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## Pros and Cons of Kinship Legal Guardianship in India – A Legal Analysis

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*Orphans or abandoned children are often most neglected in society. They form an important section of the future of the country. This article aims at analyzing Kinship Legal Guardianship as an option for providing care and support to orphans. Possible pros and cons of the same have been analyzed. It also takes into account various other alternatives of providing support to them such as foster care, kinship foster care, and adoption in the light of the vision of de-institutionalization for orphans along with various recommendations to improve the plight of these children.*

**Keywords:** *orphan, kinship care, guardianship.*

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### INTRODUCTION

*“When you lose your parents as a child, you are indoctrinated into a club, you’re taken into life’s severest confidence. You are undecieved.”*

— Hilary Thayer Hamann, *Anthropology of an American Girl*<sup>1</sup>

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<sup>1</sup> Hilary Thayer Hamann, ‘Anthropology of an American Girl’ (*Good Reads*)

<<https://www.goodreads.com/quotes/303864-when-you-lose-your-parents-as-a-child-you-are>> accessed 17 July 2022

According to United Nations Children’s Fund (UNICEF), India has had 29.6 million orphaned and abandoned children since 2018. Surprisingly, this is more than the whole population of Sri Lanka. Only a fraction of these children is ending with a family, thanks to the extremely low adoption rates in India.<sup>2</sup> There was also a survey done by SOS Children that discovered that the orphan category equates to 4% of India’s child population. The study by the Ministry of Women and Child Development (MWCD) undertaken in 2016-17 has revealed that there are 9589 CCIs/Homes (registered/unregistered); 91 percent of which are run by non-government organizations, and only 9 percent are government supported. One in five districts in the country does not have even a single orphanage. A majority of districts do not have the minimum three orphanages needed (one for children less than 6 years of age and one each for boys and girls of 6-18 years respectively).<sup>3</sup>

Not many understand the plight of orphans and little is done in their favour. Even the government initiatives have not been enough for the category as they do not come in the so-called “Vote Bank” of the population and can’t stand up for their rights. There is a need to understand the category and their mental trauma to help them provide better care and guidance in helping them secure their future along with making them contribute to the country’s GDP and boost its economy. In the words of Ray Merritt, “Old men can make war, but it is children who will make history”. There is a concept of *Parens Patricia* which states the state act as a legal guardian in absence of any holds to a high extent for this category. It makes it even more important for government institutions to act vividly and work efficiently in their regard. The state acts as representative of those who are unable to represent themselves.

Since Covid-19 struck the pandemic in 2020, thousands of children have been orphaned too and the figures are still not known completely. What’s more haunting is the fact that of all children who were orphaned or abandoned, only half of them reached access to some institutional care. The left of them is wandering on the streets waiting for their death due to starvation, getting closer to abuse, human trafficking, etc. To top all this off, the majority of

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<sup>2</sup> ‘Orphaned Children in India – Explained, Pointwise’ (*Forum IAS*, 1 June 2021)  
<https://blog.forumias.com/orphaned-children-in-india/> accessed 17 July 2022

<sup>3</sup> ‘Orphans : The Forgotten Children of India’ (*Seruds India*, 31 January 2021)  
<https://serudsindia.org/blog/orphans-the-forgotten-children-of-india/> accessed 17 July 2022

orphans in India are girls, a part of one of the most vulnerable sections of society. There are orphans not only from the poorer sections of society but also from well-to-do families whose concerns are never talked about. Nobody has time to recognize their plight in the budding years of their life when they're growing and need utmost care and love. There is a need for the care of orphans as they are already traumatized and lack confidence. If proper care and attention are not given to them at an early stage of their life, they may become prone to wrongdoings at later stages of their life.

It becomes important for us to understand the various alternatives that an orphan has in India and we are just restricting this to the poorer sections of the society but also the other well-to-do sections as well. UNICEF classified orphans into three: Paternal orphans are those children who have lost their fathers. Maternal orphans are those children who have lost their mothers. Double orphans are those children who have lost both their parents.<sup>4</sup> Orphans in India have few options that they avail themselves of to get them the required care and shelter. They can have access to foster care, undergo adoption, or have kinship foster arrangements maybe with their grandparents, relatives, etc. For a country like ours, where we see instances of people abandoning their kids in parks, dustbins, etc, it won't be a lot to say that only a few children can take access to these alternatives that are mentioned above. How good is one over the other when it comes to these options and also whether kinship care is a better way is the scope of this paper.

### **ANALYSIS OF VARIOUS ARRANGEMENTS FOR ORPHANS IN INDIA**

India is home to several institutional settings like orphanages where abandoned and orphan children live. There are various drawbacks of such a structure and it is seen that these are not very capable of providing the necessary care and development of the child. These institutional settings are highly ridiculed as they are pretty insufficient and there is a lack of family-based care for the kids.

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<sup>4</sup> Abhinesh Singh & T.V. Sekher 'Orphans and their living arrangement in Indian households: Understanding their educational and nutritional status' (2021) 121 Children and Youth Services Review  
<[https://www.iipsindia.ac.in/sites/default/files/Orphan\\_Children-2021.pdf](https://www.iipsindia.ac.in/sites/default/files/Orphan_Children-2021.pdf)> accessed 20 July 2022

“I walked into an institution in Bucharest one afternoon, and a small child was standing there sobbing. He was heartbroken and had wet his pants. I asked, ‘What’s going on with that child?’ A worker said, ‘Well, his mother abandoned him this morning and he’s been like that all day.’ That was it. No one comforted the little boy or picked him up. That was my introduction.” - Prof. Charles A. Nelson III, Lead researcher for the Bucharest Early Intervention Project.

There are several pitfalls when it comes to institutional arrangements for orphans. Research has demonstrated that young children who are institutionalized before the age of six months suffer long-term developmental delay (Rutter & the English and Romanian Adoptees Study Team, 1998; Marcovitch et al., 1997<sup>5</sup> these institutions also invite other problems like human trafficking, sexual offenses, child labour, etc.

*“The use of physical restraints, isolation, and solitary confinement occurs in some institutions... in some instances amounting to torture.”*

- The UN Global Study on Children Deprived of Liberty

The Indian Constitution undeniably protects the right of the child. Art 14<sup>6</sup>, 19,<sup>7</sup> and 21<sup>8</sup> under the Indian Constitution are the fundamental rights to protect the best interests of a child. Apart from that, Art. 39<sup>9</sup> (e) and (f) of the Directive Principles of State Policy direct the State to frame policies to protect children from all kinds of abuse. Art. 15 (3)<sup>10</sup> directs the state to make special provisions for children as and when needed. As per Article 51A (k)<sup>11</sup>, every parent/guardian who is a citizen of the state is endowed with a duty to provide an adequate opportunity for education to his/her ward or child. Art. 24<sup>12</sup> says that no one below the age of fourteen should be employed to work in any factory, mine, or other hazardous employment. Child Labour

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<sup>5</sup> Kevin Browne, ‘The Official Newsletter of the International Society for Prevention of Child Abuse and Neglect (ISPCAN)’ (2007) 16 (1) The Link <<https://www.ispcan.org/wp-content/uploads/ispcan/link/link.16.1.english.pdf>> accessed 18 July 2022

<sup>6</sup> Constitution of India, 1950, art.14

<sup>7</sup> Constitution of India, 1950, art.19

<sup>8</sup> Constitution of India, 1950, art.21

<sup>9</sup> Constitution of India, 1950, art.39(e) and (f)

<sup>10</sup> Constitution of India, 1950, art.15(3)

<sup>11</sup> Constitution of India, 1950, art.51A(k)

<sup>12</sup> Constitution of India, 1950, art.24

(Prohibition and Regulation) Act, 1986<sup>13</sup> also prohibits the engagement of children in certain kinds of employment and regulates the kind of work in certain other kinds of employment.

Countries that spend less on public health and social services are more likely to have higher numbers of institutionalized children possibly as a consequence of not providing mother-child residential care facilities and counseling services to prevent abandonment and rehabilitate parents who are at risk of abusing/neglecting their child.<sup>14</sup> Foster Care is a new approach, unlike the traditional orphanage approach. It is followed a lot in foreign countries like the US and the UK. It is an arrangement whereby Foster Care is a non-institutional child care alternative whereby the child lives with an extended or unrelated family for temporary care. This caters to children whose biological parents are unable to care for them for variegated reasons or who are separated from his/her family.<sup>15</sup>

The Union Ministry of Women and Child Development has issued Model Guidelines for Foster Care. The Guidelines have been developed through a whole process of consultation with the help of various institutions, academicians, experts, States/UTs, Non- governmental organizations, etc. These guidelines on Foster Care have the procedures, roles, and responsibilities of stakeholders and also various aspects related to the implementation of the foster care program. “Under the guidelines brought by the Union Ministry of Women and Child Development, children in the age group of 6-18 years, whose parents are unable to take care of them due to reasons such as mental illness, poverty or imprisonment and those staying in child care institutions will be placed in foster care. Children in the age group 0-6 years will not prefer to be considered for placement in foster care as such small children will be encouraged for adoption.”<sup>16</sup> These guidelines don’t cover Pre-adoption Foster Care, as in such cases, Regulations Governing Adoption of Children, 2017 will apply.

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<sup>13</sup> Child Labour (Prohibition And Regulation) Act, 1986

<sup>14</sup> Kevin Browne (n 5)

<sup>15</sup> Aishsurana, ‘Foster care in India-An alternative family based care’ (Legal Service India)

<<https://www.legalserviceindia.com/legal/article-192-foster-care-in-india-an-alternative-family-based-care.html>> accessed 18 July 2022

<sup>16</sup> ‘Model Guidelines for Foster Care’ (*Vikaspedia*) <<https://vikaspedia.in/social-welfare/women-and-child-development/child-development-1/child-adoption/model-guidelines-for-foster-care#:~:text=Under%20the%20guidelines%20brought%20by,be%20placed%20in%20foster%20care>> accessed 20 July 2022

The decision of the Supreme Court in *Laxmikant Pandey v Union of India*<sup>17</sup> also emphasizes a child's right to family and a healthy atmosphere for development which can mostly be provided by the biological parents and if that is not possible, then options like foster care, adoption and guardianship can be used. Additionally, Principle 3.6 of the ICPS strengthens deinstitutionalization and encourages family-based care for children deprived of parental care.

Supreme Court in *Bachpan Bachao Andolan v Union of India*<sup>18</sup> Suggested that there is a need for schemes that promote foster care in India, also pointing out the limitations of institutional care in India. In our country foster care is underutilized and adoption is used as a major method to protect the child's rights. This is not in conformation with the international standards and there is also a stigma attached to it that gets amplified in adoption.

*"Anyone who ever wondered how much they could love a child who did not spring from their loins, know this: it is the same. The feeling of love is so profound, it's incredible and surprising."*

— Nia Vardalos, Instant Mom<sup>19</sup>

As per section 2(2) of the Juvenile Justice Act of 2015<sup>20</sup> "Adoption" means the process through which the adopted child is permanently separated from his biological parents and becomes the lawful child of his adoptive parents. In such a process, the biological parents give away all the rights, privileges, and responsibilities that they have and are now with the adoptive parents. Adoption particularly in India has gone through a radical change. The Reforms related to the old Hindu law on adoption which was the Hindu Adoptions and Maintenance Act, 1956.<sup>21</sup> Section 2 of this act allows any person who comes within the definition of 'Hindu' to be eligible to take a child for adoption. This brought a lot of changes like adoption by Hindu females, etc.

Several international conventions on Human Rights like the Convention on Rights of Child, 1989 (CRC) mention the need to protect the interests of the children and provide protection to

<sup>17</sup> *Lakshmi Kant Pandey v Union Of India* (1984), AIR 469

<sup>18</sup> *Bachpan Bachao Andolan v Union of India* (2011) Writ Petition (Civil) No. 51/2006

<sup>19</sup> Nia Vardalos, 'Instant Mom' (*Good Reads*)<<https://www.goodreads.com/quotes/809755-anyone-who-ever-wondered-how-much-they-could-love-a>> accessed 20 July 2022

<sup>20</sup> Juvenile Justice Act, 2015, s 2(2)

<sup>21</sup> Hindu Adoptions and Maintenance Act, 1956, s 2

them. In India, other communities like Muslims, Parsis, and Christians, did not have any concept of adoption, they could have recourse to the Guardians and Wards Act, 1890<sup>22</sup>. But still, this would not make the kid their adopted child. On turning 21 years, the child no longer remains a ward and assumes an individual identity. For the orphans, abandoned, and surrendered children, these aforesaid enactments remain silent. It was after this only that a laudable attempt was made by the Juvenile Justice (Care and Protection of Children) Act, 2000<sup>23</sup>. Here, the religious identity of the child was immaterial and it was this secular move by this highly commendable Act. This enactment has given the right of all children to be adopted and all citizens to adopt. A new body as per the Supreme Court's directions, Central Adoption Resource Authority (CARA) became the current apex controlling body in relation to the matters of legal adoption. This was based on the judgment in *Lakshmi Kant Pandey v Union of India*.<sup>24</sup>

Other arrangements include Guardianship and kinship legal guardianship. The difference however is that guardianship is an arrangement wherein a designated person gets the responsibility of a child and makes decisions on their behalf. Kinship care is when a guardian is a relative, grandparent, or even a close friend. Some people confuse these with adoption. Although, the fundamental of both of these processes are the same which is providing care, love, and attention to the child and making sure that all of his/her necessities, and proper education are fulfilled. In Adoption, the biological parent loses all rights of the child, it is permanent, wherein guardianship is temporary.

## **JURISPRUDENCE OF ORPHAN RIGHTS IN INDIA**

*“... We are guilty of many errors and many faults, but our worst crime is abandoning the children, neglecting the fountain of life. Many of the things we need can wait. The child cannot. Right now, is the time his bones are being formed, his blood is being made, and his senses are being developed. To him we cannot answer ‘Tomorrow,’ his name is today.”*

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<sup>22</sup> Guardians and Wards Act, 1890

<sup>23</sup> Juvenile Justice (Care and Protection of Children) Act, 2000

<sup>24</sup> Lakshmi Kant Pandey (n 17)

- Gabriela Mistral<sup>25</sup>

India has unfortunately no legislation on orphans per se. Sec 2(k) of the Juvenile Justice (Care and Protection) Rules 2007,<sup>26</sup> describes an orphan as “a child who is without parents or willing and capable legal or natural guardian”. India has no provisions for the welfare of orphans particularly. Generally speaking, an orphan may be a child who lost his/her parents in an accident/mishap or some other reason or who has been deliberately abandoned by their parents. According to the United Nations Conventions on Rights of the Child (UNCRC), a child is anyone who is below the age of 18 or unless the law applies to the child, the majority is attained earlier.<sup>27</sup> The right to “Family Care” is a right that each child has. This is mentioned in the Indian Constitution, the Jurisprudence of the Indian Supreme court on child rights, and also in the Convention on the Rights of the Child, 1989 (“CRC”), the UN Guidelines for Alternative Care 2009. There are certain rights that a child has. These are the right to identity, the right against exploitation, the right to have an opinion, the right to health, and the right to have a family.

“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>28</sup> The need for this kind of family-based care is recognized in the child rights jurisprudence and also at the international levels. “Every child and young person deserves to grow up in a nurturing, protecting, and caring environment that encourages them to reach their best potential.” This is stated in Article 4 of the UN Guidelines for Alternative Care of Children, 2009. Article 5 of the same Act states that the “State has the responsibility to assure the safety, well-being, and development of any child placed in alternative care, as well as the regular examination of the appropriateness of the care arrangement given”. Article 39(f) of the Indian Constitution<sup>29</sup> also states that “the state should ensure that children have the

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<sup>25</sup> Gabriela Mistral (*Good Reads*) <<https://www.goodreads.com/quotes/537897-we-are-guilty-of-many-errors-and-many-faults-but>> accessed 20 July 2022

<sup>26</sup> Juvenile Justice (Care and Protection) Rules, 2007, s 2(k)

<sup>27</sup> Pritha Lahiri & Ayush Kumar, ‘Legal Rights of Orphan Children in India’ (*Child Rights Centre, NLU Patna*, 21 July 2021) <<https://www.crcnlu.org/post/legal-rights-of-orphan-children-in-india-pritha-ayush>> accessed 20 July 2022

<sup>28</sup> *Ibid*

<sup>29</sup> Constitution of India, 1950, art.39(f)

opportunity and resources they need to grow up healthy in a dignified manner to ensure that childhood and adolescence are protected against exploitation as well as moral and material abandonment.”<sup>30</sup>

### WHAT IS KINSHIP LEGAL GUARDIANSHIP?

Legal guardianship is a judicially created relationship between a child and a responsible adult in which the guardian assumes many of the rights and responsibilities that customarily would reside with the child’s parents.<sup>31</sup> When this guardianship is taken by some relatives, grandparents, close friends, etc. of the child, it is kinship Legal Guardianship. Section 6 of the Hindu Minority and Guardianship Act, 1956<sup>32</sup>, provides that the natural guardian of a minor boy or an unmarried woman is their father and only then their mother. It also mentions that the guardian of married minor women is her husband. Other types of guardians under the act are testamentary guardians, guardians appointed by courts, and de facto guardians. Another Act that regulates guardianship is the Guardianship and Wards Act, 1890<sup>33</sup> under which the guardians are appointed by the courts.

It is an arrangement that is usually followed when the kid’s parents are no more, in a case where the parents are alive but not able to provide care, such situations, Kinship Foster Care is preferred. Under kinship foster care, children in recognized childcare institutions can be fostered by their kin with financial support from the government.<sup>34</sup> The central and state governments in India have provided help by offering financial aid to children, besides providing institutional support. “The Juvenile Justice Act is in place for all children who need care. District-level child welfare committees comprising social workers, doctors, activists, and psychologists are tasked to ensure their well-being.”<sup>35</sup> These committees draft individual care

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<sup>30</sup> Pritha Lahiri & Ayush Kumar (n 27)

<sup>31</sup> ‘Kinship Guardianship as a Permanency Option’ (*Child Welfare*, July 2018)  
<<https://www.childwelfare.gov/pubpdfs/kinshipguardianship.pdf>>

<sup>32</sup> Hindu Minority and Guardianship Act, 1956, s 6

<sup>33</sup> Guardianship and Wards Act, 1890

<sup>34</sup> ‘84 lakh for kinship foster care scheme’ (*The Hindu*, 7 July 2019)  
<<https://www.thehindu.com/news/cities/Thiruvananthapuram/84-lakh-for-kinship-foster-care-scheme/article28308315.ece>> accessed 19 July 2022

<sup>35</sup> Preeti Kulkarni, ‘Wish to be the guardian for a COVID-orphaned kid? Here’s how you can get legal and financial information’ (*Money Control*, 02 July 2021) <<https://www.moneycontrol.com/news/business/personal->

plans for such children to identify guardians they will stay with if relatives are willing to step in or consider giving them for adoption or moving them into institutional facilities,”<sup>36</sup> explains Priyank Kanoongo, Chairperson, National Commission for Protection of Child Rights (NCPCR).

## PROS OF KINSHIP LEGAL GUARDIANSHIP

*“We’d rather have a kid sleep on grandma’s couch than in a bed at a stranger’s home.”*

- PAM BOOKHART, SOCIAL WORKER SUPERVISOR, CATAWBA COUNTY GOVERNMENT, N.C.<sup>37</sup>

Having a legal guardian who is a relative maybe, a grandparent or some close friend makes the child feel at home. The child who undergoes certain separation from parents is often traumatized and has issues with dealing with social events at a later point in life. There are better chances of growth and development of the child whose parents are either no more or incapable of providing care due to several reasons. The following are the merits of Kinship guardianship.

**EMOTIONAL STABILITY:** Having kin as guardianship provides a certain degree of emotional stability. The child would know the guardian he/she is with. If the child is above 6 years of age, he may recognize the kin and there are better chances of his development along with an emotional connection to the kin. The kin caregivers are also going to have an emotional connection with the child in most cases.

**WELL BEING:** Kin caregivers may offer the kid well-being that he/she deserves. The child may not feel that the caregivers are alien to them and it may subdue their already existing trauma. The careers also ensure that the kid’s well-being is taken care of.

**FINANCIAL SUPPORT:** Kin guardians can provide better financial support as they can reimburse it from the child’s property. There won’t be an issue for kin guardians to take care

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[finance/wish-to-be-the-guardian-for-a-covid-orphaned-kid-heres-how-you-can-get-legal-and-financial-information-7116321.html](https://www.casey.org/kinship-guardians-overview/)> accessed 16 July 2022

<sup>36</sup> *Ibid*

<sup>37</sup> ‘How can guardianship be better utilized to promote permanency and well-being?’ (Casey, 4 June 2021)<<https://www.casey.org/kinship-guardians-overview/>>accessed 22 July 2022

of the various needs of the kid including medical, educational, recreational, and moral support of the kid.

**CONNECTION TO GUARDIANS:** The kid might feel connected to the kin over a stranger. The culture, background, and religious preferences may also be the same. This may not be the case so far as adoption is concerned. A child may have some differences which may affect the child's overall mental health and add to his/her trauma.

**RECIPIENT OF BENEFITS FROM BIRTH HOME:** Guardianship is not going to stop the child from being the kid the receiver of all benefits from his/her parent's home. He/ She will be entitled to all property that is in their name along with other benefits too.

**ALTERNATE TO INSTITUTIONAL SETTING AND ADOPTION:** It can be an alternate for adoption and much worse institutional settings like orphanages in a scenario where the parents are either no more or have abandoned the child, or are incapable of providing care may be due to drug abuse, financial issues, ill-health, etc.

**LEGAL RIGHTS:** The guardian has the legal right by maintaining the child's welfare by making legal decisions on behalf of the child and making decisions relating to medical, surgical, and educational aspects of the orphans' s life,

**SOCIAL BENEFITS:** Since you have signed the legal documents of you being the guardian, there won't be many complications later on while making decisions regarding the child. The process will be much simplified for both the kid and the kin.

### **CONS OF KINSHIP LEGAL GUARDIANSHIP**

Guardianship gives a wide variety of advantages but there must be some cons of this process that may arise a need for a better process of proving care to orphans such as foster care, etc. Just think of a scenario, if the kin is old and the other friends or any relative of that kin may be sexually assaulting the child and the old kin is unaware, what to do in such a situation? The following can be the disadvantages of kinship legal guardianship.

**LITTLE KNOWLEDGE OR TRAINING:** Many times, the kin might have no knowledge or proper training as to what to do after such a mishappening. They might not be able to provide the best parenting to an already traumatized kid who just lost his parents.

**UNWELCOMED PARENT'S VISITS:** There may be unwanted visits by the biological parents which can be discomfoting for the child and the guardian would not have any legal grounds to stop that.

**UNCERTAINTY:** There is a lot of uncertainty as to what will be the desired decisions relating to the child after the child turns 18, what would the child's response, etc.

**KIN MAY BE OLD:** In a few circumstances, the kin may be elderly grandparents and there is a possibility that due to their old age, they may die even before the child turns 18. Such a scenario could be highly depressing for the orphan child and may hinder his development.

**RESPONSIBILITY:** Just being a guardian for the namesake is usually not an option. A lot of added responsibilities get attached to the guardian on signing up for such an arrangement.

**TIME COMMITMENT:** There is an involvement of at least 18 years of full responsibility and care towards the child. After that also, there may not be a complete stoppage of this process.

**LEGAL COMPLICATIONS:** Just like any other procedure, guardianship also involves several legal complications whether it may be regarding the property or reimbursements, subsidies, etc.

## **COMPARISON OF LEGAL GUARDIANSHIP WITH ADOPTION**

Adoption is more of a sacramental than a secular act. As per the Merriam-Webster legal dictionary, legal adoption means 'to take voluntarily a child (of other parents) as one's child, especially in compliance with formal legal procedures.<sup>38</sup> This can be legal as well as illegal. Under Indian law, adoption is a legal coalition between the child and the party willing for adoption. It forms the subject matter of 'personal law' where Hindu, Buddhist, Jain, or Sikh religions can make a legal adoption. When it comes to Muslims, Christians, and Parsis, don't

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<sup>38</sup> Mohd Aqib Aslam, 'Adoption and guardianship' (*Legal Service India*)

<<https://www.legalserviceindia.com/legal/article-4884-adoption-and-guardianship.html>> accessed 21 July 2022

have any separate laws, they have to approach the court under the Guardians and Wards Act, 1890 for legal adoption.

A child would have a completely new family, parents, siblings, etc. The biological parents if alive would not have any say in the decisions regarding the child, they cannot even meet their kid. These parents won't be given any reimbursement for the child's expenses. On the other hand, a guardian is a person who makes all decisions in the kid's life. He/ She has all the duties, rights and responsibilities, and powers that a biological parent has in bringing up that child. A guardian may be classified as natural or by relationship (Testamentary) or by appointment of the court.<sup>39</sup> They can get reimbursed from the child's property if any.

India is home to nearly 30 million orphaned and abandoned children. The legal adoption of these children presents a two-fold challenge. Long-winding adoption procedures result in just a fraction of them finding a home. "The annual adoptions facilitated by the Central Adoption Resource Authority (CARA) are as low as 3,000-4,000. Secondly, there is a reluctance to adopt because of the onerous life-long commitment and enforceable legal rights of the adopted children."<sup>40</sup> Foster care, by comparison, has a more flexible ecosystem. It has the additional security of regular follow-ups of the child, compared to legal adoption where there is little or no follow-up.

### **COMPARISON OF KINSHIP LEGAL GUARDIANSHIP WITH KINSHIP FOSTER CARE**

Kinship Foster Care is a modern approach to the issue being talked about. It is common in developed countries, but in India, it still has a long way to go. Foster care is an arrangement wherein the child is placed in a family-based environment with unrelated family members to provide care and protection to a child. This is usually for a short period. When the foster care is with related family members of the kid, then it is kinship foster care. The government has given administrative sanctions for ₹84 lakh to implement the kinship foster care scheme.<sup>41</sup>

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<sup>39</sup> 'AIBE: Guardianship, Adoption and Succession under Family Law' (*Ipleaders*, 31 September 2019) <<https://blog.ipleaders.in/aibe-guardianship-adoption-succession/>> accessed 21 July 2022

<sup>40</sup> Vrinda Shukla, 'Ties that bind: Why India must expand foster care' (*The Indian Express*, 8 June 2021) <<https://indianexpress.com/article/opinion/columns/india-foster-care-children-death-covid-second-wave-7348473/>> accessed 20 July 2022

<sup>41</sup> 84 lakh for kinship foster care scheme (n 34)

Out of many children in the 817 institutions registered under the Juvenile Justice (Care and Protection of Children) Act, most of them were keen on staying with their relatives. But, what held them back was the financial circumstances of the kin. This was what stopped them from taking responsibility for the children. Regarding this only, the government had formulated the kinship foster care scheme as part of its Samantha Balyam foster care program. If a child's close relative was willing to take up the responsibility, then the whole point of deinstitutionalization is fulfilled along with the provision of care and growth to the child.

In most countries, annual funds are provided to support the fostering process which encourages couples to take up this. They can also extend from foster parents to adoptive parents after some time depending on different state laws. There is excellent merit if the government supports foster parents as it helps parents of modest means and they can provide a similar socio-cultural environment to a child from where he came from. In India, district agencies do receive such funds in the name of fostering, but these are usually unutilized for the purpose. Foster care is the way forward for India and its orphan children. We still need to go a long way for making this process effective in the long run. New policies need to be made and proper allocation of funds is also a requisite.

## RECOMMENDATIONS

For an orphan, not having a child may even in some circumstances extend to feeling like not having limbs to perform the basic functioning of life. Imagine the plight of the kid, who lost both of his/her parents in a mishap or even lost them at different time periods. The child may get traumatized for life. He/ She might be able to feel similar attachment, bonding, love, care, opportunities, etc anywhere else. To top it all off, he/she is minor, unable to make their own decisions, and may get deeply depressed and hopeless. Let's just say they were given their crutches aka maybe their kinship guardians to take care of them. But what's next? Sooner or later, they may be tagged with labels like "Misbehaved", "Rebel kid", "Spoilt", "Ungrateful", etc. All this is because the child does not feel okay with where he/she is living, how he/ she is being treated, whether is being subject to some kind of abuse which they are not able to come up with and many more things that makes the child deeply under confident and even make him/ her perform bad at various fields in their life.

Thereby, even if the child is living with the legal guardians as a matter of appointment by the court, the legislation needs to frame laws that include the formation of a committee that does these regular checks on the child along with proper counselling arrangements. Apart from this, training must be imparted to the legal guardians as well to deal with the special needs, attention, and love that the orphan kid deserves. Along with this, the scope of kinship guardianship as a permanency option must also be explored. It gives the whole process more stability. Secondly, we must realize that Institutionalization for orphans like orphanages, etc is a big no and that it should be treated as the last resort. As already mentioned above, many studies show how these affect the kid and family-based care is a must for the child besides it being the kid's right to have a family. The way the children are will have long implications on what they do later in their life. In such institutions, there are instances of abuse, peer-to-peer violence, neglect of care, malnutrition, lack of quality education, chances of human trafficking, etc.

"The sun rose very slowly for us every morning, a girl rescued from a shelter home in India's Bihar state told an investigator recently. She had cupped her hands together forming a small bowl shape and smiled wanly. Daylight bled easily into dusk outside, but inside the dank, windowless home, the nights seemed to be without end. Unknown visitors, she said, would often appear in the dark and sexually assault her."<sup>42</sup> With horror cases like these, it is better to keep this way of providing support to the kids as the very last option and hopefully not at all as an option shortly.

So, are guardianship and Adoption the only ways? Certainly Not! India can explore the not much-explored option of Foster care along with Kinship Foster Care. Although the state has some basic policies made in this regard, that is not enough, we need to go a long way. There has to be a database collected from all orphanages, etc., and given to the state governments. The state governments should distribute the data at the district level. Now at these lower levels, interested foster parents' applications must be invited. Thereafter a board needs to be set up that reviews these families, their status, criminal records, create them, and foster

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<sup>42</sup> Soutik Biswas, 'The horror story inside an Indian children's home' (*BBC News*, 11 August 2018) <<https://www.bbc.com/news/world-asia-india-45124802>> accessed 22 July 2022

parents. The role of the board would not just end here. They need to set up periodical checkups of these kids and if possible prepare reports as a record. Apart from this Kinship foster care should be given a preference as they would connect more. However, this kinship arrangement has to be voluntarily done. These foster parents must also be entitled to some funds to take care of the child. The government needs to keep some funds aside for this cause too.

Lastly, what is extremely unfortunate is the fact that we do not have any legislation separate for orphans. At present only the Juvenile Justice Act 2015<sup>43</sup>, looks into the problem along with few religion-based laws. There is a need for proper and uniform law on this. There is a need to make laws on orphaned children in the name of “welfare of the kid” along with the proper allocation of funds from the central government to the state government.

## CONCLUSION

After analyzing the various pros and cons of Kinship Legal Guardianship, it is not a bad option considering that some periodical investigations should be taken care of. The kid will be most close in such kind of a scenario. Usually, kids of age 0-6 should be considered for adoption because they won't remember much. But after that guardianship should be sought. Other alternatives like foster care are also recommended after the government fixes the various lacunae in the legislation for the same. It is also noted that institutions like orphanages should be highly not chosen in India especially given the horror stories and underdevelopment of kids there, as backed up by various sources and studies.

Children are going to be the future of any country. Orphans and abandoned children are no less and have all the rights to get a good life. Government must intervene in this process and make their lives better following the 'parens Patricia principle.

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<sup>43</sup> Juvenile Justice Act, 2015

*“Perhaps there are those who can go about their lives unfettered by such concerns. But for those like us, our fate is to face the world as orphans, chasing through long years the shadows of vanished parents. There is nothing for it but to try and see through our missions to the end, as best we can, for until we do so, we will be permitted no calm.”*

— Kazuo Ishiguro, *When We Were Orphans*<sup>44</sup>

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<sup>44</sup> Kazuo Ishiguro, ‘When We Were Orphans’ (*Scribble Whatever*) <<https://www.scribblewhatever.com/when-we-were-orphans-quotes/>> accessed 21 July 2022