

# DISABILITY IN ABANDONED/ORPHANED CHILDREN AND STATE RESPONSIBILITY: THE INDIAN PERSPECTIVE

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## **Abstract**

*Disability is a condition which needs acceptance and immense support. It becomes even more pronounced when it is in children who have been abandoned/orphaned and have nobody to care for them. Although we have legal protection available to persons with disability at both international and national level, unless there is social ratification of these in the form of removal of stigma attached to the disabled, the purpose of the law cannot be achieved.*

*The Constitution of India guarantees fundamental rights to all persons (including adults and children, with disabilities).*

*The Convention on the Rights of Persons with Disabilities ensures that the countries signatory to it, enact legislations for upholding the human rights of persons with disabilities and it must be made mandatory to include homeless children with disabilities who are at the mercy of the State. The reason for the palpable apathy towards the disabled despite the existence of law needs to be examined and removed for good. It is the responsibility of the State to not just enact the law but also assess its impact from time to time.*

*The definition of "Street Children" needs to be understood in the context of disability and efforts must be taken by the state to identify and ensure that there is proper implementation of the law in order to accomplish its desired goal.*

**Keywords:** *disability, state, child, orphan, abandon, law, human rights*

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## **1. Introduction**

Disability can be defined as a mental or physical condition wherein there is an inadvertent limitation on a person's activities, movement or senses. At times, a form of disability is apparent enough to be recognized by law as one but at times, it is latent and only the disabled understands the difficulty associated with it. Disability needs continuous care and support in most of the cases but with children who are orphaned or homeless need it way more than anyone else. Whether physical or mental, disability in itself is a powerful impediment to leading a normal life but when it comes with being an orphaned or abandoned child, it becomes the duty of the government to take proactive measures to

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support the child and help him in all matters essential to his existence as a human being, namely, education, food, housing, health and career.

It is with regard to this consideration that the United Nations Convention on the Rights of Persons with Disabilities (hereinafter, the Convention) was adopted on 13 December 2006 at the United Nations Headquarters in New York.

In pursuance of the objectives of this Convention, India too enacted the Rights of Persons with Disabilities Act, 2016 (hereinafter, the 2016 Act) to combat the prevalent situation of stigma and absence of governmental support for the disabled. Although there is no special enactment in India for disabled children *per se* but the aforementioned statute does its bit for such children. There are other laws that govern various aspects of disabilities like the Mental Health Act, 1987, the National Trust for the Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 and the Rehabilitation Council of India Act, 1992. But what we are concerned with here is the state of homeless and abandoned children who also have the limitation of disability.

This paper aims to study how far we have come in the fight against disability and providing the disabled more control over what they deserve.

## **2. The Highlights of the UN Convention**

For a very long time the disabled have been viewed as objects of social charity and sympathy. For the first time the Convention tried to identify them as humans capable of making choices and asserting their rights.

The Convention which entered into force on May 3, 2008 had eighty-two signatories to the full Convention, forty-four signatories to the Optional Protocol, and one ratification to its credit and was the first human rights convention to be open for signature by regional integration organizations.

The Convention is a landmark in the form of a human rights instrument with an unequivocal aspect regarding social development. It identifies a broad categorization of disabled persons and endorses that all persons with any kind of disability must enjoy the rights and fundamental freedoms available to any human being.

The Convention also clarifies and qualifies how all categories of rights apply to persons with disabilities and identifies areas where adaptations have to be made for persons with disabilities to ensure that they effectively exercise their rights and areas where their rights have been violated, and where protection of rights must be reinforced.<sup>1</sup>

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<sup>1</sup> Available at <http://www.cbm.org/United-Nations-CRPD-256097.php> (last visited on 1st March, 2019).

### **3. The Optional Protocol**

The Optional Protocol to the Convention establishes an individual complaints mechanism for the Convention similar to those of the other United Nations Conventions like the International Covenant on Civil and Political Rights (ICCPR), Convention on the Elimination of All Forms of Racial Discrimination and Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

There is also the recognition and acceptance of individual rights on economic, social and cultural rights. There is a Committee on the Rights of Persons with Disabilities which considers complaints from individuals or groups who claim that their rights under the Convention have been violated.

The Committee also has the power to request for information from and make recommendations that it deems fit and proper to a party. The party may also, additionally, permit the Committee to conduct investigation and make reports and recommendations on violations it considers “grave or systematic”.

### **4. Children in Need of Protection**

United States Agency for International Development (USAID) has divided Street Children into Four Categories<sup>2</sup>:

a) A ‘Child of the Streets’: Children who have no home but the streets, and no family support. They move from place to place, living in shelters and abandoned buildings.

b) A ‘Child on the street’: Children who visit their families regularly and might even return every night to sleep at home, but spend most days and some nights on the street because of poverty, overcrowding, sexual or physical abuse at home.

c) Part of a Street Family: These children live on sidewalks or city squares with the rest of their families. They may be displaced due to poverty, wars, or natural disasters. The families often live a nomadic life, carrying their possessions with them. Children in this case often work on the streets with other members of their families.

d) In Institutionalized Care: Children in this situation come from a situation of homelessness and are at risk of returning to a life on the street.

### **5. United Nations International Children’s Emergency Fund (UNICEF) and the Convention for the Rights of the Child (CRC)**

Article 27 of the Convention on the Rights of the Child (CRC) asserts that “States Parties recognize the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social

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<sup>2</sup> Available at <http://yapi.org/childrens-rights/street-children/> (last visited on 13<sup>th</sup> March, 2019)

development.” Homelessness denies each one of those rights. According to an Inter-NGO Program on street children and youth, a street child is “any girl or boy who has not reached adulthood, for whom the street (in the widest sense of the word, including unoccupied dwellings, wasteland, etc.) has become his or her habitual abode and/or source of livelihood, and who is inadequately protected, directed, and supervised by responsible adults.”<sup>3</sup>

UNICEF aims to promote the rights of every child, everywhere, in everything the organization does. With its global presence in nearly every country in the world, UNICEF is able to reach places others cannot, and thus is uniquely positioned to make a difference in the lives of children. In advocating to protect children's rights, to help meet their basic needs, and to expand their opportunities to reach their full potential, UNICEF helps to strengthen laws and policies and to improve understanding of the Convention at all levels of society. Among other activities, UNICEF supports countries to ratify and implement the Convention and its Optional Protocols. UNICEF draws attention to the duties of governments, families, communities and individuals to respect those rights and provides support for them to do so. UNICEF also supports the Committee on the Rights of the Child, which monitors implementation of the Convention and Optional Protocols and facilitates broad consultations within countries to maximize the accuracy and impact of reports to the Committee.<sup>4</sup>

The Digest No. 13 of the UNICEF Innocenti Research Centre titled *Promoting the rights of Children with disabilities*<sup>5</sup> states that Preconceptions or lack of open discussion about disability sometimes results in children with disabilities being overlooked in the planning and provision of services. In other cases, the services put in place are inappropriate, poorly conceived or ill-funded. Even in situations where such barriers can be overcome, this means little if children with disabilities are unable to gain physical access to schools, hospitals, public buildings or recreational areas, or to use public transportation to do so. The report lays down how we need to build foundations for inclusion and ensure a supportive environment for children. This needs to be low cost and should consist of persons capable of instilling trust, confidence and a sense of security in children.

Thus together, all of the abovementioned conventions, if followed in letter and spirit by governments all over the world, are capable of emancipating the homeless, disabled children towards a better life. A lot of

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<sup>3</sup> *Ibid.*

<sup>4</sup> Available at <https://www.unicef.org/crc/> (last visited on 12<sup>th</sup> March, 2019).

<sup>5</sup> Available at <https://www.unicef-irc.org/publications/pdf/digest13-disability.pdf> (last visited on 6<sup>th</sup> March, 2019).

what the digest covers has been incorporated in the Indian Act of 2016 which will be discussed in a while.

## 6. Legal Position in India

According to the Census of India, 2011, disabled persons accounted for 2.21% of India's population. Of these, 20.3% have a movement-related disability, 18.9% are those with hearing disabilities and 18.8% with vision-related disabilities.<sup>6</sup> This data includes the number of disabled children as well. In a welfare state that India is, the Constitutional provisions, for example, Articles 21A, 24, 39(f), 45, 51A(k) directed towards the benefit of children do not state anything specifically about disability but children in general.<sup>7</sup> But In 2007, India became a signatory to the Convention. The Convention required signatory states to make appropriate changes in law and policy to give effect to rights of disabled persons.<sup>8</sup> Therefore, the need for a new law in furtherance of this arose.

The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) (PWD) Act, 1995 specified seven conditions as disabilities and made special provisions for disabled persons with regard to their rehabilitation, and opportunities for employment and education.<sup>9</sup> In 2010, the Ministry of Social Justice and Empowerment constituted an expert committee under Dr. Sudha Kaul to Draft a new Bill for persons with disabilities.<sup>10</sup> The committee submitted a Draft Bill in 2011 that proposed to replace the PWD Act and addressed rights and entitlements for disabled persons. Subsequently on February 7, 2014, the Rights of Persons with Disabilities Bill, 2014 was introduced in Rajya Sabha and referred to the Standing Committee on Social Justice and Empowerment on September 16, 2014. The problem of disability and absence of any cogent solution resulted in the Parliament's enactment of the 2016 Act which intended to replace the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.

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<sup>6</sup> Census of India 2011, Ministry of Home Affairs, Government of India.

<sup>7</sup> The Constitution of India available at <https://www.india.gov.in/my-government/constitution-india/constitution-india-full-text> (last visited on 1st March, 2019).

<sup>8</sup> Convention on the Rights of Persons with Disabilities", United Nations, December 13, 2006, Available at <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html> (last visited on 15th March, 2019).

<sup>9</sup> The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 available at [http://www.disabilityaffairs.gov.in/upload/uploadfiles/files/PWD\\_Act.pdf](http://www.disabilityaffairs.gov.in/upload/uploadfiles/files/PWD_Act.pdf) (last visited on 23rd March, 2019).

<sup>10</sup> "The Rights of Persons with Disabilities Bill, 2011", [http://www.internationalcentregoa.com/web/pdf/The\\_Rights\\_of\\_Persons\\_with\\_Disabilities\\_Bill2011.pdf](http://www.internationalcentregoa.com/web/pdf/The_Rights_of_Persons_with_Disabilities_Bill2011.pdf) (last visited on 4th March, 2019).

## 7. Legal Provisions for Children under the 2016 Act<sup>11</sup>

The long title of the 2016 Act says that, inter alia, it is an act to give effect to the United Nations Convention fostering respect for the evolving capacities of children with disabilities and respect for the rights of children with disabilities to preserve their identities. Section 4 of the Act states that the government is to take measures so that Women and Children with disabilities may enjoy their rights equally with others and such children have the right and full state-support to freely express their views on all matters affecting them. Section 9 says that a child with disability may only be separated from her or his parents if a competent court has so ordered keeping the best interests of the child in mind.

The government is also to ensure that the disabled child is placed with his near relations or within the community in a family setting or in a shelter home if he or she cannot be cared for by the family due to certain constraints. Section 16 says that the government shall endeavor that educational institutions funded or recognized by them provide inclusive education to children with disabilities.

The government shall also detect specific learning disabilities in children at the earliest and take suitable pedagogical and other measures to overcome them and shall also provide for transportation facilities and attendants for educational purposes. Section 17 ensures that for the purposes of section 16, the government shall conduct survey of school-going children in every five years for identification of children with disabilities ascertaining their special needs and the extent to which they were being met. It also ensures that teachers qualified in sign language and Braille and those trained in teaching children with intellectual disability are employed.

For the purposes of this paper, section 24 is extremely important. It provides that the government shall formulate necessary schemes and programmes to safeguard and promote the rights of persons with disabilities for adequate standard of living so that they can live independently or in community and such assistance by the government would be higher by 25% than similar schemes applicable to others. Section 24(3) ensures that such schemes include schemes for children with disabilities who have no family or who have been abandoned, or are without shelter or livelihood. Children of disabled mothers are also to be provided with support for livelihood and upbringing of their children.

Section 25(2) aims to identify children who are at risk of becoming disabled and prevent the disability from actually arising. For the same purpose,

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<sup>11</sup> Available at [www.disabilityaffairs.gov.in/upload/uploadfiles/files/RPWD%20ACT%202016.pdf](http://www.disabilityaffairs.gov.in/upload/uploadfiles/files/RPWD%20ACT%202016.pdf) (last visited on 10th March, 2019).

measures are to be taken for pre-natal, perinatal and post-natal care of mother and child. Section 31 provides that every disabled child between the age of six and eighteen years shall have the right to free education in a neighborhood school, or in a special school of his or her choice and the government shall protect this right of the child.

The government, under section 39, shall also conduct awareness programmes to foster respect for the decisions made by persons with disabilities on all matters related to family life, relationships, bearing and raising children. Section 60 and 66 provide for the constitution of Central and State Advisory Boards on Disability to exercise the powers conferred upon and to perform the functions assigned to it under the 2016 Act. Section 92 is in the nature of penalty and provides for a punishment of minimum six months to a person who exploits a child sexually.

### **Conclusions**

Since the UN Convention on Disability caters to all persons with disability and the UNICEF and CRC look into child welfare, a combined effort by both can go a long way in establishing the rights of homeless or abandoned children affected with disability. As already discussed above, the Indian statute of 2016 makes specific provisions for children who are disabled as well as homeless. Since India is a signatory to both the conventions, incorporating the ideals of both in a single statute has been one of the greatest achievements of the Indian Parliament as far as giving effect to an international agreement through domestic legislation is concerned.

But the fight does not end here itself. There is a deep-seated stigma attached to disability which makes it tough for the ones affected to step up and seek help from the government.

Even after the enactment's coming into force, what is needed is awareness amongst the persons in whose interest the whole movement had begun in the first place. Drawing from the theory of evolution, homeless or abandoned children can still fend for themselves and survive (not to mean that this is a good course of action though this is a subject matter of another important discussion) but the ones who are disabled but have nobody to look out for them are generally not able to survive.

It is highly desirable that the state fights tooth and nail to achieve the objectives mentioned in the Act so that it does not end up becoming another piece of ornamental legislation. It is too early to comment upon whether the act is being implemented by the executive in the correct and efficient manner since it has only been a few months since it came into effect and only time will tell whether the children who actually need it have benefitted from it the way it was intended.

For the time-being it is certainly a matter of contentment that our children have something to look forward to in their respective journeys towards becoming self-sufficient adults.

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