

A Child's Right to a Family: Deinstitutionalization – In the Best Interest of the Child

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Abstract

Family is the core unit of society and a major source of the development of children. Every child has the right to a family. There are millions of children living in institutions worldwide. The best of institutions cannot substitute the care in a family of the child. In India there is a disturbing trend of young children, although having both parents, frequently being placed in institutional care for supposed education and a better life. There is proven recognition, worldwide, that institutional care is associated with negative consequences for children's development. Yet thousands of children are in institutions rather than with their families, because they cannot access alternative care systems. Using national and international law, court observations, and field experiences, this paper argues a case for deinstitutionalization of such children, by empowering the families, thereby protecting their right to a family and preventing abuse and exploitation.

Introduction

A child's best chance for a fulfilled and happy life begins in a family environment. In an ideal world, children would grow up in a loving family; if not with their mother or father, perhaps with a grandmother or an uncle. Family life is not always a guarantee of a good life, but the alternatives to family are often grim. In the real world, global issues such as death, poverty, HIV/AIDS, migration, and even war and displacement are real problems that prevent children from being raised by their own families. For many of the millions of children who lose their families because of parental death, poverty, or other causes, the alternative to family is institutionalization. There are millions of children living in institutions worldwide. One estimate puts the total at up to eight million¹ ; though, given gaps in global statistics and

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1 The number of residential institutions and the number of children living in them is unknown. Estimates range from 'more than 2 million' (UNICEF, Progress for Children: A Report Card on Child Protection

indications that there are many unregistered children's homes; the true figure may well be much higher. It is also likely to rise with the increasing impact of conflict, climate change and the HIV and AIDS that affect the poorest and most vulnerable families.

India has 430 million children (0-18), the largest population of children in the world.² There is a need to ensure that these children grow up healthy, both in terms of physical health and mental health, and have sufficient opportunities to contribute to the growth of the country. Amongst the information provided by the Government of India in its third and fourth combined report on implementation of the Convention on Rights of the Child relating to children's care³, the following estimates relating to children in institutions are significant:

- It is estimated that a large number children are destitute and orphans or without parental support in the country. Many of them have been placed in institutional care under the juvenile justice system. These include children in conflict with law, children of prisoners, and children in need of care and protection. Information on the number of children, who are not orphaned but placed in institutional care, is not available.
- The Programme for Juvenile Justice provides for the establishment and maintenance of institutions for the rehabilitation of juveniles in conflict with law and children in need of care and protection.⁴ At present, there are 794 homes established under the JJ Act, 2000, catering to 46,957 children. This Programme has been merged with the Integrated Child Protection Scheme (ICPS).⁵

Number 8, 2009) to 8 million (Cited in: Pinheiro, P., World Report on Violence against Children, UNICEF, New York, 2006). These figures are often reported as underestimates, due to lack of data from many countries and the large proportion of unregistered institutions

2 Census of India 2011, Government of India

3 India's third and fourth combined report on the implementation of the Convention on the Rights of the Child. CRC/C/IND/3-4. 22 July 2013 submitted to the Committee on the Rights of the Child. See full report at: <http://www2.ohchr.org/english/bodies/crc/crcs66.htm>

4 Objective of the Juvenile Justice Act, 2015: The Act creates a robust legal framework for the protection of the rights of all children whether alleged or found to be in conflict with law or children in need of care and protection, by catering to their basic needs through proper care, protection, development, treatment, social reintegration, by adopting a child- friendly approach in the adjudication and disposal of matters in the best interest of children and for their rehabilitation through processes provided, and institutions and bodies established therein which will adopt child friendly processes.

5 The Integrated Child Protection Scheme (ICPS) is a centrally sponsored scheme of the Ministry of Women and Child Development Government of India, aimed at building a protective environment

- Based on the various estimates, there are between 6 and 30 million children with disabilities (CWDs) in India, who have special needs.⁶

Orphans and children living outside of family care are an extremely vulnerable population, often exposed to poverty, stigma, physical and sexual violence and a lack of educational resources. The best of institutions cannot substitute the care of the family of the child. My research studies, surveys and visits to institutions in Maharashtra⁷ over a period of time, have shown that only a minority of children in institutions are orphans, with many of them having being displaced and separated from a living parent or relative whose whereabouts may be unknown, some of them abandoned due to disability or illness. In practice, there is now an increasing use of residential care for children who are being sent by their parents for education, food and clothing.⁸ It has been observed that in the institutions, reasons that some parents place their children in institutions include the following:

1. Children having both parents being placed for education. These parents think that institutions are hostels for schooling and education and disciplining a child.
2. Poverty
3. Children of migrant parents

for children in difficult circumstances, as well as other vulnerable children, through Government-Civil Society Partnership. For details see: <http://icds-wcd.nic.in/icpsmon/>

6 See supra note 4

7 My unpublished studies for UNICEF and Mumbai High Court on implementation of Juvenile Justice Act in Maharashtra, reports on the of children's homes in Maharashtra for the Mumbai High Court, and a status report on Mentally Deficient Children's Homes in Maharashtra. In the recent study on the status of MDC homes in Maharashtra (PIL 182/2010, Mumbai High Court), one of the finding is: 43% of Homes in the state cater to children who live with their parents but whose families use the MDC Home as a hostel facility.

- 39% children in the MDC Homes have one or both parents alive.
- Social workers hired by the Home scout the neighbourhood for children who are mentally disabled. They encourage parents to send their children to the Home, instead of enabling them to care for their children within the community.
- The Juvenile Justice (Care and Protection) Act 2000 (amended 2006) recommends institutionalisation of a child only in the event that other non-institutional rehabilitation options are rendered unavailable for any reason. Therefore children who have one or both parents are to be supported and enabled within the community. Instead in Maharashtra, children who have one or both parents alive are left in MDC Homes. As a result the Homes are treated as hostels, where parents can leave their children for extended periods of time. This contradicts the very spirit of institutional care as articulated in the Act.

8 Official data required for the numbers of such children who are using institutions as hostels

It is a disturbing trend that young children with both parents are frequently placed in institutional care for the purpose of education. They are generally admitted on an application by their parents in the month of June, before the new academic year commences. Like other children living with families, they go home during vacations and holidays, festivals and after exams are over and return again to be admitted for the next academic year. When the children's institutions are visited during vacations, these children are there on the roll but absent from the institutions as they are back home celebrating *Ganpati and Divali*. The meagre resources of the State and institutions are thus being used incorrectly. The reason generally given by parents is that they are too poor to educate their children and hence choose to place the children in institutions. These parents are now generally considered unfit parents under Section 2 (14) (v)⁹ of the JJ Act and their children placed in institutions by the Child Welfare Committees (CWCs).¹⁰

This is the situation throughout the country. Indian orphanages and childcare institutions all over the country are thus crowded with a mix of orphans, abandoned children and a complicated category of children from families who have placed them in institutions to obtain education and a better life, but have not technically forfeited all parental rights. Many of these children come under the category of children in need of care and protection as defined under Section 2(14) of The JJ Act 2015¹¹. The State has the legal

9 Juvenile Justice Act 2015, Section 2(14)(v) states that : who has a parent or guardian and such parent or guardian is found to be unfit or incapacitated, by the Committee or the Board, to care for and protect the safety and well-being of the child

10 Juvenile Justice (Care and Protection of Children) Act 2015, Section 27(1). Child Welfare Committee. The State Government shall by notification in the Official Gazette constitute for every district, one or more Child Welfare Committees for exercising the powers and to discharge the duties conferred on such Committees in relation to children in need of care and protection under this Act and ensure that induction training and sensitisation of all members of the committee is provided within two months from the date of notification.

11 Juvenile Justice (Care & Protection of Children) Act 2015, Section 2(14) “child in need of care and protection” means a child— (i) who is found without any home or settled place of abode and without any ostensible means of subsistence; or (ii) who is found working in contravention of labour laws for the time being in force or is found begging, or living on the street; or (iii) who resides with a person (whether a guardian of the child or not) and such person— (a) has injured, exploited, abused or neglected the child or has violated any other law for the time being in force meant for the protection of child; or (b) has threatened to kill, injure, exploit or abuse the child and there is a reasonable likelihood of the threat being carried out; or (c) has killed, abused, neglected or exploited some other child or children and there is a reasonable likelihood of the child in question being killed, abused, exploited or neglected by that person; or (iv) who is mentally ill or mentally or physically challenged or suffering from terminal or incurable disease, having no one to support or look after or having parents or guardians unfit to take care, if found so by the Board or the Committee; or (v) who has a parent or guardian and such parent or guardian is found to be unfit or incapacitated, by the Committee or

and moral responsibility to protect Children in Need of Care and Protection (CNCP). The concern is that the only option the State currently has, is to place children in institutions under the Juvenile Justice (Care & Protections of Children) Act 2015. This appears to be an easy way out but not in the best interest of the children.

Institutions today have low staff to child ratios and interaction, poor salaries, low levels of staff experience and autonomy and no motivation nor monitoring, lack sensitivity towards children, strict routines, and poor provision of books and play equipment. As for the children, they lack personal possessions and individuality, and the everyday experiences of living in families. Institutions are often unsafe for children. They can leave them vulnerable to neglect, violence and abuse, which often goes undetected and unreported. The UN Study on Violence against Children (2006)¹² identified care institutions as one of the five settings where violence against children occurs. It mentions that children in institutions 'are at risk of violence from staff and officials responsible for their well-being'. Inappropriate institutionalization can compound the effects of abuse and neglect, and contribute to the suffering of children and the harm done to them.¹³

There is thus worldwide proven recognition that institutional care is associated with negative consequences for children's development. Many institutions do not have structured curriculums or formal schooling. Young children in institutional care are more likely to suffer from poor health, physical underdevelopment and deterioration in brain growth, developmental delay and emotional attachment disorders. Consequently, these children have reduced intellectual, social and behavioural abilities compared with those growing up in a family home. A long history of institutionalization also produces problems for young adults when they leave institutional care and

the Board, to care for and protect the safety and well-being of the child; or (vi) who does not have parents and no one is willing to take care of, or whose parents have abandoned or surrendered him; or (vii) who is missing or run away child, or whose parents cannot be found after making reasonable inquiry in such manner as may be prescribed; or (viii) who has been or is being or is likely to be abused, tortured or exploited for the purpose of sexual abuse or illegal acts; or (ix) who is found vulnerable and is likely to be inducted into drug abuse or trafficking; or (x) who is being or is likely to be abused for unconscionable gains; or (xi) who is victim of or affected by any armed conflict, civil unrest or natural calamity; or (xii) who is at imminent risk of marriage before attaining the age of marriage and whose parents, family members, guardian and any other persons are likely to be responsible for solemnization of such marriage;

12 http://srsg.violenceagainstchildren.org/un_study accessed on Sept 2, 2017

13 *ibid*

try to reintegrate into society, leading to much higher rates of homelessness, aggression, difficulties finding employment, criminal activity, and depression resulting in high rates of suicide. The aftercare system in the country is in the doldrums. So a child in need of care and protection may turn into a child in conflict with law.

Institutions cut children off from their families and take away that critical role in promoting children's long term care and wellbeing. **Most such children in institutions would not be there if their parents had adequate support.** Several studies have shown that institutional care is more expensive than providing support to vulnerable families. Many institutions are happy to have more children on the roll as their grants are proportionate directly on the number of children. Some institutions actively recruit children because they are paid based on the number of children in their facilities.

The best place for these children is their homes, with their families and not in Institutions. The Right of Children to Free and Compulsory Education Act (known as the Right to Education Act or RTE), 2009, makes education a fundamental right of every child between the ages of 6 and 14 and specifies minimum norms in elementary schools. It also requires all private schools to reserve 25% of seats for children that cannot afford fees (to be reimbursed by the state as part of the public-private partnership plan). Schooling being free up to 14 years of age, many of these children could be in school and remain with their families. Certainly, broader structural interventions are needed, which will address the underlying causes of these children's problems and counteract their marginalization, bringing them within the reach of needed services and schemes of the State and Central government and enabling them to access their constitutional rights and entitlements. Their special circumstances need to be addressed by Government through special laws, schemes and programs. There are Government Schemes for foster care, sponsorship, poverty alleviation programs and schemes for children of migrant parents, employment guarantee and schemes for skill development etc. The Government must further review these schemes to suit such children and their families and make them easily accessible and create awareness.

Current National and International laws and principles relating to Institutionalization of Children

The current laws and principles relating to institutionalization of children are laid down in:

- a. The Constitution of India
- b. Objectives of Juvenile Justice Act 2015(JJ Act) and the general principles laid down Chapter II of the JJ Act 2015 for implementing the Act in its true spirit.
- c. The Convention on the Rights of the Child and other international law ratified by India.
- d. Some Observations of the Courts in India.

a. The Constitution of India.

The Directive Principles of State Policy guarantee that the children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and guaranteed protection of childhood and youth against exploitation and against moral and material abandonment¹⁴. Elementary education is considered a basic fundamental developmental right of every child and which human resources the Department of Education, skill development, social justice and human resources and development must fulfil. It is clear that if those families that are deemed incapable or unfit are supported and strengthened by the Government to be capable, the health, development and education of the child can be achieved in the family, with freedom and dignity.

b. The Juvenile Justice (Care and Protection of Children) Act 2015 (JJ Act).

The objective of the JJ Act 2015 in its preamble¹⁵ and in its statement of objects and reasons acknowledges the significance of international instruments and includes the provision of basic needs and social integration of children as its main objective.¹⁶ Chapter II of the JJ Act 2015 lays down the General principles for implementing the Act in its

14 Constitution of India, Article 39(f)

15 The preamble is the preliminary part of the Act usually setting out what it is all about or why it has been prepared, specially used of an Act of Parliament where Parliament expresses the general purposes of the piece of legislation. It can be referred to for the purposes of statutory interpretation

16 An Act to consolidate and amend the law relating to children alleged and found to be in conflict with law and children in need of care and protection by catering to their basic needs through proper care, protection, development, treatment, social re-integration, by adopting a child-friendly approach in the adjudication and disposal of matters in the best interest of children and for their rehabilitation through processes provided, and institutions and bodies established, herein under and for matters connected therewith or incidental thereto

true spirit.¹⁷ The general principles laid down in the JJ Act uphold the right of all children to grow up in a family with institutionalization being a measure of last resort. The variety of non-institutional options in the Act include: sponsorship and foster care including group foster care for placing children in a family environment which is other than child's biological family, which is to be selected, qualified, approved and supervised for providing care to children. Thus under the Act itself, keeping the child in the family is the first option and sending children to institutions or keeping children in institutions must be the last resort only after exploring options of family and other non-institutional alternatives.

The following principles under the Act further lay down the rights of the child and reiterate that family is the best option for the child unless there is exploitation and abuse in the family. It also lays down that parents cannot force their children to the institutions and their rights need to be taken into consideration.

- Principle of family responsibility¹⁸: means that (a) the primary responsibility of bringing up children, providing care, support and protection shall be with the biological parents. However, in exceptional situations, this responsibility may be bestowed on willing adoptive or foster parents. (b) All decision making for the child should involve the family of origin unless it is not in the best interest of the child to do so. (c) The family - biological, adoptive or foster (in that order). **This principle clearly implies that family must be given the first preference for placing the child.**
- Principle of participation¹⁹ : Every child shall have a right to be heard and to participate in all processes and decisions affecting his interest and the child's views shall be taken into consideration with due regard to the age and maturity of the child. **This implies that in a decision relating to institutionalization, the views of the child must be taken, if he is capable of forming it.**
- Principle of best interest²⁰ : All decisions regarding the child shall be

17 Juvenile Justice (Care & Protection of Children) Act 2015, Chapter II Section 3. General principles to be followed in administration of the Act.

18 JJ Act 2015, Chapter II Sec 3, General Principles of Care and Protection of Children, Principle v

19 Act 2015, Chapter II Sec 3, General Principles of Care and Protection of Children, Principle iii

20 JJ Act 2015, Chapter II Sec 3, General Principles of Care and Protection of Children, Principle iv

based on the primary consideration that they are in the best interest of the child and to help the child to develop full potential.²¹

ICPS also envisages 'institutionalization' as a measure of last resort to take care of vulnerable children and re-integrate them in society. Yet, thousands of children are in institutions and not with their families or they cannot access alternative care systems. Under Section 39 of the JJ Act 2015²² preference for rehabilitation and reintegration is given to family based alternatives. Section 40 of JJ Act 2015²³ implies that restoration and protection is only for children in need of care and protection. The first priority is the biological parents. The CWC has to determine the suitability of the parents, adoptive parents or foster parent, guardian or fit person or guardian or fit person to take care of the child, and give them suitable directions.

CRC and International Law

Globally, the move is towards deinstitutionalization of children and providing alternative quality care. The UN Guidelines for the Alternative Care of Children clearly speak in favour of such evolution: 'where large residential care facilities (institutions) remain, alternatives should be developed in the

21 Definition of best interest in Sec 1 (9) of JJ Act 2015 — best interest of child means the basis for any decision taken regarding the child, to ensure fulfillment of his basic rights and needs, identity, social well-being and physical, emotional and intellectual development;

22 Sec 39(1): Process of rehabilitation and social reintegration. The process of rehabilitation and social integration of children under this Act shall be undertaken, based on the individual care plan of the child, preferably through family based care such as by restoration to family or guardian with or without supervision or sponsorship, or adoption or foster care: Provided that all efforts shall be made to keep siblings placed in institutional or non-institutional care, together, unless it is in their best interest not to be kept together

23 JJ Act 2015 Section 40 Restoration of child in need of care and protection. . (1) The restoration and protection of a child shall be the prime objective of any Children's Home, Specialized Adoption Agency or open shelter.

(2) The Children's Home, Specialized Adoption Agency or an open shelter, as the case may be, shall take such steps as are considered necessary for the restoration and protection of a child deprived of his family environment temporarily or permanently where such child is under their care and protection.

(3) The Committee shall have the powers to restore any child in need of care and protection to his parents, guardian or fit person, as the case may be, after determining the suitability of the parents or guardian or fit person to take care of the child, and give them suitable directions.

Explanation.—For the purposes of this section, —restoration and protection of a child means restoration to—

(a) parents;
(b) adoptive parents;
(c) foster parents;
(d) guardian; or
(e) fit person

context of an overall de-institutionalization strategy, with precise goals and objectives, which will allow for their progressive elimination.’ Further, the concept of ‘last resort measure’ is detailed in the Guidelines for the Alternative Care of Children,²⁴ which mention that State parties must focus on all possible alternative care options PRIOR to the decision of institutionalizing the child.

Article 9 and other articles of the UN Convention on the Rights of the Child state that children have a right to family relations and to be with their parents unless this is proven not to be in their best interests.²⁵ According to Article 3 of CRC ‘in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.’ The Convention directs the State Parties to ensure that ‘both parents have common responsibilities for the upbringing and development of the child.’ The CRC provides that a child should be separated from his or her parents if there is ‘abuse or neglect of the child by the parents, or where the parents are living separately and a decision must be made as to the child’s place of residence.’ Welfare of the child, as a criterion for decision, is generally flexible, adaptable and reflective of contemporary attitudes regarding family within society. The best interest principle is a tool to aid any statutory construction or decision relating to children including institutionalization.

The Committee on the Rights of the Child has provided additional guidance regarding the best interest standard in its General Comment 14.²⁶ The Committee stated that it is ‘useful to draw up a non-exhaustive and non-hierarchical list of elements that could be included in a best-interests assessment by any decision-maker having to determine a child’s best interests.’ The Committee suggested that the following considerations can be relevant: the child’s views; the child’s identity (such as sex, sexual orientation, national origin, religion and beliefs, cultural identity, and personality); preservation

24 Resolution adopted by the UN General Assembly on the report of the Third Committee (A/64/434)64/142.Guidelines for the Alternative Care of Children. Available at: http://www.unicef.org/protection/alternative_care_Guidelines-English.pdf

25 The UNCRC was ratified by India in 1992. Nations that ratify this convention are bound to it by international law. Compliance is monitored by the UN Committee on the Rights of the Child, which is composed of members from countries around the world

26 Committee on the Rights of the Child, General Comment No. 14 on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art. 3, Para. 1), U.N. Doc. CRC/C/GC/14 (May 29, 2013).

of the family environment and maintaining relations (including, where appropriate, extended family or community); the care, protection and safety of the child; any situation of vulnerability (disability, minority status, homelessness, victim of abuse, etc.); and the child's right to health and right to education.

General Comment No. 14 further states that: 'attention must be placed on identifying possible solutions which are in the child's best interests' (Para 33). 'If harmonization is not possible, authorities and decision-makers will have to analyse and weigh the rights of all those concerned, bearing in mind that the right of the child to have his or her best interests taken as a primary consideration means that the child's interests have high priority and not just one of several considerations. Therefore, a larger weight must be attached to what serves the child best' (Para 39).

The above standards 'come from internationally respected organs and bodies of the UN and the Council of Europe, agreed on by a community of meaningful and significant state representatives and that these regulations are an expression of the behaviour which the respective Member States expect from each other' [White paper of the European Council for Juvenile Justice, created by the International Juvenile Justice Observatory (IJJO) in 2009.²⁷

Judicial Observations:

Through judicial activism "the Indian judiciary has played a proactive role in implementing India's international obligations under International treaties, in the field of human rights relating to vulnerable groups like women and children. The courts, while applying the rules of international customary law, have crafted them in Indian domestic law.²⁸ In *Jose Maveli v State of Kerala and Ors*²⁹ the facts were that five minor children were produced before the

27 I. Pruin, The evaluation of the implementation of international standards in European juvenile justice systems in *SAVE MONEY, PROTECT SOCIETY AND REALISE YOUTH POTENTIAL: IMPROVING YOUTH JUSTICE SYSTEMS DURING A TIME OF ECONOMIC CRISIS* 27 (Marianne Moore Ed, July 2013) http://www.oijj.org/sites/default/files/white_paper_publication.pdf (last Visited may 25, 2016)).

28 The combined reading of Articles 51(c), 73, 253 read with entries 10 to 21 of Seventh Schedule and 372 and judicial interpretation reveal that, unless and until Parliament enacts a law implementing international treaty (treaties involving conferring or curtailing private rights, cession of territory), such treaty provisions cannot be enforced per se in India. Further if such treaty provisions are consistent with Indian law or there is void in the domestic legal system then they can be read into, to do justice, and if there is conflict between the two then domestic law prevail over international law

29 MANU/KE/0830/2007 (Crl. R.P. No. 4423 of 2006) (high Court of Kerala)

Chief Judicial Magistrate by an institution that saves street children who are found begging or engaged in child labour. On production, the children were entrusted to the institution until further orders, pending an enquiry. After about six months, a person claiming to be the father of three of the children filed a petition before the Chief Judicial Magistrate's Court for getting the three children released to his custody. On being satisfied that the Petitioner is the father of the three children, the Magistrate directed the institution to release the children to their father.

The order was challenged in the revision petition by the Director of the institution contending that the institution is entitled to retain the children in their custody in their best interest. The Court directed that minors were to be released to their parents, and the others to their home State in accordance with the provisions of the JJ Act.

Observations have been made by the Court regarding parents being 'unfit or incapacitated' in the Juvenile Justice (Care and Protection of Children) Act 2000. 'A parent who is not of an acceptable standard or not suitable to be a parent can be said to be 'unfit'. A child of such a parent is a 'child in need of care and protection' as per section 2(d) (iv). But, poverty of the parent by itself may not make a parent 'unfit' to be a parent.' It further stated that 'in a country like India, poverty is not quite uncommon. It will, therefore, be unjust and even cruel, if poor financial condition of a parent or guardian alone is made the basis for disqualifying a biological parent to be 'unfit', so as to treat his/her child as a 'child in need of care and protection'. A child may not be treated as a 'child in need of care and protection', and nipped off from the care of his or her own biological parents, only because his parent is financially poor, homeless or penniless. Even if the parents are poor and their purses are empty and they are unable to feed the children or provide for them a hut to live in, a conducive family atmosphere is ensured by most parents.

In such circumstances, it is only reasonable to think that the legislature would not have intended that a parent who does not have a house to live in and who is without any ostensible means of subsistence must be deprived of the custody of a child, for that reason alone. It does not appear to be the intention of the legislature that a child shall be denied of his right to live under the care and custody of his biological parents or their guardian, who may be willing to look after them, only because they are financially poor.

The Child Welfare Committees, which is the appropriate authority under the JJ Act, must not just pass orders sending a child to an institution. They must examine the relevant facts and decide, on the facts and circumstances of each case, as to whether the parent or family is 'unfit' or not. But, the financial unfitness of the parent alone should not be a consideration. **Financial unfitness of the parent alone may not be sufficient to deprive the child of parental care, if the parent is otherwise fit.** Secondly, every child between the age of 6 and 14 years is entitled to receive free education. When a State is providing free education to every child up to 14 years (under RTE Act)³⁰ and the school is available in the neighbourhood, sending the child to an institution is in violation of the child's right to a family as well as to the right to education.

Institutionalization – the last resort

Children and their circumstances are not homogeneous. Each Child faces distinctly different risks and specific vulnerabilities. Hence each child must be dealt on a case-by-case basis. The decisions of the CWC must be informed by the general principles laid down in the Constitution of India, JJ Act and CRC, and international law. These principles convey the essence of the JJ Act, which ensures that:

- o The child remains within the family and institutionalization is the last resort;
- o Access to Government schemes and services to be facilitated and followed up
- o Every decision by the CWC is made on a case to case basis, looking at the unique circumstances of the child;
- o Decisions are informed by a thorough assessment of the child and his/her situation;
- o Confidentiality is ensured in all processes pertaining to the child and her/his family;

³⁰ The Constitution (Eighty-sixth Amendment) Act, 2002 inserted Article 21-A in the Constitution of India to provide free and compulsory education of all children in the age group of six to fourteen years as a Fundamental Right in such a manner as the State may, by law, determine. The Right of Children to Free and Compulsory Education (RTE) Act, 2009, which represents the consequential legislation envisaged under Article 21-A, means that every child has a right to full time elementary education of satisfactory and equitable quality in a formal school which satisfies certain essential norms and standards. Article 21-A and the RTE Act came into effect on 1 April 2010

- o Informed consent of the child is sought in all processes including for interviewing
- o The child, medical testing etc and the child's views are taken into account in the process of decision making; which are in the best interest of the future of the child.
- o Protection of the child is ensured at all stages of rehabilitation and social integration.
- o The child's progress and family situation is reviewed on a periodic basis
- o Decision on whether a parent is unfit or fit is a temporary decision and needs to be periodically reviewed.

In addition to the other clauses already in Section 2(14) of the JJ Act, such as being forced into child labour, physical abuse, sexual abuse, etc., to be an unfit or incapacitated parent, the CWC could consider only temporary institutionalization:

- a. If the child is addicted to drugs, alcohol, or any intoxicating substance, and the family does not have the resources or capacity to provide for rehabilitation and de-addiction. The child must be sent for de addiction and attempt to be rehabilitated.
- b. Where the parents are mentally or physically disabled to a degree that they cannot take care of the child, or parents suffering from severe mental illness.
- c. Where the child has repeatedly (more than 3 times) committed petty offences. (The JJ Board usually lets children out on a 'plead guilty' bond for petty offences such as theft. However, many of these children are repeat offenders, which indicate that their parents are unable to supervise the children. They are generally let out on bonds, and commit repeat offences. (They need intense counselling and therapies and later sent out so that as CNCP they are prevented from becoming CICL. This could be done through and NGO, within community supervision, or in an institution.
- d. Where one parent has abandoned the family/passed away, and the remaining parent has to work long hours without adequate family support/supervision of the children.

- e. If the child is regularly being exposed to domestic violence at home between the parents.
- f. Parents themselves found to be drug users.
- g. Parents who are terminally ill and are unable to take care of the child.
- h. Parents accused of child abuse or rape.
- i. Parents serving prison term (could be for short term or life imprisonment).

No family can be declared permanently unfit. In the above circumstances, where the family situation is dangerous or harmful for the child or where the family, because of their situation, is not in a position to take care of the child, the CWC can declare the family temporarily unfit for the care and protection of the child. The CWC will reach this decision only after a detailed inquiry process by the Probation Officer or by home visits by the committee.

To prevent inappropriate admissions and consequent institutionalization, before declaring parents as unfit the following steps must be undertaken by CWC:

- Counselling of parents
- Needs Assessment of the child
- Family , Parents and Community Assessment
- Considering the views of the child
- Identifying and Monitoring alternate placement or support or non institutional services linking with Government schemes, monitoring access and periodic review

Conclusion:

Undoubtedly, families are best placed to care for and nurture children and keep them safe. But families trapped in chronic poverty, surviving on irregular income or suffering other stresses, domestic violence, drug and alcohol abuse, face major obstacles in caring for their children. Families in these situations need support and this support can take a variety of forms including home visits by social workers or community workers; social protection including cash benefits; preschool and nursery care; eliminating

school fees and charges for health care (including hidden costs for school such as transport, school uniforms etc); parent counselling, information and education; community-based rehabilitation services for children with disabilities; child protection services to work with families and communities to address issues of abuse, neglect, violence, and substance abuse; vocational training or economic strengthening.

With so much reliance on non-institutional services, standards must be laid down. There is a need for the development of high-quality alternative care options such as kinship care (extended family), fostering and adoption. It has been suggested that a set of minimum standards and guidelines for such care be developed. Foster care families should be carefully assessed supported and monitored to prevent the child continuing to experience poor parenting, maltreatment and additional moves. Alternative care must also provide permanency planning which must explore the option of reuniting the child with his or her family after removal, or adoption if reunification efforts fail.

It is essential that there are more budget resources or reallocation of the budget to support parents and family-based care, and for recruiting family-based carers. But the State's assistance in supporting families may be challenging due to resource constraints, under spending of the State budget and delay in the delivery of services. Funds are rarely released under the heads of formal education, vocational training, counselling and drug detoxification, which form the backbone of the rehabilitation process³¹.

No public health care facility should be entitled to exclude a child in need of care and protection from treatment. Tax concessions should be offered to private clinics that provide emergency services to destitute children. Specific financing should be allocated to schools that accommodate such learners. No public school should be entitled to turn away a child on the grounds of not having a uniform.

A universal grant scheme should be in place to provide protection against absolute poverty, accessible to every child, along with additional special grants to address special needs and circumstances like disability, illness, single-parenting. Reflecting national patterns, and the strong correlation between poverty and malnourishment, regular health check-

31 Meghna Dasgupta, *Rehabilitation through Education for Juveniles in Conflict with Law*, Working Paper No 238 (2010).

up, immunization and supplementary nutrition for pregnant and lactating women. In that malnutrition affected areas like Melghat, additional grants should be directed. Or in case of de-addiction of the family or child, special assistance may be granted. The programmes may take the form of special assistance being rendered to non-governmental and other organizations to enable them to provide such services. Above all there must be networking of all Child Welfare committees.

Deinstitutionalization is the process of reforming childcare systems and gradually closing down orphanages and children's institutions, finding new placements for children currently resident and setting up replacement services to support vulnerable families in non-institutional ways.³² Deinstitutionalization has occurred in the US, in Western European and some South American countries and the former Soviet Bloc.³³ India must stop making new children's institutions or homes and move towards deinstitutionalization as every major social change, the process of de-institutionalization needs periodic review and independent evaluation to answer questions, such as to what extent the goals have been achieved and are they still valid, and have the planned activities been implemented and how the process shall be further continued. The process could take time, but it needs to be sustained in order to end the institutionalization of children and regain their right to a family life.

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