child's participation, the child's right to protection, and, the child's right to survival and development. The CRC specifically recognises the right to family care. In Article 20 of the CRC, it is stated that children who cannot be looked after by their own family have a right to alternative care and must be looked after properly, by people who respect their ethnic groups, religions, cultures and languages. In Article 21, it is stated that children have the right to care and protection if they are adopted or in foster care. In Article 18(2) it is written that, for the purpose of guaranteeing and promoting the rights set forth in the CRC, state parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children. Thus, there is a legal obligation on governments in India to ensure the development of institutions for providing care for children, such as foster care.

The most recent and encompassing move towards family-based care is marked by the UN Guidelines for Alternative Care of Children, 2009. Article 4 of the Guidelines states that *"Every child and young person should live in a supportive, protective and caring environment that promotes his/her full potential. Children with inadequate or no parental*

*care are at special risk of being denied such a nurturing environment.” In Article 5, it is stated that “Where the child’s own family is unable, even with appropriate support, to provide adequate care for the child, or abandons or relinquishes the child, the State is responsible for protecting the rights of the child and ensuring appropriate alternative care, with or through competent local authorities and duly authorized civil society organizations. It is the role of the State, through its competent authorities, to ensure the supervision of the safety, well-being and development of any child placed in alternative care and the regular review of the appropriateness of the care arrangement provided.”*

Thus, internationally, there is a clear recognition of the child’s right to family care and that, in the event a child is not in a position to be able to be cared for by her family, the State is obligated to provide for alternative care for the child, either by adoption or by foster care. Removal of a child from a family and moving into institutional care is certainly the last option only in the most extreme of circumstances or for immediate relief.<sup>x</sup>

The Indian constitution also protects child rights. Article 15(3) provides that the State shall make special provisions for women and children whenever necessary. The right to equality, protection of life and liberty, the right against exploitation<sup>xi</sup> and other fundamental rights enshrined Article 14, 19 and 21 are extended and read in the specific context of child

rights. In the Directive Principles of State Policy, Article 39(e) directs the State, in framing its policies, to secure that the tender age of children is not abused. Article 39(f) states that the State should ensure that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity, so as to ensure that childhood and youth are protected against exploitation and against moral and material abandonment. Article 51A(k) inserted in 2010, makes it a part of fundamental duties of every citizen of India, who is a parent or guardian of child to provide opportunities for education to his child or, as the case may be, ward between the age of six to fourteen years.<sup>xii</sup>

Keeping the best interests of the child in mind, the Supreme Court in the landmark judgment of *Laxmikant Pandey v. Union of India*<sup>xiii</sup> laid down the regulations for adoption in India. In terms of the rights of a child to family care, it held that “*Every child has a right to love and be loved and to grow up in an atmosphere of love and affection and of moral and material security and this is possible only if the child is brought up in a family.*”<sup>xiv</sup> Although *Laxmikant Pandey case* focused on adoption, and specifically inter-country adoption, it laid down the broad principle that a right to family is central in the best interests of the child. This judgement is extremely significant because, although it may not directly refer to foster care, it lays emphasis

on the best interests of the child and the right of the child to family care. This perceptual shift towards prioritising family-based care over institutional care is evident in the recent 2011 Supreme Court judgment of *Bachpan Bachao Andolan v. Union of India*<sup>xv</sup>. Referring to the Integrated Child Protection Scheme (ICPS), the Supreme Court suggested the need for creating and implementing schemes that provide support for foster care through Sponsorship and Foster Care Funds. Referring to a report from the Ministry of Women and Child Development, the Supreme Court in the *Bachpan Bachao Andolan case*<sup>xvi</sup> pointed out some of the gaps and shortcomings of institutional care in India. It emphasised the overwhelming focus on institutional care while neglecting non-institutional care options like adoption, foster care and sponsorship to children without home and family. It also pointed out the lack of rehabilitation services for older children not adopted through regular adoption processes.

Therefore, with the ratification of the international conventions, a Constitution that recognizes child protection as a fundamental right and Supreme Court judgments developing a strong child rights jurisprudence, it is argued that there is a clear and recognised right of a child to family care and that, where the child is not cared for by his / her own family, state governments must ensure that the child has

alternative family care by means of foster care, adoption or other informal means of family-based care.

Foster care is severely under-utilised as a method of providing family care to children in India. We need to build effective structures for developing an effective foster care regime.

## **A Legal Framework for Foster Care in India:**

In India, non-institutional alternative care largely can largely be practiced in four ways - adoption, sponsorship, kinship care and foster care. Adoption creates a legally binding relationship between children and the adoptive parents. It transfers all parental rights and responsibilities to the adoptive parents. Foster care is a situation where children are placed by a competent authority for the purpose of alternative care, in the domestic environment of a family other than the children's own family or kinship care. Unlike adoption, a foster child remains the legal responsibility of the state and the natural parents. Sponsorship programs are very different from adoption and foster care. A sponsorship program such as stated in Section 43(1) of the JJ Act, is to provide supplementary support to families, to children's homes and to special homes to meet medical, nutritional, education and other needs of the children with a view to improving their quality of life. The *Palanbar*

*Yojana Scheme* is an example of a sponsorship program in Rajasthan. Sponsorship programs are an effective instrument for encouraging kinship care but are not a substitute to it.

Foster care was provided for under the JJ Act only in 2000. However, even before the JJ Act, foster care has been legally recognised as a way of including a child as a member of one's family. In the case of *K.V. Muthu v. Angamuthu Ammal*<sup>xvii</sup>, a decision prior to the JJ Act, the Indian Supreme Court dealing with eviction proceedings between a landlord and tenant had to address the question of whether a foster son would be a member of a family. The Supreme Court held that a 'foster child' is essentially the child of another person but is nursed, reared and brought up by another person as his own. It held that "*Care therefore in rearing up the child need not always be parental*" and that a child was brought up by foster parents with the love and care that one usually receives from one's family, the child would certainly be a member of that family.<sup>xviii</sup>

In response to the CRC recommendations, India incorporated its aims into domestic legislation by passing the Juvenile Justice (Care and Protection of Children) Act, 2000 ("JJ Act") amended in 2002 and 2006. The Statement of Objects and Reasons of the JJ Act include the responsibility to bring the laws relating to

juveniles in conformity with the standards prescribed by the CRC and other international obligations.

As per the JJ Act, any child who has not completed the age of 18 shall fall within the ambit of the Act. It distinguishes a 'child in need of care and protection' from 'child in conflict with law'. The Child Welfare Committee (CWC) is the competent authority to deal with 'children in need of care and protection' while the Juvenile Justice Board (JJB) is meant to deal with 'juvenile in conflict with law'. The JJ Act also establishes various kinds of institutions such as children's homes for the reception of child in need of care and protection, special homes for juvenile in conflict with law, observation homes meant for temporary reception of children during pendency of inquiry.

Section 2(d) of the JJ Act gives an exhaustive definition of '*child in need of care and protection*'. It includes children who are vulnerable due to social, economic or cultural disadvantages, such as those children found without any home or settled place, or mentally or physically challenged, ill children, who has a parent or guardian unfit or incapacitated to exercise this control over the child etc.

The JJ Act in Section 40 provides for the rehabilitation and social reintegration of a child in need of care and protection by means of i) adoption (ii) foster care (iii)

sponsorship (iv) sending the child to an after-care organisation.

Foster care is provided for in Section 42 which states that *(1) Foster care may be used for temporary placement of those infants who are ultimately to be given for adoption. (2) In foster care, the child may be placed in another family for a short or extended period of time, depending upon the circumstances where the child's own parent usually visit regularly and eventually after the rehabilitation, where the children may return to their own homes. (3) The State Government may make rules for the purposes of carrying out the scheme of foster care programme of children.*

Section 42(3) read together with Section 68(xii) gives the power to the State Government to establish rules for carrying out the scheme of foster care programme of children. Section 43 and 44 deal with sponsorship and after-care programmes respectively. Both these provisions do not make any mention of foster care even though both sponsorship programmes as well as after-care programmes need to be integrated into foster care programmes.

JJ Rules: In the Juvenile Justice (Care and Protection of Children) Rules, 2007 ("Rules"), Rules 34, 35 and 36 describe foster care, criteria for selection of foster carer and pre-adoption care respectively. Rule 35 lays down 11 criteria that a potential foster care family would have to satisfy to be eligible for being an authorized foster parent. The CWC then has the authority to

declare by order, whether the person is 'fit' and suitable as a foster carer, before placing the child in foster care.

### ***Schemes for Foster Care:***

In addition to the JJ Act and Rules, the Ministry of Women and Child Development through the Integrated Child Protection Scheme (ICPS) reaffirmed the rights of the child to grow up in a family. The Guiding Principles 3.6 of the ICPS states that institutionalization needs to be the last resort for the care and protection of the child. The Scheme aims to pursue a conscious shift to family-based care and the focus of the ICPS is *"to promote and strengthen non-institutional family-based care options for children deprived of parental care, including sponsorship to vulnerable families, kinship care, in-country adoption, foster care and inter-country adoption, in order of preference."*

Under the ICPS, the CWC shall identify suitable cases and order placement of the child in foster care. Once the CWC orders placement of child in foster care, a copy of the order shall be marked to the District Child Protection Services ("DCPS") for release of funds and to Specialized Adoption Agency (SAA) for follow up and monitoring. The SAA shall periodically report about the progress of the child to the CWC and DCPS.

It was held by the Bombay High Court in a 2010 judgment, when the question of a conflict between the JJ Act

and personal laws came up, that “*The JJ Act is a special enactment...the legislature has taken care to ensure that its provisions are secular in character and that the benefit of adoption is not restricted to any religious or social group.*”<sup>xxix</sup> The court further ruled that, if there is a conflict between the provisions of the Hindu Adoption and Maintenance Act, 1956 and the JJ Act, it is the latter act which would prevail.<sup>xx</sup>

**The JJ Act therefore prevails in all matters relating to foster care and adoption of children and would even override personal laws in India.**<sup>xxi</sup>

### **Definitional Constraints:**

Surprisingly, the JJ Act does not provide any definition for foster care. Foster care is only mentioned in Section 42(1) as follows- *Foster care may be used for temporary placement of those infants who are ultimately to be given for adoption.* (emphasis added by author)

The literal interpretation of this provision limits the understanding and use of foster care. It firstly uses the word “infants” which generally refers to very young children, usually below the age of 1 year. Secondly, the use of the words “*ultimately to be given for adoption*” also restrict the class of children to only those who are ‘pre-adoptive’.

Such a literal and restrictive interpretation of the provision was employed in case of *R. Arivazhagan v. The Secretary to Government* (decided on 23<sup>rd</sup> April,

2009)<sup>xxii</sup>. The Petitioner in this case, the biological parent, challenged the order of the CWC directing that his child be put in foster care with the Respondents. The Madras High Court reading Section 42(1) of the JJ Act, stated that foster care can be pressed into service by the Committee if only the children in question are going to be given for adoption. Because there was no intention to give the children in adoption in the future, *the order of foster care declaring the respondents as Fit persons and directing the children to be kept in the foster care was set aside.*

The above judgment is an example of how the lack of any definition for foster care under the JJ Act has led to it being largely used only as a pre-adoptive method and not as a means of providing care independently. Our recommendation is to lay down a broad and inclusive definition of foster care that would expand its scope.

### **Foster Care Rules and Schemes**

Since the JJ Act has such a limited description of foster care, the development of foster care is largely being done through the State Rules under the JJ Act notified by various State Governments or through special schemes.

### **Delhi NCR & Goa:**

Goa, under the powers conferred by Section 68 of the Juvenile Justice (Care and Protection of Children) Act, 2000 passed the Goa Foster Care Scheme named ‘*Vatsalya*’.

The Preamble to the *Vatsalya* Scheme defines foster care as being ‘temporary, family-based care for children in different circumstances’. The scheme works in conjunction with the ICPS and serves to strengthen non-institutional forms of care. The NCT of Delhi passed the Delhi Foster Care Rules (2009) as part of the Draft Delhi Juvenile Justice (Care and Protection of Children) Rules, 2009.

These Rules and Schemes have been launched and implemented only recently, so their effectiveness is yet to be seen. The *Vatsalya* scheme which was launched only in July, 2013 is yet to find takers as on November 2013.<sup>xxiii</sup>

### **Eligibility of Foster Children:**

Under the Goa Scheme, the eligibility for children to be put under foster care includes ‘children in need of care and protection’ and also includes juveniles in conflict with law.

This is a positive sign, because juveniles in conflict with law also need to be brought within the ambit of foster care. However, a literal reading of the JJ Act seems to be unclear about whether foster care would apply to juveniles in conflict with law as well. Section 15(e) of JJ Act authorises the JJB to release the juvenile on probation by being placed under “other fit person” which can include a foster caregiver under Section 42 of the JJ Act. A system however has to be worked out through

foster care rules that would transfer this jurisdiction from the JJB to the CWC.

### **Criteria for Selection Of Foster Caregivers:**

The Delhi Rules list out the criteria by which foster families shall be selected. The criteria encompass the health, income, standard of living, physical, mental and emotional stability and willingness of the foster family to work towards providing an environment conducive to the overall wellbeing of the child. The Rules also state that the foster parents should have been residing within the NCT of Delhi for at least three years on the day of making a request for having a foster child. The best interest of the child shall be the foremost consideration in determining the placement of the child.

In the *Vatsalya* Scheme, the criteria for selection of foster caregivers are in accordance with Section 35 of the Rules under the JJ Act. The identification of foster families as per the *Vatsalya* Scheme, shall be done with the help of the child’s biological parents and adoption agencies. Age and sex of the child, siblings and parents, behavioural issues, the child’s opinion and the number of children in a family etc shall be considered while placing a child in foster care. Also, in the case of a child in conflict with the law, the JJB may refer the child to the CWC for fostering. It is the CWC that decides if a child is eligible for foster care.

Ultimately, it is the CWC which receives applications for foster care and screens potential foster caregivers.

### **Discussion and Analysis:**

The Delhi Foster Care Rules and the Vatsalya Scheme open up the space for broad and inclusive regulations for foster care in India, acting as a springboard for future policy debates. However, both provide only a skeletal framework on foster care. Kinship-care is not distinguished from foster care nor is it stated to be a part of foster care. They also fail to make provisions for children with disabilities or with illnesses such as HIV.

The Vatsalya Scheme also prescribes that before placing the child with the family, the foster family goes through a period of orientation and training with Child Care Coordinator and the Department of Women and Child Development. While the scheme mandates that the foster care family attend training or orientation programmes, we recommend however, that these be broadened to include child integration programs which will be attended by both the child and the foster care family in order to help the initial integration of the child into the family. The initial implementation of the schemes would require training for the relevant government agencies themselves. The Department of Women and Child Development creates the Foster Care Fund to enable the implementation of

the scheme. The State Government oversees the disbursement of funds, introduces other schemes as a buffer in case of contingencies and evaluates and reviews the scheme periodically.

### **Child Welfare Committee (CWC):**

Under the Delhi Rules, the nodal body implementing the foster care scheme continues to be the CWC. This has its pros and cons, such as whether the CWC is already burdened with many other functions under the JJ Act and whether it can adequately focus on foster care as well. While the Rules do give the CWC the authority to place the child in foster care for a period of one year which is extendable, the Committee proposes an annual review of the adequacy of care being provided. This gap between the initial reviews of one year seems too long. More frequent reviews of the status and conditions are necessary, at least in the initial periods of fostering. The CWC is also in charge of transferring the custody of the fostered child from one eligible person to another. However, the Rules fail to mention any check-and-balance system to regulate it, in order to avoid the problem of excessive transfers. The Delhi Rules state that the child shall be returned to the CWC when the foster parents are directed to do so. However, they fail to state under what circumstances such directions may be issued. A more detailed set of rules

with respect to termination of fostering service by the caregivers is needed.

### **Engagement of Voluntary Organizations:**

The Delhi Rules as well as Vatsalya Scheme provides for organizations, NGO's and civil society to actively participate in the process. Under the Delhi Rules, if organisations wish to assist the CWC in being a part of the foster care programme, they can make an application to the CWC in this respect. Once selected, the organization shall submit the required reports within the time frame specified. But the Rules fails to specify the criteria by which such an organization is to be identified and chosen, nor does it specify the exact duties of such an organization. With respect to the Vatsalya Scheme, it is commendable to note that the identification of foster families and awareness about the Scheme allows for self-help groups, *Mabila Mandals*, women's organisations, NGOs and adoption agencies to be involved in the process.

### **Karnataka Draft Foster Care Rules:**

The Juvenile Justice (Care and Protection of Children) Karnataka Rules of 2010 in Rule 37(1) states that foster care is "for children who cannot be placed in adoption but are in need of family care, foster care shall be considered as an option over institutional care." Such a re-defining of foster care in the Karnataka Rules is

recommended for other jurisdictions as well. Rule 37(2) provides for kinship care wherein the foster placement is with the extended family as the first option and unrelated family is only the second option. An exclusive foster care rules for Karnataka are in the stage of deliberations with the state government.

The Karnataka draft rules make a few significant departures from the other schemes. They have specifically provided for the much debated 'kinship foster care', wherein arrangements are made for the child to be taken care of by relatives or family friends. It has also proposed the establishment of bodies apart from those provided under the JJ Act, such as a "Foster Care Approval Committee" which would consist of the District Child Protection Officer, the CWC Chairperson, Protection officer, representative from an NGO. The final order of foster care however will be given by CWC as per the JJ Act. It also allows NGO's to play the role of a Foster Care Facilitation Agency, which can *inter alia* identify and recommend through the DCPU, cases for foster care.

Another difference in the Karnataka draft rules is the inclusion of State Adoption Regulation Agency (SARA) in the planning, implementing and monitoring of foster care at the state level. The Specialized Adoption Agency (SAA) has also been involved in the procedure of recognizing a person/family as

‘fit’ to be foster carer. To what extent these rules will be accepted and enacted by the government is yet to be seen.

### **Parental Rights:**

When a court separates a child from the biological parents and the CWC places a child in foster care, the understanding is that the goal is to eventually reunite the child with the biological parents. The schemes and rules analysed above are unclear about the extent of the rights of biological parents over their child during the time of fostering. Also, the rights of the foster parents must be protected. The legal rights and duties of foster parents are considered under the common law doctrine of *in loco parentis*. “Under this doctrine, persons holding themselves out as parents are held to similar and often the same standards as natural parents.”<sup>xxiv</sup> The courts in the United States, for example, have used the doctrine of *in loco parentis* to impose on foster parents the same responsibilities as natural parents with respect to providing care, protection, education, attention etc.<sup>xxv</sup> Foster parents, therefore, would have duties similar to natural parents but do not possess their rights. A balanced understanding of the nature of these rights and duties of foster caregivers opposing contrast to rights and duties of biological parents needs to be clearly articulated and formulated.

### **Recommendations:**

The following are recommendations being made for the rules being enacted in India, at the union as well as the state level. The analysis includes Best Practices on Foster Care from **Comparative Jurisdictions:**

These recommendations are based on studying the various State Rules, the right of the child to family care as recognised in both national and international law and on best practices on foster care legislations and policies comparatively. The recommendations are as follows:

#### **(i) Definition of Foster Care:**

There is no definition of ‘foster care’ in the JJ Act. The only reference is in Section 42 of the Act. Section 42(1) states that “*Foster care may be used for temporary placement of those infants who are ultimately to be given for adoption.*” The section is worded negatively, stating that foster care is available only for “infants” ultimately being given for adoption. This lack of a simple and effective definition has led to foster care being understood only as a pre-adoption option. It is crucial to have a simple stand-alone definition of ‘foster care’ such as the one in the Uganda Children Act, in which ‘foster care’ is defined as ‘*the placement of a child with a person who is not his or her parent or relative and who is willing to undertake the care and maintenance of the child.*’ This is simple and a broader definition than that provided under Section 42 of the JJ

Act. Such wording will expand the scope of foster care to non-adoption situations as well.

**(ii) Foster Care to be provided for juveniles in conflict with the law as well as children in need of care and protection:**

This can be done by reading Section 42 in conjunction with Section 15(e) of the JJ Act which provides for the Board directing the juvenile to be placed under the care of any parent, guardian or other fit person. This provision ought to be included in the JJ Rules with procedures for the JJ Board to send juveniles in conflict with law also for foster care where the need arises.

**(iii) Classifying Foster Care based on time-frames:**

There needs to be clarity on the timeframe of fostering. This is important not just in terms of regulating the fostering process but also in defining the inter-relationships between the child and the caregiver. The Vatsalya Scheme of Goa in Rule 11 discusses the duration of foster care and classifies it into (1) emergency placement (2) temporary placement (3) long term placement until the child attains the age of 18 to be extended to 21, and (4) assessment placement, usually for approximately four months during which detailed assessments of the child can take place. It is also useful to note the Ethiopian National Alternative

Child Care Guidelines (2009) wherein it has classified foster care into three types, and this may be a useful classification to adopt because it describes each of these categories.

- *Emergency foster care:* This is placement in foster care during an emergency or conflict. Most of these cases occur when a child is displaced and family reunification and tracing activities are going on.
- *Temporary foster care:* This type of foster care refers to providing care for a specified amount of time. Typically, this type of foster care is used as a temporary family-based placement until reintegration into the biological, kinship or adoptive family occurs.
- *Long-term foster care:* This type of foster care is very similar to adoption but without the specific legal implications that adoption brings with it. Long-term foster care occurs in many low- and high-resource countries. In this type of foster care, it is understood that the child will remain in care until the age of majority.

**(iv) Rules to Contain Minimum Standards for Fostering:**

These standards would form the regulatory framework for the conduct of fostering

services. These are relevant to every local authority and independent fostering service. Once these standards are formulated, they can be enforced through independent monitoring, checks, inspections and certifications.

#### **(v) Training Standards:**

Voluntary organisations need to be allowed to provide training, advice, information and support to the foster caregivers. In England, for example, these details are set out in Training, Support and Development Standards for Foster Care (TSD).<sup>xxvi</sup> The TSD Standards are meant to raise the profile of foster caregivers, providing the national minimum benchmark that establish what the foster caregivers need to know and understand as their roles and functions. All foster caregivers in England are expected to complete the Standards within 12 months of their approval. In India, voluntary organisations and expert practitioners have to go a step further and train, not just families and caregivers, but government officials as well, for implementation of foster care programmes. The case workers, social workers, child protection officers, probation officers and more significantly, the CWC members themselves need to be given specialised training about foster care by different field experts.

#### **(vi) Complaints and Procedures:**

Fostering is inherently vulnerable, both, for the caregivers as well as the child. Foster caregivers have to cope with the behaviours and needs of the child. Some of the children may already be going through stressful conditions leading to extreme behaviour at times. Foster parents may also be neglectful or abusive. When serious allegations are made by either of the parties, there needs to be a clearly defined mechanism in place to look into the complaints and find suitable remedies. Such a mechanism must clarify the following-

- Who is the authority to whom the allegations have to be made? Such an authority should be approachable for the child as well as the caregivers.
- How are the allegations to be recorded? If it is a criminal offence, is the police to be involved and to what extent?
- How are necessary child protection enquiries, which may involve all related parties, and even the caregivers own family and children if required, to be conducted?
- When a serious allegation is made against the foster caregivers, what are the immediate measures to be taken? Is it practical to move the child if the allegations are serious?

- A fixed timeframe for prosecution, investigation and disciplinary action is required.<sup>xxvii</sup>
- The caregivers need to be given a fair trial. They need to be heard and given a chance to respond to the allegations, because this can have serious implications for their reputations and livelihoods.

**(vii) Guidelines for Termination of Foster Care:**

If a foster caregiver decides to stop fostering, a procedure needs to be established for the same. There is a need for guidelines that allow the competent authority to terminate the foster caregiver from continuing fostering. Such termination can be on grounds of fitness, unsuitability and best interest. A procedure for such termination is required. Whether the CWC in conjunction with the case-worker, can with a written notice and a fair hearing, terminate the approval of foster caregivers.

**(viii) Powers and Regulations of Voluntary Organisation:**

The inclusion of voluntary organisations into the core areas of child protection in providing foster care services is necessary. But this inclusion has to follow a transparent and accountable process wherein the roles and responsibilities of each of stakeholder are clear and demarcated. Voluntary organisations, if

registered and regulated by the state, can be given crucial powers in the foster care program, but this granting of powers needs to be balanced with a comprehensive regulatory framework.

It is recommended that voluntary organisations be registered with the state by entering into a contract through a detailed a Memorandum of Understanding (“MoU”) that lays down all necessary details about the parties as well as their relationship, functions and clauses on dispute resolution with clarity. The minimum requirements for a voluntary organisation to participate in foster care program needs to be integrity and good character, full and satisfactory information about the individuals involved in the venture, including those funding it as well as those executing the functions at a day-to-day level. The Fostering Services (England) Regulations 2011 are valuable resource for drafting certain provisions, such as the appointment of manager or the conduct of fostering services (see Part 4 of the Regulations). Adequate accounts are to be maintained by the voluntary organisations with submission of annual accounts certified by an accountant, information of associated (if registered as a company) and other such financial information.

**(ix) Children with Disabilities:**

The state government rules need to make special provisions for children in need of special care such as children with disabilities. Differently-abled children, physically and mentally, require special care and attention. Children affected by HIV/AIDS are rarely adopted and are excluded even in institutional care. Such children need special foster care attention as there is nowhere else they can turn. The Rules need to be devised such that medical reports and medical requirements are clearly considered by the CWC, and that foster caregivers are given training which is specific to the required medical attention.

**(x) Broader Government Initiatives:**

There is an urgent need for the Government to start acting on their promised support to alternative family-based care. These actions need to be reflected at several levels, including budgetary allocations with the Department of Women and Child, enactment of laws and policies pertaining to it, enforcement of national minimum standards of child care through independent quality checks and inspections, mandating reports on the functioning and effectiveness of the CWC, taking legal action wherever necessary. They must also attempt to streamline the various child related welfare schemes such as education, mid-day meal etc so that they function harmoniously.

Finally, raising awareness on the importance of family and community based care for children must be a high priority for the government. The Ministry of Women and Child Development needs to also undertake a cost-benefit analysis comparing institutional care to foster care, and how much expenditure versus qualitative returns per child is calculable in financial terms. This makes budgetary allocations more precise.

## REFERENCED CASE LAWS

- Laxmikant Pandey v. Union of India A .I.R 1984 SC 469
- Bachpan Bachao Andolan v. Union of India AIR 2011 SC 3361
- K.V. Muthi v. Angamuthi Ammal AIR 1997 SC 628
- R. Arivazhagan v The Secretary to Government (decided on 23<sup>rd</sup> April, 2009)
- Pratap Singh v. State of Jharkhand (2005) 3 SCC 551
- Re: Adoption of Payal at Sharinee Vinay Pathak and his wife Sonika Sahay Pathak in 2010 (1) BomCR 434
- Vishal Jeet v. Union of India AIR 1990SC 1412
- Umesh Chandra v. State of Rajasthan (1982) 2 SCC 202
- Avinash Malhotra v. Union of India 2009(6) SCC 398

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## ENDNOTES

<sup>i</sup> Report: “Children in India- A Statistic Appraisal 2012” (Social Statistics Division, Ministry of Statistic and Program Implementation; Government of India)

<sup>ii</sup> *See*; A Study On The Practice of Foster Care (Bangalore: National Research and Documentation Centre, BOSCO, 2013)

<sup>iii</sup> “Bal Sangopal Yojana- Experiences of Implementation in Mumbai” (Women & Child Development Department, Maharashtra) Available on- <https://womenchild.maharashtra.gov.in/Sitemap/womenchild/pdf/fostercare.pdf> (last accessed 20th December, 2013)

<sup>iv</sup> A Study On The Practice of Foster Care (Bangalore: National Research and Documentation Centre, BOSCO, 2013) p. 7

<sup>v</sup> Save The Children “Keeping Children Out of Harmful Institutions: Why We Should Be Investing in Family Based Care” (Save the Children, 2009); *Also See*; M. Ainsworth “Deprivation of Maternal Care: A Reassessment of its Effects” (World Health Organisation, Public Health Papers, No. 14, 1962); John Williamson and Aaron Greenberg “Families, Not Orphanages” (Better Care Network, 2010)

<sup>vi</sup> Kevin Brown “Keeping Children Out of Harmful Institutions: Why We Should Be Investing in Family Based Care” (Save the Children, 2009) p. 6; On the relation between developmental psychology and adolescent juvenile justice, *see* Elizabeth S. Scott and Laurence Steinberg “Rethinking Juvenile Justice” (Harvard University Press, 2010)

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<sup>vii</sup> John Williamson and Aaron Greenberg “Families, Not Orphanages” (Better Care Network, 2010) available on <http://www.crin.org/docs/Families%20Not%20Orphanages.pdf> (last accessed 30<sup>th</sup> November, 2013)

<sup>viii</sup> ID

<sup>ix</sup> M Van Reisen and A Stefanovic “Lost Kids, Lost Futures: The European Union’s Response To Child Trafficking” (Terre des Homes: Geneva, 2004)

<sup>x</sup> Article 14, UN Guidelines for Alternative Care of Children, 2009

<sup>xi</sup> *Vishal Jeet v. Union of India* (AIR 1990SC 1412) Supreme Court issued directions and guidelines in public interest to protect children from sexual exploitation and child trafficking and also providing proper medical aid, shelter and education to the children of prostitutes and girls pushed into ‘flesh trade’ through protective homes and aiming for ultimate rehabilitation in families.

<sup>xii</sup> The Supreme Court read in this fundamental duty of parents and guardians in conjunction with the children’s right to education in the case of *Avinash Malhotra v. Union of India* 2009(6) SCC 398

<sup>xiii</sup> *Laxmikant Pandey v. Union of India* A.I.R 1984 SC 469

<sup>xiv</sup> ID

<sup>xv</sup> *Bachpan Bachao Andolan v. Union of India* AIR 2011 SC 3361

<sup>xvi</sup> ID

<sup>xvii</sup> *K.V. Muthu v. Angamuthu Ammal* AIR 1997 SC 628

<sup>xviii</sup> ID at AIR 1997 SC 628

<sup>xix</sup> *Re: Adoption of Payal at Sharinee Vinay Pathak and his wife Sonika Sahay Pathak* 2010(1)BomCR 434

<sup>xx</sup> 2010 (1) BomCR 434

<sup>xxi</sup> *Re: Adoption of Payal at Sharinee Vinay Pathak and his wife Sonika Sahay Pathak* in 2010 (1) BomCR 434 or 2009(111)BOMLR 3816

<sup>xxii</sup> *R. Arivazhagan v The Secretary to Government* (decided on 23<sup>rd</sup> April, 2009)

<sup>xxiii</sup> “No Takers for Government’s Vatsalya Scheme” *Times of India* on 20<sup>th</sup> November, 2013

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<sup>xxiv</sup> Sanford N. Katz “Legal Aspects of Foster Care” in *Family Law Quarterly* (Vol. no. 5, No. 3, 1971) 285

<sup>xxv</sup> *Schneider v. Schneider* 25 NK Misc. 180 A.2d 564 *as cited in* Sanford N. Katz “Legal Aspects of Foster Care” in *Family Law Quarterly* (Vol. no. 5, No. 3, 1971) 285

<sup>xxvi</sup> Training, Support and Development Standards for Foster Care available on <http://webarchive.nationalarchives.gov.uk/20130401151715/https://www.education.gov.uk/publications/eOrderingDownload/SC105-0211.pdf> (last accessed on 30th November, 2013)

<sup>xxvii</sup> For a discussion on laws and regulations pertaining to timeframes in complaint and inquiry procedure, *See*; Lynn Davis “A Practical Guide to Foster Law” (London: Jessica Kingsley Publishers, 2010) 56.