**RESEARCH PAPER ON**

**Protection of Abandoned Children in India**

By:-

**Lakshika**

Third Year, B.B.A.LL.B.

Symbiosis Law School, NOIDA

Mobile:- 8053275645

Email id:-[lakshikaamarpuri2000@gmail.com](mailto:lakshikaamarpuri2000@gmail.com)



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**Abstract:**

Children, as we all know, are the support system of every nation’s lifeline, the backbone of every society’s future and the chief network of every generation’s legacy. However, these are the same children who are also vulnerable, gullible and prone to variety of negative facets of the society. Within the category of children, there is a classification of children as those who are in need of care and protection. This paper, specifically, deals with the protection of abandoned children in India. This research paper is an attempt to interpret, analyse and evaluate the legal provisions for protection of abandoned children in India. It examines and critically examines the constitutional mandates, conflicting *ratio decidendi* of case-laws, statutory rights, Constituent Assembly debates and obligations arising out of International Conventions. The facts and figures of abandoned children in India are ever-rising, so it of paramount importance to analyse the root cause and protect the children from being abandoned. The legal safeguards and mechanisms have become obsolete in nature and we now need new shields and schemes to protect our children. Lastly, this paper is concluded with the author’s personal suggestions and reformations that might help build a nation of children with safe and secure upbringing and childhood.

**Keywords:**

Children, Abandoned Children, Protection of Abandoned Children, Children in Need of Care and Protection, Right to Adopt and Right to be Adopted with respect to Article 21

**Introduction and Statement of Problem:**

“*According to United Nations Children’s Fund (UNICEF), India has 29.6 million orphaned and abandoned children. SOS Children Village conducted a study in 2011 and concluded that the former category equals 4% of India’s child population. However, in disconcerting figures provided by Childline India Foundation (CIF) supported by the women and child development ministry showed that in 2017, of these 30 million children (which is most likely an under-reported figure), there were only 470,000 children in institutionalised care. And of these roughly half a million children, only a fraction finds its way into family care because adoption rates in India are abysmally low. This means that there needs to be a huge readjustment in the government’s focus on child development because currently millions of children are being wasted and denied a future of opportunities to realise themselves.*”[[1]](#footnote-2)

The data provided above suffices the pressing need to protect abandoned children in India. Apart from the data, there are number of newspaper articles and scholarly journals that suggest us to redefine right/s of abandoned children in favour of their growth, development and prosperity. It is due to this highly alarming situation that we ought to re-consider legal provisions with respect to the protection of abandoned children in India.

**Definition and Meaning:**

Section 2 (12) of the Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter, referred to as ‘Act’) provides for the meaning of the term ‘child’ as “*a person who has not completed eighteen years of age.*”[[2]](#footnote-3)

Section 2(1) of the Act, defines an abandoned child as “*a child deserted by his biological or adoptive parents or guardians,who has been declared as abandoned by the Committee after due inquiry.*”[[3]](#footnote-4)

Section 2 (14) (6) of the Act, includes an abandoned child within the ambit of a ‘child in need of care and protection’.[[4]](#footnote-5)

Reading all the definitions together, it can be said that a child (below 18 years of age) who has been deserted by his parents (biological or adoptive) or guardians and has been declared as ‘abandoned’ by the respective Committee after due inquiry, such a person is a ‘child in need of care and protection’.

**Constitutional Safeguards Not Guarding Enough:**

Part IV - Directive Principles of State Policy (hereinafter, referred to as ‘DPSP’) of the Constitution of India, 1950 (hereinafter, referred to as ‘Constitution’)containing Article 39(e) and (f)provide for child welfare directives.

Article 39 (e) of the Constitution states “*that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength*”.[[5]](#footnote-6)

Article 39 (f) of the Constitution states “*that children are given opportunities andfacilities to develop in a healthy manner and inconditions of freedom and dignity and that childhoodand youth are protected against exploitation andagainst moral and material abandonment*.”[[6]](#footnote-7)

This implies that it is the mandate of the Constitution to protect children against exploitation and against moral and material abandonment. Article 39 (f) of the Constitution was substituted by Section 7 of the 42nd Amendment in 1976. Article 31(vi) of the Draft Constitution, 1948 mentioned “*that childhood and youth are protected against exploitation and against moral and material abandonment.*”[[7]](#footnote-8) This suggests that our Constitution-makers were already aware that the conditions for abandonment of children in India may arise and protection should be given to such children. This provision was added in the Constitution taking into consideration that children require special attention of the State, especially in the cases where the parent/s or guardian/s have abandoned them.

However, this provision of law is mentioned in Part IV of the Constitution i.e. DPSPs. But given the nature and gravity of this concern, I strongly believe that, it should have been mentioned in Part III of the Constitution i.e. Fundamental Rights (hereinafter, referred to as ‘FR’). As we know, that upbringing and childhood is the very foundation of life for any person. We must ensure that each and every person gets a secured childhood. This is the reason why it shouldn’t just have been a DPSP but a FR because the FRs are enforceable in the court whereas, DPSPs are only directions that are given to the State which are not as such enforceable in the court.

Part III – FRs of the Constitution, 1950 containing Article 21 provides for ‘Right to Life’.

Article 21 of the Constitution states “*Protection of life and personal liberty - No person shall be deprived of his life or personal liberty except according to procedure established by law.*”[[8]](#footnote-9) In the case of *ShabnamHashmi v Union of India*[[9]](#footnote-10) it was held that the right to adopt and the right to be adopted is not a part of the FRs and thus, cannot be included under the ambit of Article 21 of the Constitution.[[10]](#footnote-11)

Article 21 begins with the expression “**Protectionof Life**” but fails to protect the lives of the abandoned children. As mentioned earlier, that abandoned children are **children in need of care and protection**. Such children are specifically in need of care and protection. However, the scope of Article 21 is otherwise extremely wide but where it should necessarily pave way to protection, there it has miserably failed.

**Case-Law/s - Conflicting views on Article 21:**

*Lakshmi Kant Pandey v Union of India[[11]](#footnote-12)*

In this case, it was said that “*Every child has a right to love and be loved and to grow up in an atmosphere of love and affection and of moral and material security and this is possible only if the child is brought up in a family. The most congenial environment would, of course, be that of the family of his biological parents. But if for any reason it is not possible for the biological parents or other near relative to look after the child or the child is abandoned and it is either not possible to trace the parents or the parents are not willing to take care of the child, the next best alternative would be to find adoptive parents for the child so that the child can grow up under the loving care and attention of the adoptive parents. The adoptive parents would be the next best substitute for the biological parents.*”

This is a remarkable expression of reasoning which furnishes the ground of assertion that right to adopt and right to be adopted should be considered within the purview of Part III of the Constitution. It is in the best interest of the child to grow up in a family (be it biological or adoptive) rather than child care institutions. It is significant to note that adoptive parents are considered to be ‘next best substitute’ after biological parents for a child. The underlying principle is that a child is so sensitive, delicate and subtle that such tenderness should be dealt with compassion, kindness, love and care of a family.

*Manuel Theodore D'Souza[[12]](#footnote-13)*

In this case, it was said that “*They are children just like other children. These are children, however, without home and family. Don't they have a right to love and security. Should not the Constitution be also meaningful to them. Having been orphaned should the Republic abandon them forever.*”

The judgment also highlighted that “*To our Legislators the law making limb of our Constitutional Structure. I may only remind them of the words of Gabrieala Mistral:---*

*"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.*"

The indispensible element of a social structure is the children whose concerns are vital and urgent to address. We need to ensure and ascertain that every child develops senses under the umbrella of an atmosphere of security and affection. We, as a society and as an individual, should not leave abandoned children on the fate but must take responsibility of every life that is embellishing on our land.

Also, the Court reiterated that as per the Doctrine of *parenspatriae*, it is the duty of the State and Constitution to protect its citizens, especially the ones who are not in a position to protect themselves, like abandoned children and other children in need of care and protection.

**Statutory Provision/s (Inclusive of Law Commission Report/s):**

Section 317 of Indian Penal Code, 1860 (hereinafter, referred to as ‘IPC’) provides for ‘Exposure and abandonment of child under twelve years, by parent or person having care of it’. It further states that “*Whoever being the father or mother of a child under the age of twelve years, or having the care of such child, shall expose or leave such child in any place with the intention of wholly abandoning such child, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both. Explanation.— This section is not intended to prevent the trial of the offender for murder or culpable homicide, as the case may be, if the child dies in consequence of the exposure.*”[[13]](#footnote-14)

In fact, the Fifth Law Commission proposed reforms with laws related to protection of children. Specifically, for Section 317 of IPC, it recommended three major amendments which are as follows:-[[14]](#footnote-15)

1. The age of the child who has been abandoned should be changed to 5 years from the existing 12 years;
2. The reference to the serious injury to health or risk of life in the context of such a child should be provided clearly and properly;
3. The explanation part is unnecessary and hence, must be deleted.

Henceforth, in accordance with the Fifth Law Commission Section 317 of IPC should be framed in the following manner –

“*Exposure and abandonment of child under five years by parent or person having care of it.- Whoever being the father or mother of a child under the age of five years, or having the care such child, shall expose or leave such child in any place with the intention of wholly abandoning such child, shall, if such act endangers, or is likely to endanger, the life of the child or permanently injures, or is likely to permanently injure, the health of the child, be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.*”[[15]](#footnote-16)

It is interesting to note that this penal provision is applicable to children under the age of 12 years. However, while reading the definition and meaning of abandoned child, it can be concluded that the children (below 18 years of age) who has been deserted by his/her parents (biological or adoptive) or guardians and have been declared as ‘abandoned’ by the respective Committee after due inquiry, such persons are called as ‘children in need of care and protection’. Although, IPC provides for abandonment as an offence via Section 317 but doesn’t provide protection to all abandoned children. It gives protective shield to children below 12 years of age only and not to age group of 12 – 18 years. Meaning thereby, a child (whose age falls in the category of 12 – 18 years) who has been abandoned is not a victim to the offence of abandonment in pursuance of IPC. Therefore, I don’t agree with the first recommendation of the Law Commission, rather I believe that it should be increased from 12 years to 18 years to give protection to maximum children who are abandoned.

As far as the second recommendation of the Law Commission is concerned, I am still in disagreement with the proposed recommendation. This is mainly because narrowing down the definition to particular points like risk to life or serious injury to child will limit the scope of this provision. Restricting the ambit of this provision poses great threat to lives of abandoned children.

The third recommendation stating that the explanation part must be deleted is simply useless. The provision providing explanation explicitly shows the intent of the legislature and does no harm even if it is regarded as unnecessary. Explanations are, usually, given for better understanding of the provision/s and thus, must not be omitted.

Hence, I don’t agree with any of the given recommendations of the Fifth Law Commission because of the above-mentioned reasons. Rather, I further want to elucidate that this provision of law is given in interest of the abandoned children and therefore, the scope and ambit of such provision should be widened to give maximum protection to such children.

Moreover, these proposed recommendations neither received attention from drafters of the Indian Penal Code (Amendment) Bill, 1978 nor the Fourteenth Law Commission for its 156th Report on IPC.[[16]](#footnote-17)

Moving forward to other salient features of Section 317 of IPC, it is pertinent to ascertain the responsibility and liability of this offence. In accordance with the Guardians and Wards Act, 1890, the natural guardian of the child is the father and the mother’s position as the guardian is after the father. But,Section 317 of IPC provides for the liability on the equal footing for both the father and the mother. Also, for the concerned section, it should be duly noted that this section doesn’t differentiate between the children who are born in wedlock or outside it.[[17]](#footnote-18)

This section not only includes the parent/s but anyone under whose care the child is put. Each person is equally liable just as the parent of the child. For instance, orphanages, crèches and other such centres for taking care of the child are under the scope of this statutory provision.[[18]](#footnote-19)

Overall, Section 317 of IPC should be given widest possible definition in order to protect the interests of the abandoned children. It is of key importance to protect the lives of abandoned children because, unlike other children, they are not growing up in the institution of family and hence, they require aid and assistance of the laws to be in favour of them. The children in need of care and protection should atthe least be given such care and protection in the form of nature and scope of legal provisions.

**Constituent Assembly Debates:**

Constituent Assembly of India–Book – IV; Volume IX (30th July to 18th September 1949)

Dr. P.S. Deshmukhin the constitutional assembly debates mentioned the following

“…*But unfortunately there is nothing so far as the welfare and protection of children and youth is concerned, especially their exploitation and abandonment, which has been one of the articles which we have already passed, viz. article 31. By this article we want the UnionGovernment to be responsible for the protection of children and to see that there is no exploitation or abandonment of children and youth*…”[[19]](#footnote-20)

Shrimati G. Durgabai in the constitutional assembly debates mentioned the following

“…*It may be argued that there is penal law which deals with the matter. I know that the criminal law deals with this matter of abandonment. I also know, because I am conversant with it, how deep matters are going on. It is true that the person who is charged with the offence of abandoning is really punished and he or she is sentenced for that offence. But what happens to the child that is abandoned? That is the question. Where, is it to go? How long is it going to wait in search of somebody to come forward and take it for protection? Therefore, Sir, it is a very dangerous thing. If only we leave the children to themselves, they will take to beggary and also to many vices such as stealing and they would cultivate very bad habits. Therefore it is the duty of the State to come forward and help these children sufficiently in time to see that they are developed well, because these children are our future hope and the nation depends upon these children, their goodmanners, their upbringing, their good health and their strong character*….”[[20]](#footnote-21)

ShriBrajeshwar Prasad in the constitutional assembly debates mentioned the following

“…*If there is to be protection of childhood and youth against exploitation and against moral and material abandonment, the Government of India must be vested with the necessary powers. The Government of India must provide necessary facilities for birth-control, if we are to protect the future generation from exploitation both moral and material*…”[[21]](#footnote-22)

“…*It is the duty of the State to nurse every child from the moment of its birth till he or she reachesthe age of maturity. The State must provide education, medical facilities and means oflivelihood to each and every citizen living within the ambit of the Indian Union. Theinstitution of family is undergoing rapid transformation. I do not know what ultimate formit will assume. But I am quite clear in my own mind that today it is not in a position toprotect childhood and youth against exploitation and against moral and materialabandonment. It is incumbent therefore on the State to protect the youth of the countryfrom all evil influences*…”[[22]](#footnote-23)

In light of the above, it can be inferred that the members of Constituent Assembly realized the need of protection of children, especially the abandoned children. And, thus, suggested that the State must be put under the obligation to take due care of such children. This, in a way, makes the State responsible for abandoned children. This duty should begin from the birth of the child until s/he attains the age of maturity. The members of the Assembly further discussed the need for the State to provide necessities like educational facilities, medical facilities and means of livelihood not only to abandoned children but to all the citizens living in the Union of India.

The debates have elaborately contended that children are in constant need of support, care, love and affection of the family. However, in the case of abandoned children, it is the State that must act as the family of such children.As the children are considered to be vulnerable, tender and gullible, therefore, to prevent them from committing wrong deeds, the State should take proper and accurate measures in order to nurture future hope of India. It is needless to say that children are the backbone of the future of any nation.

Interestingly, when an argument regarding penal provisions of abandoned children arose, it talked about the punishment to the father andmother; however, it didn’t state anything in the interest of the abandoned children. Abandoned children, as already discussed earlier, are children in need of care and protection. So, clearly it is of paramount importance that we need to take care ofsuch children and ensure that they are atleast sufficiently given the basic amenities of life and livelihood.

The Constituent Assembly debates that took place in 1949 regarding abandonment of children, in my view, couldn’t assume the actual gravity of the concern. Although, there have been traces of attempts that took place to incorporate stronger provisions in favour of abandoned children, but requires further consideration and deliberation. In my humble opinion, merely casting the duty on the State cannot be the standalone solution for the issue in hand. Moreover, the penal provisions are hardly concerned about the aftermath of life of such children. Hence, I feel that it is not only the responsibility of State or the parent/s or guardian/s to take care of the children but it is upon the society as a whole to be duty-bound for this cause.

The blame is sometimes put on the State and sometimes on the parent/s or guardians/s but the grave concern here is that the upbringing of a child. According to me, whatever may be the institution of the family, however may be the formation of the family, the child must not suffer at any cost.

**Obligations Arising Out of International Convention/s:**

Part IV i.e. DPSP of the Constitution containing Article 51of Constitution obliges the State to respect the International Laws and Treaties.[[23]](#footnote-24)India is a signatory to numerous treaties and laws in international front.

Article 25(2) of the Universal Declaration of Human Rights, 1948 states that “*Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.*”[[24]](#footnote-25)

This implies that childhood is a tender state that requires special attention of the legal provisions. Protection of abandoned children, who are also children in need of care and protection, is one such area that requires the special attention of all.

The Preamble of Convention on the Rights of the Child, 1989 provides that “*Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding*.”[[25]](#footnote-26)

A child needs a family for nourishment of values in upbringing and growing. Every child must be entitled to a family, for love of the family is the very foundation of a child and, especially the ones who are in need of care and protection.

**Limitations and Future Scope of the Study:**

1. I could only study and research on the substantial aspects of protection of abandoned children and not the procedural aspect. Meaning thereby, the procedural aspects of this theme is yet to be explored.
2. As this research paper was prepared during the pandemic occurred due to COVID-19, I couldn’t have access to the law library of the college which could have benefitted more. However, internet sources sufficed the need of a library in physical spaces.
3. This paper isnot an exhaustive list of laws in the context of this topic and there are other policies, rules etc. which I couldn’t include due to paucity of time and word limit restraints. There areother facets to this theme that deserve to be unfolded.

**Conclusion and Suggestions:**

To conclude, I would like to suggest the following:-

1. Adoption – It is one of the indispensible measures thatmust be highlighted. For the cause of abandoned children, it is necessary to give them the shelter of a family.
2. Donation – For serving the purposes of proper development and protection of abandoned children, if we cannot adopt a child, at the least, we can donate some amount of our earnings to the child care institutions. This is because we cannot buy love but food, which is another essential for survival.
3. Awareness of legal rights and duties– The children, especially the children who are in need of care and protection, must be aware of their legal rights and duties that help them not only to know the legal provisions but to become better citizens of the nation.
4. Exercising rights and duties– Awareness is one factor but exercising rights is the central idea of generating awareness. We must encourage and help the children in need of care and protection to bring the rights and duties into action.
5. Contributing towards Organizations working for this cause – Other than the Government, many other organizations (including N.G.O.s) are providing help to such children. We must visit such places often and contribute towards the welfare and well-being of those children.
6. Incentives for remarkable work in this field to persons and/or institutes – The Government must motivate people to work for this cause and therefore, must present awards to the ones who have done their job effectively and saved lives of such children.
7. Other suggestions have been included in the research paper, including the age factor involved in Section 317 of IPC, right to adopt and right to be adopted with respect to Article 21 and other FRs of the Constitution and lacuna in Constitutional Assembly debates.

It shouldnot only beour moral duty but constitutional and legal duty as well to try to connect each child with a family. The bottom line is that no child should be left without the love, care, support and togetherness of a family.

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**About the Author:**

Lakshika is a learner of law and a student at Symbiosis Law School, NOIDA. She is currently pursuing the five-year-integrated-degree programme called B.B.A.LL.B. She aspires to be a legal researcher and her interest lies in the domains of Constitutional Law, Criminal Law, Family Law, International Law and Law of Torts. She has been associated with various organizations practicing legal research activities. She is efficient and effective in terms of performing the tasks duly. She is a firm believer of equality, justice, fraternity and secularism. She further wants to serve the people, the society and the nation in the best possible format.

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