

**THE RIGHTS OF THE CHILD UNDER THE  
INTERNATIONAL LAW AND THE INDIAN  
JUDICIARY**

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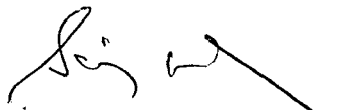
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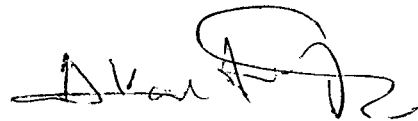
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DIDLA VENKATESWARA RAO

**Dedicated to My parents**

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## **CHAPTER - I**

## INTRODUCTION

The Primary definition of "Child" is the immediate progeny of human parents<sup>1</sup>. In its commonly understood meaning, "Child" or "Children" refers to parentage and embraces only the first generation of offspring<sup>2</sup>. It has also been said that primary meaning of the word "Child" is an infant and that the next allowable use in meaning is one of tender years, young person, a youth.

Black's Law Dictionary defines the term "Child" as Progeny: offspring of parentage. Commonly it implies one who had not attained the age of fourteen years, though the meaning now varies in different statutes." And Ballentin's Law Dictionary defines "Child" as: a juvenile subject to parental control or guardianship... one under the age of puberty or not old enough to dispense with parental aid distinguished from a youth, who although legally an infant, possesses the size and strength of man... a word which is not a technical legal term having a fixed and definite meaning, but one which is flexible and subject to construction to give effect to the intention of the maker of the instrument which it appears. To sum up, the term 'Child' is not univocal meaning. Sometimes a special land considers a child a person under 18 years<sup>3</sup>. The American Bar Association's Standards Relations to Rights to Minors proposes that, "all persons who have attained the age of eighteen years should be regarded as adults for all legal purposes." According to the United Nations Convention on the

Rights of the "Child": (1989) ".....a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is contained earlier<sup>4</sup>." In India too, the definition of the child varies with the purpose. The census of India treats persons below the age of fourteen as "Children". According to the Indian Constitution", "no child below the age of 14 years shall be employed to work in any factory or mine or engaged in any other hazardous employment<sup>5</sup>."

Because of the obvious but profound connection between the mental and physical development of children and the social and economic development of their societies, the protection that society affords to its children is the touchstone of social development<sup>6</sup>. The principle of "first call for children" is the great ideal at the heart of social development<sup>7</sup>.

It is the triumph of the Convention on the Rights of the "Child" that nothing is left out. It's articles provide uncompromising protection of children against economic exploitation and sexual exploitation and torture and war and homelessness and every other evil to which the lives of children in this perverse and brutal world are subject. The convention provides a standard, a benchmark against which the behaviour of nations can be tenaciously and perpetually measured. It is the principal, unambiguous and a sacred text for the Rights of the "Child"<sup>8</sup>.



The Geneva Declaration, 1924, and the United Nations Declaration of the Rights of the "Child", 1959, have proclaimed the child to be the most privileged ward of humanity, when they stated that; "Mankind owes to the child, the best it has to give."

Today's children are tomorrow's citizens. The future belongs to them and they have a very special place in the scheme of human life. In reality, a statement of child's rights is a statement for all adults, of governments and of international community, to create and maintain the atmosphere in which families on their own can protect the Rights of the "Child".

The concept of Rights of the "Child" has only been recognized quite recently. Prior to the Nineteenth Century the child was the human property chattel of the parents, with the latter enjoying an absolute right to the child services and earnings and had full control over the child's person and property. Legal evolution brought substantial improvements in the area of Children's Rights.

At the international level, concern in the field of Children's Rights began to be shown when the League of Nations adopted conventions prohibiting traffic in women and children in 1921, and slavery and the slave trade in 1926<sup>9</sup>. The International Labour Organization [ILO], has since 1919, adopted several conventions aimed at the abolition of child

labour, through a legal network of protection for working children with regard to conditions and terms of employment<sup>10</sup>. The Geneva Declaration of 1924, also known as the Declaration of the Rights of the Child, which was adopted by the Assembly of the League of Nations, "in the name of men and women of all countries,"<sup>11</sup> remains the greatest instrument of international significance for the protection of children.

These epoch-making basic instruments laid the foundation for the development of international law for the Rights of the "Child". Principles contained in them later formed the basis of the United Nations Declaration of the Rights of the "Child" in the year 1959. The Universal Declaration of 1959 which requires the Member States of the United Nations [UN] to, "promote universal respect for, and observance of, human rights and fundamental freedoms for all"<sup>12</sup>, and its principles are part of the customary international law. The declaration lists rights which mostly relate either directly<sup>13</sup> or indirectly<sup>14</sup> to children, though in general it is a widely acclaimed proclamation of human rights. The United Nations which has Rights of the "Child" on the international agenda declaring 1979 to be the International Year of the "Child" [IYC]. to coincide with the Twentieth Anniversary of the Declaration of the Rights of the child.

The future of a society depends directly on how the children are cared for and brought up to fulfil the many requirements which the society is faced with from time to

time. Like any other living entity, a child is basically a product of the environment around him. With many competing demands on their resources, the developing societies are often unable to do everything that is necessary to give the children their rightful place in the community<sup>15</sup>.

Children by virtue of their age are dependant on their parents or guardians to act in their best interests and to protect their rights. For many children in the world today, that protection is not enough. In a large number of cases children are denied their rights by the forces beyond the control of their families such as, natural, disaster, unemployment, poverty and lack of education<sup>16</sup>.

If the families fail from protecting their children's rights, then the governments and the international community have the responsibility to rebuild the essential walls of physical and material protection around the vulnerable years of childhood<sup>17</sup>.

The present day position of children is deplorable, to say the least. Leaving aside poverty, which accounts for most hunger, illness and death but which afflicts adults as well, children are currently at work, at war, in prison and living in the streets. They are exploited, under-educated, bullied, malnourished, abused and without homes in every country of the world<sup>18</sup>.

Along with the gradual development of universally accepted principles concerning responses to the special vulnerability, needs and situations of children, the body of international humanitarian and human rights law is also being continually supplemented. This body comprises of a wide range of instruments. Some are binding such as the Red Cross Geneva Conventions, the ILO Conventions, the International Covenants on Human Rights etc. Others are non-binding for example, the Standard Minimum Rules for the Treatment of Prisoners, the Principles of Medical Ethics and the Declaration of the Rights of the "Child". Many of the provisions of both, the binding and non-binding instruments, in fact apply implicitly to children by virtue of the status of the latter as human beings or make specific and implicit reference to children<sup>19</sup>.

The ILO conventions have played a sheet anchor role to deal with the problems of children. The protection of the child against exploitation in employment is one of the major concerns of these conventions. Out of the 18 Conventions of the ILO dealing with children; ten of them deal with the minimum age for employment of children, five with medical examination of children to decide their fitness for employment and three with prohibition of right work for children. In short, the major objective of these conventions was to provide certain norms and standards for the well being of the working children.

However, since instruments have been drawn up separately over a long period and without any overall and specific concern for children's global needs, the rights they grant, contain a number of inconsistencies and, in particular are far from being comprehensive and wholesome.

In addition, their provisions are not child-specific though applicable to children; they do not take into account the specific needs which often require the setting of standards that are higher than those for adults. And since the instruments in question are a mixture of soft and hard law, the rights they confer on children implicitly or explicitly put no obligation on the states<sup>20</sup>.

In addition to the setting of new international legal standards, new international alliances for the protection of children and their rights are beginning to get formed. In 1987, seven Heads of State in Central America made an unprecedented joint television appeal for the immunization of all children as part of a programme to reduce child death-rates by half in the region. In Asia, the seven heads of the State of the South Asian Association for Regional Cooperation [SAARC], in 1993 jointly stated that, "Children should be given the highest priority in national development planning". Similarly the African heads of state meeting in Addis Ababa, declared in 1988 a "year for the protection, survival and development of the African child<sup>21</sup>."

In the Middle East the Council of Arab Ministers of Social Affairs announced the target of halving the regions infant mortality rates should rank along outside growth in GNP as an indicator of progress and development<sup>22</sup>. Even the 1988 Moscow Summit Meeting convened principally to address issues of strategic arms limitations, acknowledged the new importance of child survival and development issues. Besides these political alliances, a grand alliance with a commitment to children is gradually being formed by medical professionals and community health workers, teachers and religious leaders, mass media and government agencies, voluntary organisations and peoples' movements, the business community and labour unions, professional associations and conventional health services and of course the political leadership at the highest level<sup>23</sup>.

The 1988 Report of the UNICEF points out that even in our times, governments are still recruiting children to fight wars, employers are still exploiting the children of the desperately poor in the fields and factories, and national and international economic forces are still allowed to inflict permanent mental and physical damage on young children who, no matter what the external circumstances, have a special right to protection for their growing minds and bodies.

The rights and well-being of the world's children are the prime concern of UNICEF. It works for the rights of the disadvantaged children in developing countries to have access

to proper health care and nutrition, functional education, clean drinking water, sanitation and other basic services<sup>24</sup>.

The universal instruments on human rights and children's rights have influenced many national legislation. The Indian Constitution has a few provisions that lay down guidelines for the state on how to treat its children and young persons. They mainly relate to education, employment growth and development of children. Indian legislations on child related matters is quite advanced and is in conformity with the international standards.

The Geneva Declaration of 1924 was revised and amplified in 1948 and the resulting text formed the basis for the ten point Declaration on the Rights of the "Child" unanimously adopted by the U N general Assembly in 1959. In 1978, the Government of Poland submitted a draft- text to the Commission on Human Rights for a UN Convention of the Rights of the "Child", with a view to its adoption in 1979, the International year of the child. In 1979, at the request of the General Assembly an open-ended working group was set up in Geneva by the Commission on Human Rights to draft a convention using the Polish text as basis. From 1979 to 1987 the working group met for one week per year, generally the week preceding the opening of the annual session of the Commission.

In 1983 an informal ad-hoc group composed of International Non-governmental Organizations [INGOs] was established to prepare joint proposals and submit them to the UN working group. By March 1988, the Commission adopted the preamble and 51 articles, many of which have their origin in the INGO proposals. This Convention was to be one of the most comprehensive international instruments since the Universal Declaration of Human Rights.

Our society's failure with children is intertwined with its larger ethics of discrimination, injustice and racism. The children who get the least of benefits are those who need them most. The children of the poor have the least protection of the laws, the poorest of services, the most vulnerability to bad treatment. It seems clear that any effort on behalf of children must take account of this intertwining of the economic, the political and the human factors, influencing "Child" Rights. The struggle for the welfare of children and the rights of the youth must, engage the larger issues of equity in our whole society<sup>25</sup>.

Children have a right to make just claims, and adults must be responsive to these claims. This conception of a just society, if widely accepted, would lead to a change in attitude on the part of adults. In according rights to children, it makes adults more accountable to children. They can no longer assume it is only at their pleasure that children are permitted to make claims<sup>26</sup>.



Despite the efforts of the UN and the various governments, children continue to suffer endlessly, Malnutrition, unsanitary conditions, lack of medical care, etc. have produced an overall infant mortality-rate in underdeveloped countries, which is five times greater than in developed countries, ranging from 60 to over 200 deaths per 1000 live births. The rate of illiteracy in the developing countries is also staggering ranging from 60% to well over 90%. Out of the world's approximately 1.5 billion children under 15 years of age [ i.e., a third of mankind] 16% are undernourished, 41% are without access to safe water, 29% are without adequate housing, and 42% are without access to effective medical care.

Children continue to be sold into slavery in some parts of the world, or working under degrading semi-slavery conditions. Though exploitation of some degree exists in most countries, such exploitation is, however, extensive and pronounced in underdeveloped countries. Thus most adversely affecting the health and mental development of such children and contributing to illiteracy. In addition to these, child beggary on a large scale is a distressingly common phenomenon in many countries. In India alone, there are an estimated 300 million children between 0 and 14 years of age constituting nearly a little over one-third of India's population. As per 1991 Census, there were 150 million children living in rural areas.

India has probably the largest child labour force in the world and it is growing every day. It is estimated that 100 million children are forced to work in the organised and unorganised sectors. "Child" labour contributes to over 20 per cent of India's gross national product [GNP]<sup>27</sup>.

According to the 1981 Census, India has 272 million children between the ages of 0-14, which nearly accounts for 42 percent of the total population, out of which 97 million are below five years of age. Article 45 of the Constitution of India, obligates the states provinces to ensure that all children under 14 years of age are in schools, whereas out of 175 million children [6-14 years], only 42-69 million children were attending schools, and of 132.31 million were not in schools. It can be reasonably concluded that this majority was engaged in some kind of work either as wage labour or were supporting their families by looking after their fellow siblings, thereby making adults free to work.

Estimates about the child labour force in India vary. The Census figures for 1971 and 1981 are 10.7 million and 13.6 million respectively, whereas the National Sample Survey figures for 1983 are 17.36 million. The Operation Research Group [ORG], Baroda, quotes a figure of 44 million in 1983 and the Balai Data Bank, a Manila based NGO puts the number of working children in India at 111 million. Despite the endemic absence of data, in 1975 the ILO conferred upon India the dubious distinction of harbouring the largest number of child

workers in the world. According to the Asian Labour Monitor, every third household in India has a working child<sup>28</sup>.

As a result of the structural adjustment policies being presently pursued by the Government Of India. under pressure from the World Bank and the IMF, the situation for a vast majority of Indian children is going to worsen. Increased unemployment, drastic reductions in the social security budget, i.e. health care, education and the public distribution system, all of which are the conditions for the acceptance of the IMF-WB package are going to have an adverse impact on the lives of millions of children.

While some of the effects of the policies are already evident, the long term impact of these policies will reveal itself in about five years.

Meanwhile, it is important to take cognisance of the impact of the IMF-WB policies in countries in Africa and Latin America. A study conducted by the ILO Bureau of statistics and special studies in 1980 placed the count of children in the labour force of the world at 52 million with India contributing to about one third of Asia's child labour and one fourth of the working children in the world<sup>29</sup>.

The precise estimate of the overall magnitude of child labour in India is admittedly difficult on account of the

predominance of the informal and unorganised nature of the labour market.

A Report<sup>30</sup> released on the eve of Children's Day in 1992, said that these children, whose number was unofficially estimated at 44 million, contributed about 23 per cent to the household economy and account for six percent of India's total labour force<sup>31</sup>.

It is shocking for any nation that believes in child as its important human resource, to have this high percentage of children as part its workingforce. What is more shocking and disturbing is the fact that a very large proportion of working children belong to factories engaged in work of a hazardous nature which is most dangerous to their health and well being.

Child labour is very common and perhaps the oldest in carpet making. About 3 million children below the age of 14 years work in the carpet industry. The Carpet and Weaving Industry of Uttar Pradesh has acquired notoriety in engaging child labour. Match and Fireworks Industry in Sivakasi has the second highest number of about 55,000 working children. The children work from 7 a.m. to 6 p.m. with a short break in between. The wages are determined on the basis of piece-rate. Though the Supreme Court of India in a public interest litigation had directed the employers to provide safeguards for safety of children employed in factories,<sup>32</sup> the employees however took no such effective steps.

In the Glass Bangle Industry there are about 50,000 working children between 5-14 years of age in Firozabad district of Uttar Pradesh, who work on the curving of bangle tubes under temperatures varying from 800-1600 celcius. Factories function only overnight where children work for 10 to 12 hours for a merge amount of Rupees Five to Seven.

About 45,000 children are employed in Zari making in Lucknow, in the State of Uttar Pradesh, in the age group of 8-15 years. The precious stone polishing industry of Jaipur employs 10,000 children. All of whom work in slums.

About 7000-10000 children work in lock industries at Aligarh. They are engaged in hand pressing, electroplating, polishing-spray, packing etc. They suffer from bronchitis, lung-cancer etc., working with poisonous chemicals for unduly long hours.

"Child" labour is also common in other informal sectors including restaurants, roadside hotels, domestic servants, car parking, rag picking, repair shops, coolies, hawkers etc. These sectors of employment are mostly unregulated by laws and the children toil completely at the whims and fancies of their employers, who extract work under duress for 6 to 7 days a week without giving any proper wages or other facilities. The working conditions are pitiabile and many work in horrifying conditions. Most of the children employees belong to weaker sections of society never ever having an opportunity of child care.

## **SOCIAL & ECONOMIC FACTORS INFLUENCING RIGHTS OF THE CHILD**

The human condition in large parts of the world today suggests that economic development has substantially neglected the human factor, which is the ultimate goal as well as the main investment of development.

Of the world's 1.5 billion children four-fifths live in the developing countries, and among them, about 600 million suffer from poverty and hunger. The main reason for this is that the international and the national economic systems work, in effect, to their disadvantage. The World Food Council states that 450 million people remain severely undernourished because the 40-60 million tonnes of wheat they need in a year and which the world can easily spare, does not actually reach them.

### **ECONOMIC FACTORS**

Today, the economic picture is grim due to a set of concurrent economic crises: the soaring costs of energy, the slowing down of growth across the world, the rising graph of unemployment, the danger of the eco-system being pushed out of balance and the relentless upward spiral of prices of even essential goods, the depletion of non-renewable mineral resources and contrasting standards of living. The burden of all these falls unequally between the fortunate few and the numerous poor, within countries and the world overall. There

is also the tendency to shift the burden from the present to the future, visiting the debt of adults on children. In this context, there exists the need for a set of largely complementary strategies to be applied on a global scale, increasing employment, meeting basic needs, reducing inequalities of income and wealth and of status and opportunity, and raising productivity of the poor. For this to happen, economic inputs have to be reinforced by social-inputs like education, nutrition, health, water-supply, clean environment, among several others.

#### **SOCIAL FACTORS**

Expenditure on social factors of development must be considered as investment in the quality of life of all human beings, right from the earliest childhood. It also represents a choice between deflationary economic policies and a dynamic approach to development with human resource as its prime mover. Development has to be defined as consisting of two inter-related aspects: growth to meet material means like food, clothing, health, education, housing, employment, income and change towards access to non-material needs, like food, clothing, health, education, housing, employment, income and change towards access to non-material needs, like opportunity for self-reliance, participation, self determination, security, identity and freedom.

The case of children vividly illustrates the truth that the process of development does not depend solely on an increasing rate of investment, but hinges mainly on the human factor because the productivity of labour, along with the quality of management and entrepreneurship, is the key to reducing the level of capital-output ratio. In an underdeveloped economy, the number of children is large, the share of resources for their maintenance is small and the needed resources that are available limited. As a result, the chances of investment in children are extremely low. Thus a vicious circle perpetrating poverty and under development set in as a barrier to progress.

The problem then is not only of raising the level of investment but, even more importantly, of making it more productive. The answer lies in allocating more resources for investing in children as the principal means of breaking out of the poverty syndrome. A concurrent approach to the same problem is of course, to reduce the number of children yet to be born. However, poor families are caught in a trap. They need many children so that at least some survive to help with the work and provide security to parents in old age. But by having more children families share fewer assets and less income per person. The only way out of this situation is to have fewer, but more productive children.

In this perspective, because human investment rather than physical capital accumulation is the essential basis for



higher productivity, the truest investment of any community, rich or poor, developed or under- developed, capitalist or socialist, ancient or modern, is the investment in its own children.

#### **THE INDIAN CASE**

The India, the problem of child labour is not a result of any single isolated factor. It is a multidimensional problem that involves various reasons contributing to this problem in a variety of ways. Some of the foremost ones responsible for prevalence and perpetuation for child labour are: continued poverty, illiteracy and ignorance of poor parents; inadequate family income; large family; indebtedness; absence of social security schemes; absence of provision for compulsory education; stagnation of agriculture resulting in increased landlessness and the destruction of village economy; presence of a huge informal sector implying the presence of a huge work force and cheap wage labour especially cheap child labour; children coming from families having traditional occupation (such as artisans) which are now on the verge of total ruin; discrimination based on caste and religion leaving children coming from the lower rungs of social hierarchy with exceedingly limited opportunities (thus the majority of child workers being from the socially and economically backward classes) and lack of faith of families in the present day education system which is not cognizant of the structural patterns existing in the Indian society.

Apart from these reasons, the fast erosion of social, cultural and moral values scenario also changed with the advent of industrialisation and urbanisation along with exploding population. Also, the employer is anxious to lure child labourers as they may do the same amount of work as that of an adult but cost for less in terms of wages. "Child" workers are a great source of profit, for they generate a large surplus value for the employer. As much as 95 per cent of the carpets made in India by children are exported, bringing in about Rupees 750 "crores" foreign exchange<sup>33</sup>.

It is clearly evident from the foregoing discussion, that the problem of child labour is acute, multi-dimensional, its size vast and its reasons, complex and varied. The Government of India also concedes the existence of child labour as a "harsh reality".<sup>34</sup>

#### **CONSTITUTIONAL SAFEGUARDS FOR CHILDREN IN INDIA**

After Independence, the Indian State has become fully conscious of its responsibility towards children. Consequently, this consciousness and concern is reflected in some of the principles enshrined in the Indian Constitution for protecting and promoting the rights and well-being of children. India's abiding interest in the welfare of children is an expression of the country's commitment to the welfare of its children- a commitment enshrined in the Preamble and various other articles of the Constitution. Thus:

- i. Article 15(3) enables the State to make special provisions.
- ii. Article 23 prohibits the traffic in human beings and forced labour in all its forms.
- iii. Article 24 prohibits employment of children below the age of 14 years in hazardous jobs.
- iv. Article 37 (e) makes it a duty of the state to prevent the children from entering into jobs unsuited to their age.
- v. Article 39 (f) recommends the protection of childhood against exploitation and moral and material abandonment.
- vi. Article 45 directs the state to provide free and compulsory education to all children upto 14 years of age, within the time limit of 10 years. Eight years of education to all children in the age group of 6-14 has been envisaged as Universal Elementary Education (UEE) (and reiterated in the Five Years Plans. However, the dream of UEE still remains far from fulfilled. We have, therefore also failed to fulfill our constitutional obligations, towards the children, as there is a steady growth in the number of employment of children during the past four decades).



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Apart from the constitutional obligations, the state as well as the centre have enacted various laws which place restrictions on the employment of child labour<sup>35</sup>. Yet none of these pieces of legislations could prohibit employment of children for want of one reason or the other. Even laws like Minimum Wages Act, Migrant Labour Act, Contractor Labour (Abolition and Prevention) Act and the Employment Guarantee schemes of the government have not helped to eliminate child labour or keep it in check.

Twentieth Century has been a landmark in the history of child welfare to the extent it has brought about greater awareness regarding the Rights of "Children" as an independent entity. Article 18 of the United Nations Convention on the Rights of the Child 1989, recognises the rights of the child to,

- (i) be protected from economic exploitation and performing any work that is likely to be hazardous; or
- (ii) interfere with his education; or
- (iii) be harmful to the child's health or physical mental, spiritual, moral or social development. The International Labour Organization is also opposed to child labour in situations where children are disadvantaged educationally and socially where they work in conditions that are exploitative to their health.

The Indian Government receives child labour as a "necessary evil", a concomitant of poverty which cannot be done away unless poverty itself is eradicated from society. Thus the government in its continuing, efforts to find out some suitable remedy to eliminate the engagement of children at least in certain areas of employment, got another Act by the parliament in the year 1986, namely the Child Labour (Prohibition and Regulation) Act, 1986. This is the step towards concretising the labour conditions of the child work force repealing thereby the Employment of Children Act, 1938. The 1986 Act does not completely ban child labour but only seeks to "project" working children. With the earlier laws having failed to protect children from exploitation, the future looks bleak with doubts persisting about the effectiveness of the new laws and also the will and machinery required to enforce the new child labour laws.

#### **CONCEPTUAL FRAMEWORK**

The Convention on the Rights of the "Child", drafted by the UN Commission on Human Rights, and adopted by the General Assembly of the United Nations on 20 November 1989, defines "child" in Article 1 as follows:

".... a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier."

The Convention comprises a set of international standards and measures intended for the protection and promotion of the well-being of children in the society. The Convention provides for four sets of civil, political, social, economic and cultural rights of every child.

These are :

[i] The Right to protection,

It includes freedom from all forms of exploitation, abuse, inhuman, or degrading treatment, and neglect including the right to special protection in situations of emergency and armed conflicts.<sup>36</sup>

[ii] The Right to Development.

It includes the right to education, support for early childhood development and care, social security, and the right to leisure, recreation and cultural activities.<sup>37</sup>

[iii] The Right to participation.

It includes respect for the views of the child, freedom of expression, access to appropriate information, and freedom of thought, conscience and religion.<sup>38</sup>

[iv] The Right to Survival

It includes the right to life, the highest attainable standard of health, nutrition, and adequate standards of living. It also includes the right to a name and a nationality.<sup>39</sup>

The Convention provides the legal basis for initiating action to ensure the Rights of "Children" in society. The Convention is derived from a core set of human values and ethical premises that recognize the inherent dignity and the equal and inalienable rights of all members of the human family as the foundations of freedom, justice and peace in the world. Accordingly, the Convention states that rights shall be extended to all children without discrimination of any kind while drawing particular attention to the fact that there are, in all countries of the world, children living in exceptionally difficult circumstances.

**A. India and the Convention.**

To an extent, the Convention reiterates and elaborates what is already contained in a nutshell in the Constitution of India, in Article 39 of the Directive Principles of State Policy.<sup>40</sup>

The National Policy for "Children" in 1974, affirmed the Constitutional provisions and declared that,<sup>41</sup>

"it shall be the policy of the State to provide adequate services to children, both before and after birth and through the period of growth, to ensure their full physical, mental and social development. The State shall progressively increase the scope of such services so that, within a reasonable time, all children in the country enjoy optimum conditions for their balanced growth".

The Government of India, by ratifying the Convention on the Rights of the "Child" on November 12, 1992, once again reaffirmed its commitment to children.

Also by endorsing the survival and development goals for the year 2000, laid down by the World Summit For "Children", the Government of India has firmly reaffirmed its commitment to advance the cause of children in India.<sup>42</sup>

In the Indian legal context, the National Human Rights the Commission, the Non-Governmental Organisations and Public Interest Litigation as the means of redressal, have played a crucial role in propagation and protection of "Child" Rights.

#### **B. Public Interest Litigation on Child Rights.**

The traditional rule is that a person whose constitutional or legal right is infringed can apply for relief under Art. 226 of the Indian Constitution. But the



Supreme Court has now considerably liberalised the above rule of *locus standi* by allowing the "next friend" to initiate action in public interest. Public Interest Litigation means that, any member of the public can approach the court for redressal where a specific legal injury has been caused to a determinate class or a group of persons, when such class or group persons is unable to come to the Court because of poverty, disability, ignorance or due to their disadvantageous social and economic position. The Court will have to decide from case to case as to whether the person approaching the Court for relief has "sufficient public interest". Access to justice through "class action", "Public Interests Litigation" and "representation proceeding" is part of the present constitutional jurisprudence,<sup>43</sup> for the protection of the "Child" Rights. The appellate courts have welcomed and have been welcoming the Public Interest Litigation through social organisations and right thinking persons. Whenever the case comes before the courts the appellate courts are delivering the verdict in favour of the children.

### **C. The Role of National Human Rights Commission.**

The National Human Rights Commission was established in October, 1993, for the protection of the human rights in India, mainly to seek redressal and remedy for immediate wrongs and to strive for the development of the culture of the human rights over the length and breadth of the country.<sup>44</sup> In the matter of the Child Rights the Commission has not done

much, except little work on the alleged death of 125 children in Phulbani district of Orissa State,<sup>45</sup> owing to malnutrition, malaria and chicken-pox, in 1993. In this case, the Commission's recommendations to the Orissa state government regarding the 125 tribal families whose children had died were not implemented by the state government. In appropriate cases the commission may also move the Supreme Court under Section 18 of the Human Rights Protection Act, 1993.

#### **THE RELATIONSHIP BETWEEN INTERNATIONAL LAW AND THE INDIAN LAW.**

In the Constitution of India, which came into force on 26 January, 1950, Article 253, empowers Parliament to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.

The executive power of the Union under Article 73 in the matter of entering into, and implementing of treaties is derived from the legislative power incorporated in Articles 246 and 253, read with entry 14 of List I.<sup>46</sup> As Article 73 makes it clear, the extension of the executive power thereunder is "subject to provisions of this constitution itself." The following classes of treaties require Constitutional Amendment or other Parliamentary legislation to be internally enforceable:

- a] Treaties involving cession of territory<sup>46</sup>
- b]. Treaties whose implementation requires addition to, or alteration of, the existing law.<sup>47</sup>
- c] Human Rights Covenants and other instruments.<sup>48</sup>

India has quite an impressive record of participation in international conferences held to adopt treaties. Not all the treaties to which India is a party are dependent upon the intervention of Parliament or Judiciary for their enforcement; they are self-executing in the sense that they are operative within the country without further legislative or judicial action. Compared with the number of treaties to which India is a party, the number of treaties which have been incorporated into Indian law, either fully or partially, is small.

**a. INTERPRETATION OF INTERNATIONAL LAW**

Indisputably, a non-statutory rule of construction, does not amount to a "law in force", within the meaning of Art. 372 of the Constitution. Art. 51(c) of the Indian Constitution, is designed to serve the courts as a guide to interpretation of international agreements. It provides that the State shall endeavor to "foster respect of international law and treaty obligations in the dealing of organised peoples with one another." Thus, there exists a constitutional imperative that

the interpretation of treaties confirm to the objective of fostering respect for international law.<sup>50</sup>

As a matter of course, the Municipal Courts do not follow the same principles of interpretation of treaties as those followed by international tribunals or institutions. Nor do the Municipal Courts of one State follow the same approach as the one followed by the Municipal Courts of another State. Although uniform interpretation is highly desirable, in practice it is not easy to achieve. Except where substantive national laws come in their way, National Courts should do their bit to ensure that the State stands by its international obligations in the sense in which these obligations are understood in the international sphere. It is well established that the interpretation of a treaty is a question of international law. By virtue of the commandment of Article 51 (c), Indian Courts are under a constitutional duty to adopt the internationally accepted principles of interpretation of treaties.<sup>51</sup>

There is a broad distinction between the interpretation and application of treaties. Interpretation is the process of making the meaning of the treaty clear. It determines the legal character and effects of the treaty. Application is the process that comes in when the meaning of the treaty is clear. It determines the consequences of the interpretation of the treaty in a concrete case.

**b. CONSTRUCTION OF TREATY-IMPLEMENTING STATUTES**

The principles of statutory interpretation adopted by courts also apply to treaty implementing statutes. Prior to the commencement of the Constitution, there were only a handful of judgements which dealt with statutory interpretation and international law. According to recognized rules of construction of statutes the Legislature is presumed not to enact anything contrary to international law or common law of the realm. The Supreme Court also held that the words of a treaty are to be understood in the context of international law rather than Municipal Laws of the parties to the treaty.

In the end, it appears that the Indian courts have not been able to adopt a uniform approach to principles of statutory construction. Nor has the Supreme Court ever underlined the desirability or otherwise of having definite principles of statutory construction. The practical problems in the application to the principles of interpretation arise primarily due to the multiplicity of principles or their contradictoriness.

The Indian courts have not generally, evolved any principles of interpretation which are special in respect of treaties or treaty implementing statutes. The Supreme Court declared that the Directive Principles (of which the principle enshrined in Art.51 constitutes an integral part) should "serve the courts as a code of interpretation". The Vienna

Conventions on the Law of Treaties, 1970 embodied in Articles principles of treaty interpretation which are universally recognized. The Indian courts are under a constitutional duty to apply these principles of interpretation when interpreting treaties and treaty-implementing statutes.

An attempt is made in this study to deal with the Rights of the Child under International Law and the response of Indian Judiciary in respect of their implementation in India. It seeks to highlight the failures and shortcomings in implementing in addition to exploring the avenues for further improvement in the plight of children and suggest the means and methods for realising them.

#### **THE INDIAN CONSTITUTION**

The Indian Constitution provides for an impressive list of Rights for "Children". The Right of "equality before the law and equal protection of the laws" is available to any person (including children). The State is empowered by Article 15 (3) to have special laws for children only, intended to enable them to enjoy the fruits of guaranteed equality. Hence, the "Child" Labour prohibition laws, the Juvenile Justice Act and the Children Act, are constitutionally permitted and mandated. A total ban has been placed on forced labour and such practices have been made punishable by law, under Article 24.

The Indian judiciary was able to promote the jurisprudence of "Child" Rights through the provisions in Part IV of the Indian constitution under Article 39 (e), (f), 42, 45 and 47. Taking into consideration the relative performance of the three wings of the Indian Government in the matter of securing "Child" Rights, the Indian Judiciary has accorded Child-Rights and principles governing them, the top most priority and has given every child, the neglected as well as the delinquent, an opportunity to enjoy the minimum guarantees of law.

The Supreme Court has unfailingly and consistently helped many children get access to justice through Public Interest Litigation.<sup>52</sup> Whenever the issues relating to Child-Rights have been referred to the High Courts and the Supreme Court, there has always been a positive, activist response in granting appropriate reliefs and in reminding governments of their Constitutional obligations towards the children.

Judicial activism in the matter of juvenile justice has been particularly pronounced in four areas, viz., children in custodial institutions, children offered in adoption, child labour and educational rights. Through a series of decisions mainly rendered during the last 10 to 15 years, the Judiciary has succeeded to a large extent in bringing Child-Rights to the mainstream of human rights discourse and in extracting greater accountability from government agencies for the protection of "Child" Rights.

On the other hand, the legislative bodies viz., the Union Parliament and State Assemblies have been woefully lacking in bringing forward appropriate legislation to support the status and welfare of children. There are thirteen major Legislative Acts, concerning children, which have been passed over the years.

#### **SCOPE OF THE STUDY**

The study of Rights of the "Child" under international law and the Indian judiciary encompasses the entire subject as dealt by the League of Nations and the UN and the Indian Judiciary.

It is essentially the study of children in society, their present status in the world today in general and in the Indian society, in particular. The study involves the analysis of relationships between the International Law and the Municipal Law and their individual outlooks on Rights of the "Child", including the similarities as well as the dissimilarities.

The study is specifically interested in the link between the Judiciary, Executive and the Legislature in their political aspects, viz., use of power, legal framework, authority, implementation and their judicial competence both in respect of Municipal as well as International legal contexts, but mainly revealed through judicial action in India.



It is also concerned with the Public Interest Litigation in India on the Rights of Child, the role of the Non-Governmental Organisations (NGOs) and the role of National Human Rights Commission in the propagation of Child Rights. The study seeks to highlight the International Law and Indian Judiciary's achievements alongside their shortcomings; prospects for improvement in the plight of the children and the urgent need to bridge the gulf between the Conventions of

Statutes and their actual implementation and the extent of relief and succor they have provided to the children of the world.

Chapter One is the introduction to the Rights of Child under International law and the Indian Judiciary, identifying the problems implementation of these rights viewed through the normative framework of the international legal instruments.

Chapter Two deals with interaction between law and Indian law. Broadly, it deals with the definition and meaning of the International law and Municipal law; human rights in International laws; Child Rights as a part of human Rights, Indian law with reference to child Rights.

Chapter Three is a study of the Juxtaposition of International law and Indian law on the Rights of the Child. It also deals with development of International Law on Child Rights; a historical perspective on Child Rights from the

Pre-United Nations era to the present day UN, WHO, UNESCO and UNICEF; development of Indian law on the child Rights.

Chapter four is a discussion on the Indian Judiciary in implementing the International law Norms in Indian Courts on Child Rights. This chapter also includes the study of: constitutional provisions for interpretation of International law; Public Interest Litigation [PIL] as a means to protect and promote children's rights, National Human Rights Commission [NHRC] and the Non-Governmental Organizations [NGOs] with reference to Child Rights and various Judgements delivered on child Rights in India.

Chapter Five is the conclusion based on the entire study. The study underscores that the Rights of the Child are of paramount significance to today's governments and international affairs, and that highest priority must be accorded to the children and their problems which are most immediate as the children are in urgent need of care and compassion, in the world today.

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## **CHAPTER - II**

## INTERNATIONAL LAW AND MUNICIPAL LAW

### I. Changing Nature and Scope of International Law:

As pointed out by Roscoe Pound, "Law must be stable, and yet it cannot stand still". The "central problem of law", consequently, is "to reconcile the conflicting needs of stability and change."<sup>1</sup> The most important function of law is to help in solving the problems of society in and for which it exists."<sup>2</sup> Law can perform this august function effectively only if it can reconcile the needs of change and stability.

Professor L. Oppenheim has defined International Law in the following words:-

"Law of Nations or International Law is the name for the body of customary and treaty rules which are considered legally binding by civilized states in their intercourse with each other".<sup>3</sup>

Professor Oppenheim's definition provides a number of comments in terms of changing nature and scope of international law.

In the first place "..... it is now generally recognised that, not only 'states' but public international organizations, have rights and duties under International Law, even though they may not have all the rights and duties that the States have."<sup>4</sup> Infact, "The future of International Law is one with the future of International Organisations."<sup>5</sup>



The use of the term 'Civilized States' by Oppenheim is also severely criticised. The criterion of distinguishing so-called 'uncivilized states' has neither long history nor culture. Even though China had 5000 years old culture, she was not included in the group of civilized states. So was the case of oriental states. In not too distant past, the Western States regarded only the 'Christian States' as 'Civilized States'.<sup>6</sup>

Thirdly, "more controversial but no longer untenable is a view that even individuals and other private persons may have some such rights and duties".<sup>7</sup> Of all the changes that have taken place in the International Law since the Second World War, the most important change has been the addition of new subjects.<sup>8</sup> The main change that has taken place is that from of the formal structure of relations of states it is moving towards the interests and welfare of citizens of member states.<sup>9</sup> As Jenks has rightly remarked: "contemporary International Law can no longer be reasonably presented within the framework of the classical exposition of the International Law as the law governing the relations between the states but must be regarded as the common law of mankind in an early stage of its development." It is no longer possible to regard International Law as governing relations solely between States. At present, it also governs relations

between States and International Organisations and between International Organisations and private persons. In this connection, the example of the advisory opinion of the International Court of Justice on Effects of Awards of Compensation made by the U.N. Administrative Tribunals <sup>10</sup> may be cited. Besides this, 1965 Convention on Settlement of Investment Disputes between States and Nationals of other States deserves a special mention. Reference may also be made to the Universal Declaration of Human Rights, 1948, which enumerates a number of rights of the individuals and now "constitutes authoritative interpretation" of the Human Rights provisions of the Charter. International Covenants of The Human Rights and the Optional Protocol to the Covenants on Civil and Political Rights further confirm that the individuals have become not only the subjects of International Law but can also directly claim rights and remedies provided under International Law. Individuals can send petitions to the U.N. Commission on Human Rights. Individuals can also send petitions (or make complaints) to the Human Rights' Committee established under the International Covenant on Civil & Political Rights, 1966. Above all the Charter of the U.N. begins with the words "We the People of the United Nations." The developments since the inception of the U.N., particularly the International Protection of Human Rights, have confirmed that these words have not crept

into the Charter incidentally but were deliberately used and were pregnant with meaning. It may, therefore, be observed that the present International Law cannot be regarded as the law governing the relations between States, but must be regarded "as the common law of mankind in an early stage of its development." European Convention on Human Rights 1950, American Convention on Human Rights, Convention on Suppression and Punishment of Apartheid, 1973, Convention on Elimination of All Forms of Racial Discrimination, etc. also deserve a special mention in this connection.

Forthly, "it is now widely recognised that International Law consists not only customary and conventional rules but also of 'General Principles of Law' ART. 38 (1) (C) of the Statute of the International Court of Justice mentions 'General Principle of Law'<sup>11</sup> recognised by Civilized States' as the third source in order under which the sources of International Law are to be used while deciding an international dispute. That is to say, if the Court does not find any International Treaty or International Custom on a particular point under dispute, the Court may take the help of 'General Principles of Law Recognised by Civilized States'. As aptly pointed out by Lord McNair, it describes, "The inexhaustible reservoir of legal principles from which tribunals can enrich and develop Public International Law."<sup>1</sup>

Fifthly, "the very conception that International Law is a "body of rules" now stands questioned as "static and inadequate." Further, "like all living law, International Law does not stand still but is continuously reinterpreted and reshaped in the very process of its application by authoritative decision-makers, national and international." <sup>13</sup> International Law, or any law for that matter is a dynamic concept. Law changes with the change of time and circumstances. A law, to be living must be flexible, adaptable and changeable. M.A.Kaplan and Nde.B Ketzenbach <sup>14</sup> have aptly remarked, "it is now a commonplace that the law is a process, not a body of self-executing rules." What is true of law, in general is also true of International Law. The changing character of International Law is a consequence of transformation of general conditions, a transformation of the impact of which is equally felt in the Municipal legal orders. This is good so far as it goes but it cannot be denied that it has become customary to define law as "body of rules". Therefore it is not proper to criticise Oppenheim on this account. In view of the changing character of International Law, Oppenheim's definition has now become obsolete and inadequate. Prof. Friedmann has remarked, "both in volume and scope, the area of international institutions and agreement has greatly widened. International Law is today actively

and continuously concerned with such divergent and vital matters as Human Rights, Crimes against Peace and Humanity, the International Control of Nuclear Energy, Trade Organisations, Labour Conventions, Transport Control or Health Regulations. This is not to say in all or any of these fields, International Law prevails, but there is no doubt today that they are its legitimate concern."<sup>15</sup> Further, "As International Law moves today on so many levels, it would be surprising indeed if the traditional principles of inter-state relations developed in previous centuries were adequate to cope with the vastly more divergent subject-matters of International Law of the present day."<sup>16</sup> It has, therefore, become necessary to redefine International Law. "The redefinition of International Law will be a continuing process, but it will be increasingly unlike the subject defined and handed down to us by previous generations."<sup>17</sup>

Finally, it has now been recognised by the International Court of Justice that there are certain obligations of State under international law that are "erga omnes".

Thus, obligations, deriving from outlawing of acts of aggression and of genocide, and from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination, are such that all states have an interest in the protection of the rights involved.

Obligations such as those relating to human rights are necessarily required to be implemented by states within their respective territorial jurisdictions. Hence their implementation falls within the interface between international law and municipal law, an area that leaves considerable scope for disharmony between the two.

#### MUNICIPAL LAW

The state law or municipal law regulates the conduct of persons living within the Territory<sup>18</sup> of State. Municipal law operates in a centralised system. There is no power over and above the states because, states are Sovereign. All states consider themselves independent<sup>19</sup> and sovereign. Municipal law means "The law of land". According to Mitras Legal and Commercial Dictionary,<sup>20</sup> Municipal law means, the law which regulates the ordinary relations of the citizens or inhabitants of a State, as distinguished from international law, commercial law etc. According to Bouvier's Law Dictionary,<sup>21</sup> Municipal law is a law in contradiction to international law, the system of law proper to any single Nation or State. It is the rule on law by which a particular district, community or nation is governed.

## RELATIONSHIP BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW

There are two prominent theories which are known as monism and dualism. International law and municipal law are concomitant aspects of the one system law in general, according to monism. But to dualism, the two represent two entirely distinct legal systems international law having an intrinsically different character from that of municipal law. Because a large number of domestic legal systems are involved, the dualist theory is sometimes known as the "pluralistic" theory, but it is believed that the term "dualism" is more exact and less confusing. <sup>22</sup>

### A. DUALISM

Probably it is true to say that it would not have occurred to the earliest writers on international law (for example, Swarez) to doubt that a monistic construction of the two legal systems was alone correct, believing as they did that natural law conditioned by the law of nations and the very existence of states. But in the 19th and 20th centuries, partly as a result of philosophic doctrines of Hegel emphasizing the sovereignty of the state will and partly as a result of the rise in modern states of legislatures with complete internal legal sovereignty, there developed a strong trend towards dualistic view. The chief exponents of dualism,<sup>23</sup> have been the

positivist writers, Triepel and Anzilotte. For the positivists, with their congenial conception of International law, it was natural to regard Municipal law as a distinct system. Thus according to Triepel, there were two fundamental differences between the two systems:

- a) the subjects of municipal law are individuals, while the subjects of international law are states solely and exclusively.
- b) their juridical origins are different, the basis of municipal law is the will of the state itself, the basis of the international law is the common will of states.

Apart from the positivist writers, the theory of dualism has received support from certain non-positivist writers and jurists and implicitly too from a number of judges of municipal courts. The reasoning of this class of dualists differs from that of the positivist writers, since they look primarily to the empirical differences in the formal sources of the two systems, namely, that on the one hand International Law consists for the most part of customary and treaty rules, whereas municipal law, on the other hand, consists mainly of Judge-made law and statutes passed by national legislatures. In recent writings on international law another ground relied upon in support



of dualism is the difference reflected in the fact that since 1980 international law has expanded to so great an extent into many different areas, while domestic national laws have continued to be concerned with a more limited range of subject matters.

B. MONISM

Modern writers who favor the monistic theory<sup>24</sup> endeavor for the most part to find their views upon strictly scientific analysis of the internal structure of legal systems as such.

By contrast with writers adopting dualism, the followers of monism regard all law as a single unity composed of binding legal rules, whether those rules are obligatory on states, on individuals, or on entities other than states. In their view, the science of law is a unified field of knowledge, and the decisive point is therefore, whether or not international law is true law. Once it be accepted as a hypothesis, that international is a system of rules of a truly legal character, it is impossible, according to Kelsen (1881-1973) and other monist writers, to deny that the two systems constitute part of that unity corresponding to the unity of legal science. Thus any construction other than monism (in particular dualism) is bound to amount to a denial of the true legal character of international law. There cannot, in the view of the monist writers, be any escape from the position that the two systems, because they are both

systems of legal rules, are inter-related parts of the one legal structure as they demonstrate identical or similar jural traits.

There are however, other writers who have favored monism for less abstract reasons and who maintain, as a matter purely of practical appraisal, that international law and municipal law are both part of a universal body of legal rules binding all human beings collectively or singly. In other words, it is the individual who really lies at the root of the unity of all law, as its ultimate beneficiary. CO-ORDINATION THEORY:

As I am Brownlie has rightly pointed out on the theories of co-ordination holding that "the logical consequences-monoism and dualism of both theories conflict with the way in which international and national organs and courts behave there is a controversy and debate by monists and dualists regarding the conflict of international law and municipal law. Some jurists expressed their view that the two systems do not come into conflict as they work in different spheres and each is supreme in its own field. Rousseau expressed similar views assessing the privacy of international law and primacy of the law in its own field. Rousseau characterises the international law as "a law of coordination which does not provide for automatic abrogation of internal rules in conflict with the obligations on the international plane"

### III. HUMAN RIGHTS IN INTERNATIONAL LAW:

Today it is generally believed, "The concept of international protection of human rights is firmly established in international human rights law".<sup>25</sup> The international protection of human rights has been established in international law after the Second World War. Before the Second World War, besides Islamic State human rights were protected by national instruments-the Magna Carta, 1215, Petition of Rights, 1627, Bill of Rights, 1688, Act of Settlement, 1702, American Declaration of Independence, 1776, American Bill of Rights, 1791, and French Declaration of Rights of Man and Citizens. 1789, were all important national instruments in which some human rights and fundamental freedoms have been protected. From these instruments three important concepts relating to human rights and fundamental freedoms have originated: principle of inalienability, principle of inviolability and doctrine of rule of law.<sup>26</sup>

The Charter of the United Nations Organization 1945, was the first international instrument by which international protection of human rights have been legally recognised. In the Preamble, the people of the United Nations record their determination "to re-affirm faith in fundamental human person, in the equal rights of men and women and of nations large and small..." Human rights and fundamental freedoms have been mentioned in Articles 13, 55, 56, 62 and 76 and specific

functions have been endowed to the General Assembly, to the State Parties, to the United Nations, to the Economic and Social Council as well as to the Trusteeship Council.

Following the Charter , on the 16th December, 1948, the General Assembly adopted and proclaimed the Universal Declaration of Human Rights as "a common standard of achievement for all peoples and all nations." The Declaration proclaims, "All human beings are born free and equal in dignity and right. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."<sup>47</sup> It also sets out the basic principle of equality and non-discrimination and regards the enjoyment of human rights and fundamental freedoms. <sup>28</sup>

The Universal Declaration of Human Rights, 1948, proclaims two kinds of rights : civil and political rights and economic, social and cultural rights. Civil and political rights, mentioned in Articles 3-22, are as follows : right to life, liberty and security of person ; freedom from slavery and servitude ; freedom from torture or cruel, inhuman or degrading treatment or punishment ; right to recognition as a person before the law ; equality before the law and equal protection of law ; right to an effective judicial remedy ; freedom from arbitrary arrest, detention of exile ; right to a fair trial and public hearing by an independent and impartial tribunal; right to be

presumed innocent until proved guilty; freedom from arbitrary interference with privacy, family, home or correspondence ; freedom of movement and residence; right to own property; freedom of thought, conscience and religion; freedom of opinion and expression; right to peaceful assembly and association; right to take part in the government of one's country and to equal access to public service in one's country. <sup>29</sup>

The economic, social and cultural rights recognised in Articles 23-27 include: the right to social security; the right to work and free choice of employment; the right to equal pay for equal work; right to form and join trade unions, right to rest and leisure; right to a standard of living adequate for health and well-being; right to education; right to participate in the cultural life of the community ; right to protection of the moral and material interests resulting from one's authorship of scientific, literary or artistic productions. <sup>30</sup>

Article 28 recognises that everyone is entitled to a social and international order in which the right and freedoms set forth in the Declaration can be fully realized. Article 29 provides that in the exercise of his rights and freedoms, every one shall be subject only to the limitations that have been established by law to secure due recognition and respect for the rights and freedoms of others and to meet the just requirement of morality, public order and general

welfare in a democratic society. These human rights and fundamental freedoms shall not be exercised contrary to the purposes and principles of the United Nations. Article 30 states that no State, group or person may claim any right, to do anything aimed at destroying the right and freedoms set out in the Declaration.

All these rights contained in the Universal Declaration of Human Rights, 1948, were moral standards because the Declaration was not legally binding. But it has got some moral and political significance. Mrs. Roosevelt went to the extent of saying that it was a Magna Carta in the making. It has some attributes of Jus cogens. Another significant feature lies in the fact that it is now considered to be an authoritative interpretation of the United Nations Charter spelling out in considerable detail the meaning of the phrase human rights and fundamental freedoms.

Whatever merit and significance the Declaration may have, it was not a treaty which was legally binding on the member states of the United Nations. So, steps were taken to give legal effect to these provisions of the Declaration in the form of covenants. Thus, in 1966, two international covenants on human rights were adopted: International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights. In addition, an Optional Protocol to the International Covenant on Civil and Political Rights was also adopted. The two covenants

proclaimed almost all the rights mentioned in the Universal Declaration of Human Rights with a view to giving legal coverage under international law. Some new rights have been introduced by the International Covenant on Civil and Political rights. For instance, Article 27 which states, "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."

The international instruments contain provisions relating to implementation of human rights and fundamental freedoms. The Human Rights Committee established under Article 28 of the International Covenant on Civil and Political Rights, 1966, is responsible for supervising implementation of human rights set out in the Covenant. The Optional Protocol to the International Covenant on Civil and Political Rights, 1966, enable the Human Rights Committee to receive and consider communications from individuals claiming to be victims of violation of any of the rights set forth in the Covenant. The committee on Economic, Social and Cultural Rights is responsible for the implementation of economic, social and cultural rights set forth in the International Covenant on Economic, Social and Cultural Rights, 1966. It should

be noted in this connection that the International Court of Justice has no jurisdiction in connection with the enforcement of human rights contained in the International Bill of Human Rights.

From the above discussion it is evident that the Charter of the United Nations was the first international instrument which internationalised human rights and fundamental freedoms. The Universal Declaration of Human Rights interpreted and explained human rights and fundamental rights mentioned in the Charter of the United Nations Organisations. The International Covention on Economic, Social and Cultural Rights, 1966, International Covenant on Civil and Political Rights, 1966, the Optional Protocol to the International Convenant on Civil and Political Rights, 1966, have given legal validity to the rights proclaimed by the Universal Declaration of Human Rights, 1948. These four instruments altogether are regarded as International Bill of Human Rights. <sup>31</sup>

Undoubtedly, the International Bill of Human Rights represents a milestone in the history of human rights. It has a far-reaching impact on the adoption of European Convention on Human Rights, 1950, Inter-American Convention on Human Rights, 1969, and African Charter on Human and Peoples Rights, 1981. Following the Bill, many of the State Constitutions adopted Bills of Rights. National, regional and international courts have frequently cited principles set out in the



International Bill of Human Rights in their decisions and opinions. In fact, the International Bill of Rights remains the beacon that lights all present and future efforts in the field of human rights, both nationally and internationally.

#### IV. CHILD RIGHTS AS A PART OF THE HUMAN RIGHTS

Philippe Aries, a French historian suggests that in the medieval Europe children were not distinguished from adults in any particular way. They were regarded simply as adults in miniature. The rights of the children have not been specifically treated until recently though scattered efforts were made since the time of Geneva Declaration in 1924. Children were included in the general category of human beings when one dealt with human rights. That is the reason why even the framers of the U.N. charter did not think it necessary to include any special provision on children.

In due course of time, there was a gradual development of universally accepted principles concerning responses to the special vulnerability, needs and situations of children. The body of international humanitarian and human rights law is also being continually supplemented. This body comprises of a wide range of instruments, some are binding such as the Red Cross on Geneva Conventions, the ILO Conventions, the International Covenants on Human Rights etc.; others are non-binding, for example, the Standard Minimum Rules for the Treatment of Prisoners,

the Principle of Medical Ethics, and the Declaration on the Rights of the Child. Many of the provisions of both the binding and non-binding instruments, in fact, apply implicitly to children by virtue of the status of the latter as human beings or make specific and explicit reference to children.<sup>32</sup> The Geneva Declaration, 1924, and the United Nations Declaration of the Rights of the Child, 1959, have declared the child to be the most privileged ward of humanity, when they stated that, "Mankind owes to the child, the best it has to give".

An international instrument of great importance for the protection of the children was the Geneva Declaration of 1924, also known as the Declaration of the Rights of the Child of 1924, which was adopted by the Assembly of the League of Nations in the name of "Men and Women of all countries",<sup>33</sup> though it did not proclaim or imply assumption of obligations by states as such. The Declaration introduced basic principles on the international plane which set the stage for the progressive development of international norms in the Area of the Rights of the Child.

The United Nations Universal Declaration of Human Rights of 1948 is looked upon by a substantial body of international legal opinion, as the *jus constituendum* of the United Nations Charter with regard to them, "human rights and fundamental freedoms", and the predominant view is that its principles are part of customary international law.

Most of the rights of the Universal Declaration relate to children either directly <sup>34</sup> or indirectly, <sup>32</sup> indirectly though some to a greater extent than others. Several of its provisions are particularly or exclusively relevant to children. The Declaration is thus the definitional matrix of internationally proclaimed human rights, in general and children's rights, in particular.

Eleven years after the proclamation of the Universal Declaration of Human Rights, the United Nations General Assembly unanimously adopted the United Nations Declaration of the Rights of the Child, <sup>36</sup> which fully incorporates and builds upon the provisions of the Geneva Declaration of 1924. It is significant that the preamble of this Declaration expressly relates its content both to the Charter of the United Nations and the Universal Declaration of Human Rights, thus affirming their interrelationship.

#### INDIAN LAW WITH REFERENCE TO CHILD RIGHTS

##### INDIAN CONSTITUTION

A. The Constituent Assembly of the independent India appointed a Drafting Committee on 29th August, 1947, <sup>37</sup> under the chairmanship of Dr. B.R. Ambedkar with a team of men of vast learning and varied experience in life. The process of constitution making began against the shadow of partition of India, transfer of powers from the British, and in the

international context of the end of the Second World War. The importance of Nuremberg trials of 1945-46 was not only for war crimes, but for crimes against peace and humanity. The UN General Assembly's adoption of the Universal Declaration of Human Rights on 10 December 1948 has had a special impact on India's constitution-making as it has left an unmistakable impression on the Indian Constitution in regard to protection of human rights. Article 38 of the constitution which is one of the Directive Principles of State Policy, provides that the state shall endeavor to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institution of the national life. The experience of the struggle for freedom in India led to the inclusion of Fundamental Rights in the Indian Constitution.

Articles 14,15,16,17,19,21,25,30,31-C and 32 form the bedrock of human rights in the Indian Constitution. <sup>38</sup> The right to equality, the prohibition of discrimination on grounds of religion, race, caste, sex or place of birth, equality of opportunity in matters of public employment, abolition of untouchability, the rights conferred by Article 19 like freedom of speech and expression, the right to assemble peacefully and without arms, the right to form associations, the right to move freely throughout the territory of India, the right to settle in any part of India and the right to

practice any profession, occupation, trade or business, the right to freedom of conscience and to free profession, practice and propagation of religion, are some of the more important Fundamental Rights conferred by part III of the Indian Constitution. These rights can be enforced by a petition under Article 32 which significantly, is itself a fundamental right. A new chapter, " Fundamental Duties" under Part IV-A, which was inserted by the 42nd Amendment in 1976. is a strong reminder, that rights have reciprocal obligations those who asserst their rights must be conscious of their social obligations.

Henceforth the Indian Constitution provides for an impressive list of Rights for Children. The Right of "equality before the law and equal protection of the laws" is available to any person (including children). The state is empowered by Article 15 (3) to have special laws for children only, intended to enable them to enjoy the fruits of guaranteed equality. Hence, the Child Labour Prohibition Laws, the Juvenile Justice Act and the Children Act are constitutionally permitted and mandated. <sup>39</sup> A total ban has been placed on forced labour and such practices have been made punishable by law, under Article 24.

The Indian Law was able to promote the jurisprudence of Child Rights through the provisions of Part IV of the Indian Constitution, under Article 39 (e) & (f), 42,45 and 47. Taking into consideration the

relative performance of the three wings of the Indian Government in the matter securing child rights, the Indian judiciary has accorded child rights and principles governing them, the topmost priority and has given every child, the neglected as well the delinquent, an opportunity to enjoy minimum guarantees of law.

The Supreme Court of India, in the context of children's rights, has unfailingly and consistently helped many children get access to justice through public interest litigation.<sup>40</sup> Whenever the issues relating to Child Rights have been referred to the High Courts and the Supreme Court, there has always been a positive, and even activist response in granting appropriate reliefs and in reminding governments of their constitutional obligations towards the children.  
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#### B. Child Labour (Prohibition and Regulation) Act 1986

The Child Labour (Prohibition and Regulation) Act 1986 is made for obtaining uniformity in the definition of 'child' in various laws relating to child labour because the term 'child' is defined in different Acts in different ways. The Act defines the term 'child' under Section 2 (ii) as a person who has not completed 14 years of age. It classifies occupations into 'hazardous' and 'non-hazardous' in nature. It states that no child under 14 may work in any of the occupations

listed in part A of the Schedule or in any workshop where any of the process set forth in part B of the Schedule, is carried on.

Part III of the Act regulates child labour in these establishments where none of the occupations or processes listed in the Schedule are carried on. However, it stipulates conditions such as wage structure working hours, etc., for employment of children in such non-hazardous occupations. Section 7 of the Act specifies that the period of work for a child in any establishment on each day is fixed so as not to exceed 6 hours. This includes interval and the time spent in waiting for work on any day. Section 7 (4) prohibits night work between 7 P.M. and 8 a.m., and section 7 (5) prohibits double employment of a child in any establishment.

The Act also provides for inspection by inspectors appointed by the State Government to look into effective implementation of the ACT and on contravention of any of the provisions of the Act or rules made thereunder, it provides with stringent punishment, which is simple imprisonment extending upto one month or fine which may extend to Rs.,10,000 or both under Section 14. The penalty is greater for those who employ or permit any child to work in contravention of the provisions of section 3. The punishment is between three months and one year or with fine between Rs.10,000 and 20,0900 or with both and for

a subsequent offence the imprisonment is enhanced for a term not less than six months extending upto two years.

It would appear that at the normative and institutional levels, there is harmony between the international law of the Rights of the Child and the Indian Law. It is indeed a different question whether the Indian law and through it international law is adequately implemented at grass roots level.



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## **CHAPTER - III**

COMPARISON BETWEEN INTERNATIONAL LAW AND  
INDIAN LAW ON THE RIGHTS OF THE CHILD

1. INTRODUCTION

As stated already, Children's rights are an integral part of human rights. Until recently Children's Rights have not been a perceptible body of law separable from the greater universe of individual human rights. If they recognised them at all, lawyers and legal scholars considered that children's rights are derived from the rights of the parents or from individual human rights recognised by international law or domestic law. Many international and inter-governmental organisations specialise in the promotion of Children's Rights, such as UNICEF, WHO, UNCESCO, and the U.M.

Legal provisions in India on Children's Rights indicate that India is a paradise for children, as their rights are recognised legally. In the matter of recognising children's Rights India can be proud of being in the forefront. Serious efforts are being made to create conditions in which these rights can be enjoyed. In the Indian Legal context, the National Human Rights Commission, the Non-Governmental Organisations and Public Interest Litigation as the means of redressal have played a crucial role in propagation and protection of Child Rights in India. The Government of India has firmly reaffirmed its commitment to advance the

cause of children in India. The United Nations Convention of the Rights of the Child is a bold and innovative document, a concerning of international legal and political opinion concerning those rights which children ought to expect their national governments to recognise.

This chapter aims to understand, highlight and analyse the developments of the Rights of the child under the international legal perspective as well as under the Indian legal system. Further the study seeks to compare and contrast the International legal version of the child rights with the Indian legal child rights.

## II. DEVELOPMENT OF THE INTERNATIONAL LAW ON THE CHILD RIGHTS:

### A. Historical Perspective:

The International Children's Rights Movement has been traced as the work of the British-born Egiantyne Jebb, who founded the Save Children International Union (SCIU) in Geneva in 1920<sup>1</sup>. In 1923, SCIU promulgated the Declaration of Geneva which was later adopted by the League of Nations<sup>2</sup>. It has not had a long history recognition. The child was the human property of the parents and owed their total subservience and the parents enjoyed an absolute right to the child services and earnings and full control over the child's person and property.<sup>3</sup>

Various Organisations put forward covenants, declarations and conventions between 1923 and 1959, which

ultimately took the form of human rights of child<sup>4</sup>. The United Nations adopted the Declaration of the Rights of the Child in the year 1959<sup>5</sup>, and in recognition of the Twentieth Anniversary of that adoption, designated 1979 the International Year of the Child.

The United Nations Declaration of the Rights of the Child of 1959 which derived its inspiration from the Charter of the United Nations and has elevated human rights to the plane of International Law and stipulated legal obligations on the part of member states of the United Nations to promote universal respect for and observance of human rights and fundamental freedoms for all.

The United Nations Universal Declaration of Human Rights of 1948<sup>6</sup> is looked upon by a substantial body of International legal opinion as the *IUS Constituendum* of the United Nations Charter with regard to the Term "human rights and fundamental freedoms"<sup>7</sup>, and the prevailing view is that its principles are part of customary international law.

It is pertinent to mention that most of the rights of the Universal Declarations relate to children either directly <sup>8</sup> or indirectly <sup>9</sup>. Most of its provisions are particularly or exclusively relevant to children<sup>10</sup>.

#### (1) Pre- United Nations Instruments :

"Declaration of Geneva" <sup>11</sup> or the 1924 Declaration of the Rights of the Child, recognised that mankind owes to the child the best it has to give. It conferred upon men and

women of all Nations the following obligations.

1. The child must be given the means needed for its normal development.
2. The child that is hungry should be fed; the child that is sick should be helped; the erring child should be reclaimed; and the orphan and the homeless child should be sheltered and succoured.
3. The child must be the first to receive relief in times of distress.
4. The child must be protected against every form of exploitation.
5. The child must be brought up in the consciousness that its best qualities are to be used in the services of its fellow men.

The 1924 Declaration was based on relief-oriented approach. The attitude was that the child in difficulty should receive help. The brutality experienced during the First World War had prepared the mankind to appreciate the position of the weak in times of distress. There should not be hungry, sick child or an orphan or homeless child who is not cared for. An erring child should not be treated as a criminal but should be rehabilitated. All means should be provided for the material and spiritual growth of the child so that he grows up to appreciate the human life and contribute to the well being of mankind. But the Right to Economic or Political Freedom was also absent from in the



catalogue of the children. The declaration was only an expression of good-will the mankind felt towards the future and the very existence of a civilised world.

2). The United Nations Instruments :

The General Assembly of the United Nations adopted the Universal Declaration of Human Rights on 10th December, 1948<sup>12</sup>. It recognised the inherent dignity and equal and inalienable rights of all human beings as the foundation for freedom, justice and peace in the world. The Declaration was an embodiment of the freedoms that were considered necessary to develop a human personality and to enjoy a rich and happy life.

Special care and assistance to motherhood and childhood finds its reference in Article 21 of the Universal Declaration. All children whether born in or out of legal marriage are to enjoy the same social protection. Article 26 deals with the Right to Education. Education is to be free and compulsory at least in elementary and fundamental stages.

When the Universal Declaration was proclaimed in 1948, it was considered as the first step in the formulation of an International Bill of Human Rights, that will have a legal as well as moral force. To give legal effect and force to the provisions of the Universal Declaration, the United Nations adopted two International Covenants on Human Rights.

Article 10, 12 & 13 of the International Covenant on

Economic, Social and Cultural Rights, 1966<sup>13</sup>, refers to needs of the children. Article 10 guarantees the protection and assistance of family, expectant-mothers, and children. Children and young persons are to be protected from economic and social exploitation. Their employment in works harmful to their morals or health if dangerous to life or likely to hamper their normal development is to be made punishable by law. States are in obligation to set age limits in which the paid-employment of child labour shall be protected and made punishable by law. Article 12(2) enjoins a duty on the state-parties to provide for the highest attainable standard of physical and mental health and they are in obligation to take steps. Under Article 13 the state-parties recognise the right of every one to education and accept the obligation to direct education to the full development of human personality and the sense of its dignity and strengthen the respect for human rights and fundamental freedoms.

The rights laid down in Articles 25 and 26 of the Universal Declaration find their fuller expression in Article 10, 12 and 13 of the Covenant on Economic, Social and Cultural Rights. Further this Covenant prohibits discrimination of children in matters of special protection and assistance and it provides for the prevention of the economic exploitation of children and young persons, their employment in jobs that are harmful to their development is made punishable by the states. Minimum age is to be set and

a child below that age limit cannot be employed in wage labour. The Right to Education provided in Article 26 of the Declaration is elaborated in Article 13 of the Covenant. The International Covenant on Civil and Political Rights, 1966<sup>14</sup>, also safeguards the Children's Rights, especially in its Articles 6,10,14,18,23 and 24, within the context of everyone's right to life. Article 6 deals with capital punishment, while calling for the abolition of the death penalty. It states that, " Sentences of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant-women," Article 10(b) states that accused juvenile persons shall be separated from adults and shall be accorded treatment appropriate to their age and legal status and brought as speedily as possible for trial.

Article 14(4) deals with juvenile delinquents and also provides that in case of juvenile persons the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation. Article 18(4) of the Covenant requires the states to respect the liberty of the parents and legal guardians to ensure the religion and moral education of heir children in confirmity with their own convictions.

In 1956, the United Nations adopted the Supplementary Convention on Abolition of Slavery, the Slave trade and Practices Similar to Slavery. It makes a mention about child slavery as well. Article 1(d) obligates the state

parties to take all practicable and necessary legislative and other measures for the complete abolition of practices such as any institution or practice whereby a child or young person under the age of 18 is delivered by either both his natural parents or by his guardians to another person whether for regard or not with a view to the exploitation of the child or young person or of his labour.

The UN Convention, Relating to the Status of Refugees, 1951,<sup>15</sup> makes a mention of rights of refugees' children to public education. Article 22 of the Covenant provides that the state parties are to provide the refugee the same treatment as is accorded to nationals with respect to elementary education.

The UN Convention on the Reduction of Statelessness 1961, provides in Article 1, that in order to prevent children being born as Stateless, the state parties shall grant its nationality to a person born in its territory who would otherwise be Stateless. Such nationality is to be granted at birth, by operation of law or upon an application being lodged for that purpose. These Conventions together grant the Refugees, Stateless Child protection in matters of public education, labour legislations and nationality. A child is not to be discriminated simply because he happens to be refugee, Stateless person.

The Proclamation of Tehran, 1968 adopted by a UN Conference on Human Rights <sup>16</sup>, has a proclamation on Children's Right. Having reviewed the progress made in the

20 years since the adoption of the Universal Declaration, the Conference proclaimed that the protection of the family and of the child remains the concern of the entire International community.

### III. THE UN DECLARATION OF THE RIGHTS OF THE CHILD, 1959

The first draft of the 1959 Declaration <sup>17</sup> was prepared in 1950 by the ECONOMIC AND SOCIAL COUNCIL (ECOSOC) which forwarded the document to the UN Commission on matters close connection with the Universal Declaration of Human Rights adopted in 1948. The Commission returned the Draft to the ECOSOC after consultation and with various recommendations.

The Preamble of the Declaration states that the child due to physical and mental immaturity, needs special safeguards and care, both before and after birth and that individuals and groups should strive to achieve Children's Rights by legislative and other means. In their carefully worded principles, the Declaration affirms that all children are entitled to:

1. The enjoyment of the rights mentioned, in the declaration without any exception whatsoever, regardless of race, colour, sex, religion or nationality.
2. Special protection, opportunities, and facilities to enable them to develop in a healthy and normal manner, in freedom and dignity.
3. A name and a nationality:

4. Social security, including adequate nutrition, housing, recreation and medical services:
5. Special treatment, education and care if handicapped:
6. Love and understanding and an atmosphere of affection and security, in the care and under the responsibility of their parents whenever possible:
7. Free education and recreation and an equal opportunity to develop their individual abilities:
8. Prompt protection and relief in times of disaster.
9. Protection against all forms of neglect cruelty and exploitation:and
10. Protection from any form of racial, religious, or other discrimination, and upbringing in a spirit of peace and universal brotherhood.

The General Assembly also resolved that Governments, Non-Governmental Organisations and individuals should give this Declaration the widest possible publicity.

#### IV. THE CONVENTION ON THE RIGHTS OF THE CHILD, 1989:

The Declaration of 1959 prompted the UN Human Rights Commission to constitute a working group of representatives of the UN Commissions to draft a Convention on the Rights of the Child<sup>18</sup>. The Convention, drafted by the UN Commission on Human Rights and adopted by the General Assembly on 20th November, 1989 came into force in 1990 and had been ratified by 179 Countries as of end of September 1995<sup>19</sup>. It represents the best ever articulation of Child Rights setting higher standard and procedure for the well-being of

children everywhere. The convention is a great progress in the field of codification of Children Rights.

The Convention contains 54 articles: 41 of them are substantive Articles and the rest deal with the implementation measures and the miscellaneous provisions, and it articulates five set of basic rights, namely, Civil and Political, Social and Economic, Cultural, Rights in abnormal or dangerous situations and right to due process of law. These sets of rights are based on certain principles of equality and non-discrimination ( Article 2), best interest of the child( Article 3), obligation to protect all the rights of the child (Article 4): and states obligation to protect parental responsibilities rights (Article 5).

The Civil rights and freedom include the following:

1. Child Right to life and to survival(Article 21).
- 2.. Right to a name and nationality (Article 7).
3. Right to preserve the identity, nationality and family relation (Article 8). 4. Right not to be separated from parents except through lawful procedure.(Article 9).
5. Right to enter and leave the country for family reunification (Article 10)
6. Right to freedom of expression (Article 12 & 13)
7. Right to freedom of thought, conscience and religion (Article 14).
8. Right to freedom of association and to freedom of peaceful assembly (Article 15)

9. Right against arbitrary or unlawful interference of privacy, family, home or correspondence as well as unlawful attacks on honour and reputation(Article 16).
10. Right of access to information and material especially to those aimed of the child's social, spiritual and moral well being (Article 17).
11. Right not to be abused or exploited physically or mentally while in the care of parents or guardians(Article19).
12. Right to ensure the "best interest of the child" in adoption practice(Article 21).
13. Right to receive appropriate protection in case of refugee status (Art.22).

The above thirteen rights declared in Articles 6 to 22 of the Convention are not exhaustive of all the civil rights and freedoms, contracted by the state parties to the convention. The social, economic and cultural rights stipulated in Articles 23 to 31 and the special right in abnormal for dangerous situations mentioned in Articles 32 to 39 are in separable aspects of the total package of rights and freedoms intended to honour and protect status of childhood. Special mention may be made in this regard of ; The Child's Right to protection from all forms of exploitation (Articles 34 and 36);

The Childrens Right to protection from torture and other cruel are inhuman treatment Articles 37 and 39, the Child's Right's in situations of armed conflict (Article 38)



and the Child's Rights with regard to due process of law and special procedures in criminal proceedings (Articles 40).

Under Convention the state parties are under obligation to provide protection to children. The Convention also provides further safe guarding of childrens Human Rights, and great progress has been made in the field of codification of Children's Rights. Almost all the Human Rights have now been extended to children with an additional provision for special protection and assistance with respect to Child's physical and mental maturity.

864Happropriate States have the moral obligation to take relevant and measures to implement the Children's Rights. The Convention has a sharp focus and puts the states under a direct obligation to report to a International body about the progress in the implementations of Children's Rights. Establishing the Committee on the Rights of the Child and making the states answerable to International scrutiny on the progress, implementation measures, difficulties faced etc., has definitely put the state parties under more pressure to perform.

The Convention has called for the bilateral and multilatered treaties to safeguard the Child. WHO and UNICEF have been requested to intensify their activities and formulate creative methods to reach the rights to the least privileged child to the last coruers of the world. The main contribution of the Convention is the codification of Children's Right into one international document and

recognizing aspirations mankind has for its children.

V. SPECIALISED AGENCIES OF THE UNITED NATIONS

A. The International Labour Organisation.

International Labour Organisation (ILO) is one of the eighteen specialised agencies of the United Nations. ILO has a distinction of being in advantage of other International Institutions in that its major concern is social justice. Its Preamble begins with a profound statement : " whereas universal and lasting peace can be established only if it is based upon social justice". The ILO has played a predominant and pioneer role in setting labour standards in carefully drafted conventions dealing with specific subject matters<sup>20</sup>. Till now, 18 Conventions and 16 Recommendations have been adopted by the ILO in the interest of the Children all over the World. These Conventions are as follows:

1. Minimum Age (Industry) Convention, 1919.;
2. Night Work of Young Persons (Industry) Convention, 1919:
3. Minimum Age (Sea) Convention, 1920;
4. Minimum Age (Agriculture) Convention 1920;
5. Minimum Age (Trimmers and Stockers) Convention, 1921
6. Medical Examination of Young Persons (Sea) Convention, 1921.
7. Minimum Age (Non Industrial Employment) Convention, 1932.

8. Minimum Age (Sea) Convention, (Revised) 1936;
9. Minimum Age (Industry) Convention (Revised) 1937;
10. Minimum Age (Non-Industrial Employment),  
Convention (Revised) 1946.
11. Medical Examination (Sea-Farer) Convention, 1946;
12. Medical Examination of Young Persons (Industry)  
Convention 1946.
13. Medical Examination of Young Persons (Non Industrial  
Occupation) Convention 1946;
14. Night Work of Young Persons ( Non Industrial  
Occupations) Convention, 1946;
15. Night Work of Young Persons (Industry) Convention, 1948.
16. Medical Examination of Young Persons (Underground Work)  
Convention, 1965;
17. Minimum Age (Underground Works) Convention, 1973;
18. Minimum Age Convention, 1973.

In the declaration concerning the aims and purposes of the ILO adopted in 1944 at its Philadelphia conference,<sup>21</sup> certain fundamental principles on which the Organisation is based were affirmed. ILO believes that Labour is not a commodity, freedom of expression and association are essential to sustained progress, poverty any where constitutes a danger to prosperity everywhere, and was against want requires to be carried out in each nation. The Conference ( One of the principal organs of the ILO) recognised the obligation to achieve among other programmes, a provision for child welfare and maternity protection, provision of adequate nutrition, housing, facilities for

recreation and leisure and an assurance of equality of educational and vocational opportunity. The ILO has certain conventions that specifically deal with children and young persons. The important some are the following:

(i) Minimum Age Convention, 1973

This Convention has taken into consideration<sup>22</sup> the Minimum Age ( Industry) Convention 1919; the Minimum Age (Sea) Convention 1920; the Minimum Age (Agriculture) Convention 1921; the Minimum Age (Trimmers and Stokers ) Convention 1921; the Minimum Age ( Non Industrial Employment) Convention, 1932; the Minimum Age ( Sea) Convenion(Revised) 1937; the Minimum Age ( Non Industrial Employment )Convention(Revised) 1937, the Minimum Age (Fisherman ) Convention, 1959; and the Minimum Age ( Underground Work) Convention, 1965. The 1973 Convention is to gradually replace the existing ones aimed at achieving the total abolition of Child Labour. The minimum age limit is to be at least 15 years which is the age of completion of compulsory schooling. The member state whose economy and educational facilities are insufficiently developed may initially specify a minimum age of 14 years and certainly not below 14.

ii) Minimum Age Recommendations, 1973.

In the Recommendation concerning mminimum age <sup>23</sup> for admission to employment state parties are to accord high priority to planning for and meeting the needs of children and youth in national development policies and programmes

and to the progressive extension of the inter-related measures necessary to provide the best possible conditions of physical and mental growth for children and young persons. Minimum age is to be fixed at the same level for all sectors of economic activity. Members are to progressively raise the minimum age to the standard envisaged in the Convention. Measures are to be taken so that satisfactory standards, safeguards and supervision are maintained at work place and that vocational/technical training administered labour inspection is to be strengthened to detect abuses. Special attention to be paid to enforcement of provisions concerning employment in hazardous types jobs.

iii) The Night Work of Young Persons( Non Industrial)  
Occupation Conventions, 1946.

The Convention applies to childrens and young persons employed for wages or working directly or indirectly for gain in non-industrial occupations. Children below the age of 14 and those who are still under compulsory schooling shall not be employed during night between 10 'O' clock and in the morning 6 'O' clock. According to this Convention, Recommendations<sup>24</sup> of the ILO is applicable to public and private undertakings, in commercial establishments, postal services, clerical works, news paper undertakings and entertainment places.

iv) The Night Work of Young Persons ( Industry )  
Convention (Revised), 1948.

According to this Convention children below 16 years

are not to be employed during the interval between 10 'O' clock in the evening and 6 'O'clock in the morning and those above 16 but below 18. The rest period shall include seven consecutive hours between 10 in the evening and 7 in the morning<sup>25</sup>.

v) Medical Examination of Young Persons ( Industry ) Convention, 1946.

This Convention states that children and young persons employed in industries shall have medical examination to determine their fitness for employment<sup>26</sup>. Children and young persons under 18 years of age shall not be admitted to employment by industrial undertakings unless they have been fit for work on which they are to be employed by a thorough medical examination.

vi) The Medical Examination of Young Persons( Under Ground Work ) Convention 1965.

Considering the health risks inherent in employment in under-ground mines, industrial standards require medical examination and periodic re-examination for fitness for under-ground employment in mines until the age of 21 years. The 1965 Convention has specified the nature of this examination<sup>27</sup>. Until the age of 21 years thorough examination for fitness shall be carried out at least once in a year. In order to prevent children below their employment during the school hours only those who are medically fit are allowed to work in industries and in underground. The medical examinations are to continue till the age of 21 years.

B. UNESCO

Several aspects of the work of UNESCO concern human rights in particular and the problems of illegality in many countries. The Convention Against Discrimination in Education 1960<sup>28</sup>, can be compared with 1958 ILO Convention concerning discrimination in respect of Employment, occupation. For the purpose of UNESCO Convention discrimination includes any distinction, exclusion, limitation or preference which being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has a purpose or effect of nullifying or impairing equality to treatment in education.

C. WORLD HEALTH ORGANISATION

One of the basic objectives of WHO is to promote maternal and child health and welfare and to foster the ability to live harmoniously in a changing environment, Art. 1(i). Health needs of the mankind has been the constant concern of WHO. WHO has serious concern over the drug-testing and its effect on infants and children. Bottle-feeding in the developed countries for infants led to controversy. That is why the 1981, World Health Assembly, representing over 150 Governments adopted the International Code of Marketing of Breast Milk Substitutes to try to stop the irresponsible promotion of infant formulae and encourage the promotion of information about the advantages of breast milk<sup>29</sup>.

In many countries, the potential of health technology

to improve the lives of children will largely have been realised before the end of the Century, Polio has already been eliminated from the Americas and can be eliminated elsewhere. Guinea worm disease and iodine-deficiency disorders are dwindling. The greater use of oral rehydration salts (ORS) means that diarrhoeal diseases such as cholera no longer represent the threat they once did. The greater availability of antibiotics means that respiratory infections are on the run, other threats like malaria and AIDS still remain and search for preventives and cures are going on <sup>30</sup>

By the year 2000, it is conceivable that in so far as it is technologically practicable the promise of health for all will be delivered. WHO reported on World Health Day in April 1995 that 146 countries have had no cases of Polio for at least a year <sup>31</sup>.

D. UNITED NATIONS CHILDREN'S EMERGENCY FUND.

In 1996, United Nations Children's Emergency Fund, (UNICEF) marks its 50th Anniversary. The organisation, a subsidiary body of the UN General Assembly, was founded in 1946 in the aftermath of World War II, as the United Nations Children's Emergency Fund. The main contribution of UNICEF has been highlighting of the state of the world's children. In 1996 the World's Children again faced the carnage of war. Millions live with shattered innocence daily terror and stifled hopes <sup>32</sup>.

It is most exciting and interesting to know that UNICEF



is co-sponsoring the first ever World Congress on Commercial Sexual Exploitation of Children in Stockholm held in Aug.1996. In industrialised countries as well as in the devloping world UNICEF has become more much more of an advocate for children injecting a new dimension into the work of its national committees.

## VI. DEVELOPMENT OF THE INDIAN LAW ON THE CHILD RIGHTS

### (a) Rights of the Child in India.

Children is entitled to special care and assistance, essential needs of children should be given highest priority in the allocation of resources at all times. Children should get a fair and equitable deal in society, government as well as non-governmental, local, national, regional. and internation should endeavour to promote the Rights of the Child.

Children are the citizens of the future era and their proper bring up and giving them proper education to make them good citizens on whom depends the future of the country. India as a party to the international Charters on rights of the child, strives to implement the same in the proper way<sup>33</sup> There are 250 Central and State Laws in India, relating to children in various spheres, which are regulatory, protective or correctional in nature. The following are the Central Laws protecting the child from the all aspects.

1. The Apprentice Act, 1861.
2. The Guardian and Wards Act, 1890.

3. The Child Marriage (Restraint) Act 1929.
4. The Reformatory Schools Act, 1897.
5. The Child (Pleading of Labour ) Act, 1956.
6. The Immoral Traffic (Prevention) Act, 1956.
7. The Hindu Minority and Guardianship's Act 1956.
8. The Young Persons (Harmful Publication) Act 1956.
9. The Hindu Adoption and Maintenance Act 1956.
10. The Women's and Children's Institution (Licencing) Act, 1956.
11. The Probation of Offenders Act, 1958.
12. The Orphanages and other Charitable Homes (Supervision and Control) Act, 1960.
13. The Children's Act, 1960.
14. The Child Labour ( Prohibition and Regulation) Act 1986.
15. The Juvenile Justice Act, 1986.

Apart from these Laws mainly concerning children, there are a host of related welfare and criminal laws which have beneficial provisions for the care and protection of children. Even the laws relating to commerce and Trade have protective provisions beneficial to children. In India the definition of child varies with the cause and purpose. The Census of India treats persons below the age of fourteen as "Children" while making use of standard demographic data, social scientists include females in the age group of 15 to 19 years under the category of "girl child"<sup>34</sup>. According to the Indian Constitution, no child below the age of 14 years shall be employed to work in any factory or mine

or engaged in any other hazardous employment (Article 23). Indian Constitution (1949) adopted the best aspects of contemporary discourse on rights and freedoms and guaranteed judicial writs to every one including children, which makes a historic turning point in the legal treatment of children in India.

The Convention on the Rights of the Child, drafted by the UN Commission on Human rights, and adopted by the General Assembly of the United Nations, on 20th November, 1989, is a set of international standards and measures cited to protect and promote the well-being of children in society. But with India's ratification of the Convention on the Rights of the Child in December 1992, more than 90 percent of world's children became protected by this most widely-ratified Human Rights Convention ever in the history of world. Some of the legal issues relating to Children's Rights in India include the following :

1. Legitimacy:

The social and legal status of a child plays an important role for his well-being his social status is basically determined by the nature of his birth. Almost all communities in India have either religious laws or statutory laws which determine legitimacy and illegitimacy of the child<sup>35</sup>.

It is strongly urged that child who has no say in the matter of his conception should not suffer the social stigma of illegitimacy. In accordance with this plea, in the

national plan of action for the International Year Of The Child, the Government of India entrusted the task of incorporating principles of "equality and non-discrimination" in respect of all persons born out of wedlock, to the Law Ministry<sup>36</sup>. Illegitimacy brings with it disabilities in the rights of inheritance, maintenance and brings in problems of abandonment, neglect and delinquency.

## 2. GUARDIAN SHIP

Article 20 of the Convention provides for the protection of child without families. Social scientists argue that the child can best develop a healthy family environment, while parents can best serve this function, this assumes great significance when they are separated or dead. Guardianship is viewed not as a matter of parental control only but also an important instrument of child development. The Civil procedure code of India provides that a judicial action can not only be taken against a minor or by a minor except through a guardian.

## 3. ADOPTION:

Adoption establishes a parent-child relationship between persons not so related by birth<sup>37</sup>. For the parentless or the abandoned child, adoption means a balanced physical and psychological family environment and to the desirous parents a chance to become parents and to experience family growth. Hindu Adoption and Maintenance Act, 1956, provides equal rights to adopt males or females. Government of India introduced an Adoption of Children's Bill in 1982 which includes Muslims and provides for

adoption by males and females and for international adoption<sup>38</sup>

#### 4. MAINTENANCE

In India all minor children are entitled for maintenance either under the personal laws or the statutory laws or the statutory provisions. The amended Criminal Procedure Code 1973, makes it obligatory on the part of the parents to maintain their minor children<sup>39</sup>. The Hindu Marriage Act, 1955, empower the courts to pass suitable orders relating to maintenance education and custody of children. The criminal Procedure Code, the Hindu Adoption and Maintenance Act and the Hindu Marriage Act are complementary to each other and they are applied to protect the interest of the child<sup>40</sup>.

Civil Marriage Act, 1954 also provides for maintenance, custody and education of children of parents whose marriage is registered under the Act<sup>41</sup>. In Muslim Law, a father is bound to maintain his son till the latter attains puberty and the daughter till she is married, which satisfies Article 25 of the Draft Convention.

#### 5. CHILD HEALTH

It is pertinent to mention that the first legislation on child health roots back to central vaccinations Act, 1880, which was directed against small pox. State acts also existed on preventing small pox among children, the Narcotic Drugs and Psychotropic Substances Act, 1985 also provides for the treatment of juvenile addicts through specially created centres. The incidences of large number of diseases which were the direct result of malnutrition,

insufficient awareness about health and less than appropriate behaviour in health matters are traceable to the adverse economic and environmental conditions in which most of the people are compelled to live.

There are several government programmes that provide health care to mother and children. The important ones are the following.<sup>42</sup>

1. Expanded programme of immunisation.
2. National sexually transmitted disease control programme,
3. Prophylaxis against Anemia among mothers and children.
4. Prophylaxis against blindness in children.
5. Immunisation of the mothers and children against Tetanus.
6. Village health guides.
7. Traditional birth attendance training scheme.
8. Integrated child development service scheme,
9. Goitre Control programme.
10. National Tuberculosis control programme.
11. National Leprosy Eradication programme.
12. Environmental sanitation and safe drinking water supply.

In order to prevent diseases arising out of nutritional deficiencies, the government has also started several programmes to improve the nutritional status of children.

#### 6. Child Labour And Education

As per the 1971 Census there were 10.7 million child workers in India. That swelled to 14.5 million by 1981 .

census. Yet another estimate puts the number of working children at 44 millions.<sup>43</sup> In the International Seminars on the ways and means of achieving the elimination of child labour in different parts of the world, poverty, general level of employment, inadequacy of legislative system, armed conflict and partitioned as the major cause of child labour exploitation. Using the children's labour cheap is common all over the world., especially in the underdeveloped countries. Many efforts have been made to improve and regulate child labour in India and also to improve their working condition. The first and foremost Act to regulate the employment of children and their hours of work was the Factories Act 1881.<sup>44</sup> The investigation committee of 1944 led to the enactment of the factory's act. of 1948, providing the maximum hours of work the minimum age of employment, training of young persons, medical examination of child employees and punishment for violation of Laws etc., on the recommendation of the Royal Commission on Labour 1929- the Pledging Child Labour Act, 1933 and the Employment of Children Act 1938 were adopted. The main emphasis of the laws has been on regulating:

- i) Minimum Age for employment of Children.
- ii) Medical examination.
- iii) Minimum hours of work and
- iv) Prohibition of night work for children.

National commission of labour in 1969 commented,<sup>45</sup> " if the education of the child is a casualty in the process, it is the poverty of the parents that is to be blamed". In

1974 the government adopted the national policy for children which declares children as the supreme national asset and their protection and safety as the main concern of the nation. The Child Labour Act of 1986 prohibits employment of children below 14 years and imposes stringent punishment in cases of violation of the Act.<sup>46</sup> A National child labour policy is aiming at the welfare and rehabilitation of children in employment is being formulated. For the implementation of Article 32 of the Draft Convention, Indian Parliament has made several laws regarding minimum age, regulation of working conditions, medical examination etc., Indian Laws also have the provisions for maximum hours of work for children of certain age, which is one step ahead of the ILO convention which are silent on this point. It is needless to say that education is universally recognised as fundamental need for the full growth of human personality.

In India the need to legislate for universal and compulsory education had been in focus since 1911 when the Gokhale Bill for elementary education was preferred., The first law on compulsory education was the Bombay Municipality Primary Education Act 1918. Many states followed the suit. During the post -independence days the educational laws aim at creating equal opportunities for all section of the society and to meet the constitutional goal of providing free and compulsory education to all children untill they complete the age of 14 years.<sup>47</sup>.

The Ministry of Education prepared the Delhi Primary Education Bill in the year 1960, which was circulated among



all the states and union territories as a model to be followed while preparing primary educational laws. The National policy on education (1967) enunciates the early fulfilment of the Directive Principles. The national policy on education 1986 has attempted to remove inadequacies by laying special emphasis on early childhood, care and education.<sup>48</sup> Girls education and the needs of the children of the weaker sections have also received special attention. Article 40 of Indian Constitution imposes a duty similar to Article 28 of the Draft convention.

7. Child Marriage:

A number of laws have been enacted in pre and post independent India. Child marriage has religious sanction in India<sup>49</sup> and reference to this practice can be found in many Hindu scriptures regarding marriage age for boys and girls among Hindus and Christians. The Indian Muslims continue to practice their personal laws on this matter. The civil marriage Act was enacted in 1872.<sup>50</sup> It laid down the age of marriage as 14 for those seeking to register under this Act. realising the dangers of early consummation of marriage to the health of young wives and their children, efforts were made to prevent the consummation of marriage before the girl was 12 years old by enacting the Consent Act in 1891. In 1925, the age was raised to 13 years.<sup>51</sup>

It was in 1929 that a comprehensive legislation known as the Child Marriage Restraint Act (also called the Sharda Act, after the name of its architect) was enacted. This act fixed minimum age of marriage for boys at 18 years and

for girls at 14 years. Subsequent amendments to this act in 1949 and 1978 raised the age to 21 years for boys and 18 years for the girls.

The Hindu Marriage Act, 1955 was another effort to check the incidence of child marriage. The amendment to this act in 1976 introduced the concepts of option of puberty. A more progressive legislation which effects the marriage of minors is the Special Marriage Act, 1954. The minimum age requirement is the same as Sharada Act, but it does not admit marriages of minors even with the consent of the guardians. Any marriage procured by concealment of age in violation of the Act is void.<sup>52</sup>

An encouraging contribution of these enactments has been the gradual increase in the age of marriage, various legislations have been enacted to prevent practice of child marriage which is considered highly detrimental to the health of the child.

#### 8. Child Welfare and Protection

Concern for protecting children against the aberrations in society, and promoting their general welfare for proper growth is another area where laws has a role to play. Welfare includes the whole gamut of activities that contribute to the development of mental, physical emotional and psychological faculties of certain categories of children to areas which lead to their growth. The treatment and rehabilitation of handicapped children., including the neglected, destitute, the victimised delinquent and the exploited are the major concerns of law in this field. The

legislative support and protection for these categories are mainly found in the Christians Act of the states and union territories.<sup>53</sup>.

The Government of India, in order to promote uniformity in the availability of services throughout the country, has recently adopted. Jevenile Justice Act, 1986. The special features of the Act are the creation of "Advisory Boards" involving the representatives of the people and the government in the policy formulation process and the State Children's Fund"<sup>54</sup> It is a fact that destitution and delinquency are promarily the result of economic backwardness and the act of training, vagrancy and begging etc.

9. Offences Against Children:

Cruelty to children, including their employment for begging, abandonment, abuse and secual exploitation of girls are some of the other areas that require legal safeguards. The Central Children Act (now Juvenile Justice Act), the Indian Penal Code,<sup>55</sup> The Anti Beggary and Anti Smoking Acts etc, protect the children from these offences. Yet another crime that is prevalient in some part of the country is female infanticide.

The framers of law have been considerate to provide for differential treatment for children with regard to offences committed by or against them. Section 82 of the Indian Penal Code Provides , "nothing is an offence which is done by a child under 7 years age"<sup>56</sup>. The law absolves the child below 7 years of age of liability and limited exemption is

given to child between 7 years and 12 years of age. The probation of Offenders Act, 1958, places restrictions on the imprisonment of young offenders. The intention is to provide conditional and absolute release or release on admonition. The Children's Act, 1960 provides for the separate detention of child offenders and prohibited trial of children with adult offenders.<sup>57</sup>.

#### VII. A COMPARATIVE STUDY BETWEEN INTERNATIONAL AND INDIAN LAW ON CHILD RIGHTS

From Legal provisions on children's right it will seem that India is a paradise for children. But the reality is entirely different. Thousands die in malnutrition and are physically/mentally handicapped due to starvation. Good number of Indian children do not live to reach their adulthood. They are abused, maltreated, and exploited everywhere. Their rights are recognised legally, but not enforced since the authorities are also victims of the same socio-economic structure. In the matter of recognising children's right India can justly be proud of being in the forefront. However, serious efforts should be made to create conditions in which these rights can be enjoyed.

Child's marriage is one of the scourge of rural India. Though we have legislations banning by the same, it is not followed or enforced. The Convention has no provision for child marriage and therefore India can be proud that it is ahead of international law in this matter. In case of legitimacy the Indian society is primitive in its thinking

and only children born of a wedlock is recognised as legitimate. The disabilities arising out of being illegitimate are very harmful to the children. Indian laws and specially the personal laws need suitable amendments to fall in line with the Draft Convention or other International Conventions.

Under the Convention states parties are under obligation to provide protection to children who are without families. Indian legal efforts are half hearted and discriminatory with regard to legitimate and illegitimate children. For adoption India is yet to have a comprehensive Adoption Act. As far as maintenance is concerned India can be proud of having various Acts as well as Criminal Procedure Code itself defending the right of a child for maintenance. Child welfare and protection is taken care under the various Children's Acts and now specially under the Juvenile Justice Act, 1986.

There are many offences against children, including cruelty employing them for begging, abandonment, abuse, sexual exploitation, etc. Indian Penal Code, Criminal procedure Code and various other acts including the Juvenile Justice Act, 1986 protect the children in India. The Draft Convention also provides for the safeguards of children's human rights under these circumstances. However, laws apart, the situation is grim due to lack of social awakening and a commitment to promote an environment conducive to child development. The class compulsions of the state also has a part in treating the Juvenile and delinquent children

badly since most of them come from the socially and economically backward groups. As equitable distribution of judicial benevolence will take much more persuasion than the provision in the Convention.

The obligation to give the highest level of health possible will be defeated under the resources crunch. Though India has various schemes to care for the health of infants, children and youth, they are not available universally. This is also true in the matter of education though it is recognised as a universal right. The improper emphasis on higher education at the cost of primary education destroys this right.,

When it comes to child labour, all the pretensions can be seen through. While the attempt is to ban child labour, in reality all that is done is to conciliate if not to regularise child labour. Apart the very many Acts that care for child employment, the basic question as to why are they forced into employment remains unanswered or avoided. The economic structure that forces the children into labour markets remains unaltered while legal efforts are made to prohibit child labour.

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21. Parveen Nangia, Child Labour; Cause-effect syndrome, (Janak Publishers, New Delhi;1987)P23.
22. ✓ ILO, International Labour Conventions and Recommendations (Geneva;ILO,1985) P.730.
23. Ibid - P.736.
24. Ibid, P.745.
25. Ibid,P.752
26. Ibid,P.755.
27. Ibid,P.766.
28. Brownlie, n.2, P.329.
29. ✓ UNICEF, The State of the World's Children (New Delhi; UNICEF,1955) P.22.
30. World Health Organisation, "Infant and Young Child Nutrition" (Progress and Evaluation Report; and Status of Implementation of the International Code of Marketing of Breast-Milk substitutes, A/47/6.
31. ✓ UNICEF, The State of the World's Children



- (UNICEF, India, 1995) P.20.
32. UNICEF, The State of the World's Children, (UNICEF, New Delhi; 1996) P.10.
  33. Sheela Barse Vs Children Aid Society Others AIR 1987.S.C 656 at P.658.
  34. UNICEF, The Right to be a Child ( New Delhi UNICEF, 1994) P.4; See V.Reveendra Reddy, Rights of Legitimized Children under Hindu Law, Journal of the Indian Law Institute, Vol.34:3, 1992. PP.445-471.
  35. Neel.K.Sarada, The Legal Economic and Social Status of Indian Child (New Delhi: National Book Organisation 1988) P.43.
  36. Government of India, National Plan of action for the International Year of the Child (New Delhi Ministry of Social Welfare 1979) P.47.
  37. Neel.K.Sarada, The Legal Economic and Social Status of Indian Child ( National Book Organisation,; New Delhi, 1988), 1988, P.49.
  38. The Bill have failed due to the opposition from certain minority religious sections who claim adoption is not permitted in their religion, see also UNICEF, Rights of the Child, P.44.
  39. Criminal Procedure Code, 1973, Section 125.
  40. Sharada, n.43, P.52-53.
  41. Special Marriage Act, 1954 Section, 38.
  42. Sharada, n 43, P.18.
  43. Ms.Rita Panikar, Reckoning with Child Labour present Day Strategies and Future Directions, P.1.
  44. Parveen Nangia, Child Labour, Cause-effect Syndrome; (Janak Publishers New Delhi, 1987) P.10-12.
  45. Parveen Nangia, n, 53, P.13.
  46. Pawan Sharma, n, 53, P.15.
  47. Bhagwan PD.Singh, and Shukla Mahanty (Ed) Children at work: Problems and Policy Options (B.R.Publishing Corporation, Delhi, 1993) P.59.
  48. UNICEF, Rights of the Child, 1994, P.73.
  49. Child Marriage had religious sanction in India and references to this practice can be found in many

Hindu Scriptures.

50. Sharda, n,43,P.39.
51. Ibid,
52. Ibid, P.40-41.
53. Sharda, n,43,P.65.
54. Ibid, P.66
55. Ibid P.67.
56. Indian Penal Code, 1870, Section 80.
57. Children's Act 1960, Sec, 18-26. See also the Supreme Court Judgment, Munna and Others Vs State of U.P,1982,P.809.

## CHAPTER - IV

## THE ROLE OF THE INDIAN JUDICIARY IN IMPLEMENTING THE INTERNATIONAL LAW NORMS ON CHILD RIGHTS

### I. INTRODUCTION

The role of the Indian Judiciary and the scope of the Judicial interpretation have expanded remarkably in recent times, partly because of the tremendous growth of statutory intervention in the present era. The Judiciary plays an important role in the protection of fundamental rights of the citizens and non-citizens alike. The twin safeguards of equality before law and equal protection of laws are acknowledged as two of the most important pillars of human rights of the universe of freedom that is where ever freedom to assert human rights is recognised, whether under unwritten or written constitution.

India is one of the largest democracies of the world, a sovereign, socialist republic with a comprehensive charter of rights written into its constitution, a signatory to most international conventions of human rights, a country in the forefront of the International Struggle against colonialism, imperialism and racism. A formidable track record indeed for a country with only forty years of independent existence, won through a freedom struggle which gave to the world the message of non-violence.

The Indian Constitution lays down bases on which its foreign policy should be constructed and its international

obligations respected. These bases are articulated principally in Article 51 which occurs in Part IV of the Indian Constitution. The "leit-motif" of Article 51 is improved by the Declaration of Havana adopted on 30th November 1939 by the second Conference of American States, members of the International Labour Organisation. While introducing this provision in the Constituent-Assembly, Dr. B R Ambedkar, Chairman of the Draft Committee, of the Constituent Assembly, said "the propositions contained in the new Article are so simple that seems to be supererogation to try to explain them to the House by any lengthy speech"<sup>1</sup>. In the Constituent Assembly, members considered that the declaration of India's pledge to promote international peace and security was necessary for, if there was no such peace and security, there could be no peace and economic and social progress within the country<sup>2</sup>. It was proposed that, in addition to laying down India's foreign policy objective as the promotion of international peace and security, it was necessary to specify some method for promoting peace and the relevant provision should commit India to encouragement of settlement of international disputes by arbitration as a means to avoid war<sup>3</sup>. The principles of independence of a state specify the independence of state and the right of a state to exercise either exclusive limited or concurrent jurisdiction both within and beyond its territory, subject to the limits

imposed by international law<sup>4</sup>. Broadly speaking it refers to the power of a state to affect the rights of persons or other entities, whether by legislation, by executive decree, or by the judgement of a court<sup>5</sup>. There are several bases for jurisdiction. A state has a right to exercise what is generally known as the territorial jurisdiction over its territory and over all persons and things therein, subject to the immunities and other conditions recognised by international law, Article 2 of the Draft Declaration on Rights and Duties of states, adopted by the International Law Commission in favour of foreign states.

## **II. INTERPRETATION OF TREATIES**

Under international law, It is well settled that a non-statutory rule of construction does not amount to a law in force "with in the meaning of Article 372 of the Constitution. Accordingly, the common law rules of statutory interpretation evolved by the English courts in their interpretative jurisdiction are not required to be applied as legally enforceable rules in India. What is more, Art. 51[c] is designed to serve the courts as a guide to interpretation of International agreements. It provides that the state shall strive to "foster respect of international law and treaty obligations in the dealings of organised peoples with one another". There is thus a constitutional imperative that the interpretation of

treaties conform to the objective of fostering respect for international law.

It has to be borne in the mind that the Indian courts are not generally called upon to interpret treaties directly; they interpret the legislation incorporating or implementing them. This is primarily so because of the fact that a treaty by itself is not a source of Indian law and is therefore, not enforced directly by the Indian courts.

Municipal courts do not follow the same principles of interpretation of treaties as those followed by international tribunals or institutions. Municipal courts of one state may not follow the approach of the Municipal court of another state. Yet one cannot over-emphasize the need to achieve uniform interpretation of a treaty. Every state in its dealings with other state-parties is bound by the treaty as it is interpreted on the basis of principles of International law relating to treaties irrespective of what its national courts may have decided within the national sphere.

It is a well-established fact that, the interpretation of a treaty is a question of international law<sup>6</sup>. National Courts should not therefore, treat this task merely as involving a question of municipal law. This is so whether the courts are interpreting a treaty implementing statute. What is at stake is the treaty in such cases. Articles 31 and 32 of the Vienna Convention on the law of treaties,

1969 and the principles of interpretation developed by the International Court of Justice. Other international tribunals and International institutions could serve national courts as guides in this direction.

Ideally, the principles of International law pertaining to treaty interpretation ought to be incorporated into municipal law before they are followed by national courts. Whatever be the position in other jurisdictions, the position in India is that even in regard to the policies of legislation, by the commandment of Art 51[c], the Indian courts are under a constitutional duty to adopt the internationally accepted principles of interpretation of treaties. The context of Art 51 is the matrix of international peace and security, international relations and international obligations and matters which under the Indian Constitution, fall exclusively within the domain of the Union (Articles 73, 245[2] and 253 and entries 10 to 21 of the Union List in the Seventh Schedule to the Constitution). Article 51 evidently addresses itself to the Central Government and to provincial units of the country, as the Central Government is competent to undertake international obligations.

The International Court of Justice and its predecessor, the Permanent Court of International Justice, have pursued the textual, the interpretation and the teleological approaches at one time or another, generally



favouring the textual approach. I.C.J. made it clear that it was its duty "to interpret the treaties, not to revise them<sup>7</sup>." It has to be noted that the provisions of the Vienna Convention on interpretation of treaties are by no means exhaustive. They emphasise on key elements of treaty interpretation and on the relationship between those elements. There are numerous rules and maxims which though not mentioned in Vienna Convention, serve as means of interpretation when required. They are familiar to municipal law also. There are also some maxim known to customary law which are now subsumed in the provisions of the Vienna Convention. Yet Vienna Convention has made a significant contribution towards dispelling the doubts around doctrinarian approaches laying down clear directions for the interpretative process.

#### **B. INTERPRETATION IN INDIAN LAW**

Prior to the adoption of the Indian Constitution, the Indian practice pertaining to relation of International law to internal law was similar to the British practice. Later after the adoption of the Constitution of India, much depended upon the provisions contained in the Constitution. Earlier to the adoption of the Constitution of India, the British practice of treating customary rules of international law as part of the law of the land, was followed in India also. Eventually, even after the adoption

of the Constitution, this practice continued by virtue of the provisions of Article 372 until the pre-constitution common law is altered or repealed or amended by a competent legislature or other competent authority<sup>8</sup>.

It has therefore, been aptly remarked by court : "It does not mean that the doors of Indian courts are entirely closed to the wide absorption of International customary law into municipal law. Under the British rule in India, the English common law doctrines were widely applicable in many fields. The Constitution of India did not alter that position as it provided for the continued operation of the "law in force immediately preceding the commencement of the Constitution, therefore, on the analogy of the English common law, the Municipal Courts of India have applied the provisions of the treaties entered into by India if they have been incorporated into Municipal law through legislation, and the well recognised principles of International customary law have been applied because they are supposed to form part of the law of the land. It is thus the dualist view of international law which has been adopted by the British and Indian courts viz. that international law can become a part of Municipal Law only for specific incorporation<sup>9</sup>". Thus various organs of the state should endeavour to foster respect for international law and treaty obligations in the dealings of organised peoples with one another as enshrined in the Art 51 of the

Constitution of India.

As far as the customary rules of International law are concerned, the situation existing prior to the commencement of the constitution continues even after the coming into force of the constitution. Customary rules of International law are part of the Municipal law in India also provided they are not inconsistent with any legislative enactment or the provisions of the Constitution of India. In respect of the rules of a treaty, India follows the British dualist view, which means an international treaty rule become part of the Municipal law of India if it has specifically incorporated.

On interpretation of treaties, it has to be considered to what extent principles of International law have been applied in the Indian courts. As noted earlier, Indian courts are not generally called upon to interpret treaties directly. They interpret treaties incorporated into the law of India by legislation. Art 51[c] of the Indian Constitution is designed to serve the courts as a guide to interpretation of International agreements. Thus there exists a constitutional imperative that the interpretation of treaties conform to the objective of a fostering respect for international law<sup>10</sup>.

In the Indian law, the "literal" or "plain meaning" approach dictates that the intention of the legislature must be found in the words used by the legislature itself.

The Supreme Court of India reiterated the "literal rule" when it observed recently, one of the pillars of statutory interpretation is plain the courts must apply regardless of the result<sup>11</sup>. However, an interpretation which does violence to international obligations specifically undertaken by India and which does not further Article 51 of the constitution, would undoubtedly allow the judiciary to instrumental in a participant in the resultant situations of violations of such obligations.

### III THE ROLE OF INDIAN JUDICIARY

Under our Constitution there is a single integrated system of courts for the Union as well as the States which administers both the Union and State laws. The entire system is presided over by the Supreme Court of India. Below the Supreme Court stand the High Courts of the different states and under each High Court there are "subordinate Courts"<sup>12</sup>.

The High Court is the Supreme Judicial Tribunal of the State, having both original and appellate jurisdiction. It exercises appellate jurisdiction over the District and Sessions Judge, The Presidency Magistrate and the original side of the High Court itself. There is a High Court for each of the States, except Manipur, Meghalaya, Tripura and Nagaland which have the High Court of Assam<sup>13</sup> as their common High Court; and Haryana which has a common High Court<sup>14</sup> with Punjab. The Bombay High Court is common to

Maharashtra and Goa.

The Supreme Court has appellate jurisdiction over the High Courts and is the highest tribunal of the land. It has been rightly said that the jurisdiction and powers of our Supreme Court are in their nature and extent wider than those exercised by the highest court of any other Country<sup>15</sup>. It is at once a Federal Court, a court of appeal and a guardian of the Constitution, and the law declared by it, in the exercise of any of its jurisdictions under the Constitution, is binding on all other Courts within the territory of India<sup>16</sup>. The Supreme Court is not only a federal court and a guardian of the Constitution, but also the highest court of appeal in the land, over Civil and Criminal cases<sup>17</sup>, apart from cases relating to the interpretation of the Constitution and also it has an extraordinary power to entertain appeal, without any limitation upon its discretion, from the decision, not only of any court but also any tribunal within the Territory of India<sup>18</sup>. The Supreme Court is vested by the Constitution itself with the power to deliver advisory opinion on any question of fact or law that may be referred to it by the President<sup>19</sup>. It is true that there is no express provision in the Indian Constitution empowering the courts to invalidate laws, but the Constitution has imposed definite limitations upon each of the organs of the State, and any transgression of those limitations would make the law void.

It is for the courts to decide whether any of the Constitutional limitations has been transgressed or not<sup>20</sup>, because the Constitution is the organic law subject to which ordinary laws are made by the legislature which itself is set up by the Constitution.

Article 13 declares that any law which contravenes any of the provisions of the part on Fundamental Rights, shall be void. But as the Supreme Court has observed<sup>21</sup>, even without the specific provision in Article 13<sup>22</sup> the Court would have the powers to declare any enactment which transgresses a Fundamental Right as invalid. Similarly, Article 254 says that in case of inconsistency between the Central and state laws in certain cases, the state law shall be void.

The original jurisdiction of the Supreme Court is dealt with in Article 131 of the Constitution. The functions of the Supreme Court under Article 131 are purely of a federal character and are confined to disputes between the Government of India and any of the states of the Union, the Government of India and any state or states on one side and any other state or states on the other side, or between two or more states "interse". One class of disputes, though of a federal nature, is excluded from their original jurisdiction of the Supreme Court, namely, a dispute arising out of any treaty, agreement, covenant, engagement, 'sanad' or other similar instrument which, having been

entered into or executed before the commencement of this Constitution continues in operation after such commencement or which provides that the said jurisdiction shall not be extended to such a dispute<sup>23</sup>. But these disputes may be referred by the President to the Supreme Court for its advisory opinion.

Apart from the power to treat a law as void<sup>24</sup> for being in contravention of the provisions of the Constitution guaranteeing the Fundamental Rights, the Judiciary has been armed with the power to issue writs such as "Habeas Corpus", "Prohibition", "Mandamus", "Certiorai" and "Quo warranto", in order that it may enforce such rights against the state at the instance of an individual whose rights have been violated. The Power to issue these writs for the enforcement of the Fundamental Rights is given by the Constitution to the Supreme Court<sup>25</sup> and the High Courts<sup>26</sup>. The Power, so guaranteed shall not be suspended except during a proclamation of Emergency<sup>27</sup>. Though a Fundamental Right may be enforced by other proceedings, such as a civil suit under the ordinary law or an application under Article 226 or by way of defence to legal proceedings brought against an individual, a proceeding under Article 32 is described by the Constitution as a "Constitutional Remedy" for the enforcement of the Fundamental Rights included in Part III of the Constitution and the right to bring such proceedings before the Supreme Court is itself a

Fundamental Right as part of Part III<sup>29</sup>. Article 32 is thus the cornerstone of the entire edifice of human right set up by the Constitution. Commenting on this article, in the Constituent Assembly, Dr. B. R. Ambedkar said<sup>29</sup>

"If I was asked to name any particular article of the Constitution as the most important - an article without which this Constitution would be a nullity - I would not refer to any other article except this one. It is the very soul of the Constitution and the very heart of it".

The power of the High Court to issue the writs such as Habeas Corpus, Mandamus, Prohibition, Certiorari and Quo Warranto, is wider than that of the Supreme Court in as much as under Article 32 of the Constitution, the Supreme Court has the power to issue these writs only for the purpose of enforcement of the Fundamental Rights whereas under Article 226 a High Court can issue these writs not only for the purpose of enforcement of Fundamental Rights, but also for the redress of any other injury or illegality, owing to contravention of the "ordinary law", provided that certain conditions are satisfied<sup>30</sup>.

An application to a High Court under Article 226 will be not only, where a Fundamental Right has been infringed but also where some other limitations imposed by the Constitution, outside Part III, has been violated<sup>31</sup>.



If the infringement of a Fundamental Right has been established, the Supreme Court and High Courts cannot refuse relief under Article 32 and Article 226 on the ground :-

- a. That the aggrieved person may get his remedy from some other court or under the ordinary law<sup>32</sup>, or,
- b. That the disputed facts have to be investigated or evidence has to be taken before relief may be given to the petitioner<sup>33</sup>,
- c. That the petitioner has not asked for the proper relief applicable to his case. In such a case, the Supreme Court and the High Court must grant him the proper relief and, if necessary, modify it to suit the exigencies of the case<sup>34</sup>.
- d. Generally only the person affected may move the court but the Supreme Court has held that in 'Social' or 'Public Interest Actions', any person may move the Court. This expansion of the "Right To Be Heard" has favoured public interest litigation<sup>35</sup>.

In *Sheela Barse, v. The Secretary Children Aid Society and others*<sup>36</sup> a free lance journalist by profession and a Member of the Maharashtra State Legal Aid and Advice Committee, in her writ petition before Bombay High Court the appellant petitioner made a grievance about the working of the New Observation Home located at Mankhurd maintained

and managed by the Children's Aid Society, Bombay. According to her the Children's Aid Society was registered under the Societies Registration Act. 1860 and also treated as a Public Trust under the Bombay Public Trusts Act. of 1950. The Society received grants from the State. It set up a Remand Home at Umerkhandi within Bombay area and this was now run as an Observation Home under the provisions of the Bombay Children Act 1948. The Society ran three observation homes, one at Umerkhandi established in 1927, the second at Mankhurd established in 1960, and the third the New Observation Home also at Mankhurd. The appeal on 22nd August, 1984 was treated as a writ petition by the Bombay High Court wherein the grievances made by the petitioner were of four types as set out by the High Court in para 23 of its judgment:

- (1) Delay in repatriation or restoration of children to their parents in respect of whom orders for repatriation were made by the Juvenile Court :
- (2) Non-application of mind in the matter of taking children into custody and directing production before the Juvenile Court.
- (3) Absence of proper follow-up action after admission of the children in the

Observation Homes, in particular grievance was made that the Child Welfare Officers were not performing their duties and such failure led to continued detention of children without any justification and;

- (4) Illegal detention in such circumstances and the condition very often resulting in harassment to the children so detained. The Bombay High Court, however, turned down the complaints thereupon the petitioner went to the Supreme Court as appeal by specially.

BHAGWATI, delivers the judgement of the Supreme Court, Chief Justice observed,

A problem child is indeed a negative factor. Every society must, therefore, devote full attention to ensure that children are properly cared for and brought up in a proper atmosphere where they could receive adequate training, education and guidance in order that they may be able to have their rightful place in the society when they grow up.

The Court noted that in 1959, the Declaration of all the rights of the child adopted by the General Assembly of the United Nations and in Art. 24 of the International Covenant on Civil and Political Rights, 1966, the importance of the child has been appropriately recognised. India as a party to these International Charters having rectified the Declaration, it is an obligation of the Government of India as also the State machinery to implement the same in the proper way.

Gerontocracy in silence manner indicated that like a young plant a child takes mosts in the environment where it is placed. However good the breed be if the sapling is placed on a wrong setting or an unwarranted place, there would not be the desired growth. Same is the situation with the humane child. The child Welfare Officer (Probation) as also the Superintendent of the Observation Home must be duly motivated. They must and have sense of keen observation : on their good functioning would depend the efficacy of the scheme.

Vishal Jeet, v. Union of India and others<sup>37</sup>, was the case that arose as a result of a writ petition under Article 32 of the Constitution of India at the instance of an Advocate, by way of a PIL seeking issuance of certain directions, directing the Central Bureau of Investigation(1) to institute an enquiry against those

police officers under whose jurisdiction red light areas as well Devdasi and Jogin traditions were flourishing and to take necessary action against such erring police officers and law breakers; (2) to bring the inmates of the red light areas and also those who are engaged in "flesh trade" to protective homes of the respective States and to provide them with proper medical aid, shelter, education and training in various ways of life, so as to enable them to choose a more dignified way of life and (3) to bring the children of those prostitutes and other children found begging in streets and also the girls pushed into "flesh trade" to protective homes and then to rehabilitate them.

Justice Ratnavel Pandian, speaking for the Supreme Court observed that:

The case involved in was one of great importance warranting a comprehensive and searching analysis and requiring a humanistic rather than a purely legalistic approach from different angles. The questions involved cause considerable anxiety to the Court in reaching a satisfactory solution in eradicating such sexual exploitation of children. Many unfortunate teen-aged female children and girls in full bloom were being sold in various parts of the country, for paltry sum even by their parents finding themselves unable to maintain their children on account of acute poverty and unbearable miseries and hoping

that their children would be engaged only in household duties or manual labour.

The Government noted that Art 23 which relates to Fundamental Rights in Para III of the Constitution and which has been put under the caption 'Right against exploitation' prohibits traffic in human beings and beggar and other similar forms of labour and provides that any contravention of Art. 23 (1) shall be an offense punishable in accordance with law. The expression 'Traffic in human beings' is evidently a very wide expression including the prohibition of traffic in women for immoral or other purposes. Art. 35(a)(ii) of the Constitution reads that notwithstanding anything in this constitution, Parliament shall have, and legislature of a State shall not have, power to make laws for prescribing punishment for those acts which are declared to be offenses under this part. The power of legislation, under this article, is given to the Parliament exclusively, for, otherwise the laws relating to fundamental rights would not have been uniform throughout the country. The power is specifically denied to the State legislatures.

Art. 39 relates another constitutions provision noted by the court was under the to Directive Principles of State policy under Part IV of Constitution. This Article

particularizes certain social objectives.

One of the objectives under cl. (e) of Art. 39 is that the State should, in particular, direct its policy towards securing that the tender age of children are not abused,. One of the objectives under cl(f) is that the State should, in particular, direct its policy towards securing that childhood and youth are protected against exploitation and against moral and material abandonment.

In Munna and others etc. V. State of U.P. and others etc<sup>36</sup>.

(Writ Pents. Nos. 9133, 8974 of 1981 and 6 of 1982).

Three writ petitions came before Supreme Court on notice to the State of Uttar Pradesh. They sought relief in respect of certain juvenile undertrial prisoners in the Kanpur Central Jail. The allegations in respect of these juvenile undertrial prisoners were that though there was a Children's Home in Kanpur, these juvenile undertrial prisoners who were, more than 100 in number were lodged in the Kanpur Central Jail instead of being sent to the Children's Home and that were being sexually exploited by the adult prisoners. These allegations are based on a news

report published in the issue of the Indian Express dated 2nd December 1981 where a reference was made to a visit of Shri Madhu Mehta of the Hindustan Andolan to the Kanpur Central Jail incognito.

The court noted that a place of safety is defined in S.2 sub/sec. (9) of the Act, to mean, "any observation home or any orphanage, hospital, or any other suitable place or institution, the occupier or manager of which is willing temporarily to receive a child, or where such observation home, orphanage, hospital or other suitable place or institution is not available in the case of a male child only, a police station in which arrangements are available or can be made for the safe keeping of a child separately from adult offenders". It was therefore clear to the Court

"when a child is arrested for an offence and is not released on bail, he cannot be sent to jail but he must be detained in a place of safety as defined in S.2, sub sec (9) of the Act. The inhibition against sending a child to jail does not depend upon any proof that he is a child under the age of 16 years but as soon as it appears that a person arrested in apparently under the age of 16 years this inhibition is attracted. The reason for this inhibition lies in the court solicitude which



the law entertains for juveniles below the age of 16 years. The law is very much concerned to see that juveniles do not come into contact with hardened criminals and their chances of reformation are not blighted by contact with criminal offenders". It would thus be seen that even where a child is convicted of an offence, he is not to be sent to a prison but he may be committed to an approved school under Section 29 or either discharged or committed to suitable custody under Section 30. Even where a child is found to have committed an offence of so serious a nature that the court is of opinion that no punishment which under the provisions of the Act it is authorised to inflict is sufficient. Section 32 provides that the offenders shall not be sent to jail but shall be kept in safe custody in such place or manner as it thinks fit and shall report the case for the orders of the State Govt. Section 33 sets out various methods of dealing with children charged with offenses. But in no case except the exceptional ones mentioned in the Act, a child can be sent to jail : The Court therefore, found it surprising that the seven children whose

names were mentioned in Annexure B to the Report of the Session Judge were sent by the concerned Magistrate to jail instead of being sent to the Children's Home which the Court believed was a place of safety in Kanpur within the meaning of S. 2 sub.s. (9) of the Act.

In M.C. Mehta V. State of Tamil Nadu and others<sup>39</sup>, a petition under Art 32 of the Constitution was brought before this Court by the way of Public Interest Litigation by M. C. Mehta practising lawyer. Related to the problem of employment of children in match factories of Sivakasi in Kamaraj Distt. of the State Tamil Nadu.

The manufacturing process of matches and fireworks is a hazardous one. Working conditions in the match factories are such that they involve health hazards in normal course and apart from the special risk involved in the process in the manufacturing, the adverse effect on health is a serious problem. The Supreme Court held that children exposure of tender aged to these hazards required special attention and also the stated employment of children within the match factories directly connected with the manufacturing process upto final production of match sticks or fire works should not at all be permitted. Art 39(f) of the constitution one court ruled provides that "the State

should direct its policy towards securing that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity that childhood and youth are protected against exploitation and against moral and material abandonment".

In the Courts View, the spirit of the Constitution perhaps is that children should not be employed in factories as childhood is the formative period and in term of Art. 45 they are meant to be subjected to free and compulsory education until they complete the age of 14 years.

The Court commented, "the provision of Art. 45 in the Directive Principles of State Policy has still remained a far cry and though accordingly to this provision all children upto the age of 14 years are supposed to be in school, economic necessity forces grown up children to seek employment".

However the court felt it is necessary that special facilities for providing the quality of life of children should be provided. This would require facility for education , scope for recreation as also providing opportunity for socialization. Facility for general education as also job oriented education should be available and the school time should be so adjusted that employment was not affected.

The court also noted that, under the Factories Act

1948 there was a statutory requirement for providing facilities for recreation and medical attention. It directed State of Tamil Nadu to enforce these two aspects so that the basic requirements were attended to. The state was also, directed to take immediate steps to provide all necessary medical facilities for the working children. "Attention may be given to ensure provision of the basic diet during the working period and medical care with a view to ensuring sound physical growth".

Vikram Deo Singh Tomar vs. State of Bihar<sup>40</sup>, arose from a letter received by the Supreme Court from the Yuva Adhivakta Kalyan Samiti, Sasa Ram, distt. Rohtas (Bihar). Among other things it was alleged in the letter that the female inmates of the "care home " , Patna (Bihar). We are compelled to live in inhuman conditions in an old dilapidated building, that they were maltreated, provided food which is both insufficient and of poor quality, and that no medical attention was afforded to them. On 6th November 1987, the Court issued notice to the Superintendent of the Home, the District Magistrate, Patna and District of Bihar simultaneously ordered the District Judge, Patna to visit the home and submit a report on the conditions actually prevailing there in the context of the allegations contained in the letter.

Delivering the judgement of the Court, Justice R. S.

Pathak, former Chief Justice of India observed :

"India is a welfare State governed by a Constitution which holds the pride of place in the hearts of its citizens. It lays special emphasis on the protection and well-being of the weaker sections of society and seeks to improve their economic and social status on the basis of constitutional guarantees spelled out in its provisions. It shows a particular regard for women and children, and notwithstanding the pervasive ethos of the doctrine of equality it contemplates special provision being made for them by law. This is only to be expected when an enlightened constitutional system takes charge of the political and socio-economic governance of a society , which has for centuries witnessed the relegation of women to a place far below their due. We live in an age when this court has demonstrated, while interpreting Art. 21 of the constitution, that every person is entitled to a quality of life consistent with his human personality. The right to live with human dignity is the fundamental right of every Indian citizen. And, so, in the discharge of its responsibilities to the people,

the state recognises the need for maintaining establishments for the care of those unfortunates, both women and children, who are the castaways of an imperfect social order and for whom, therefore, of necessity provision must be made for their protection and welfare. Both common humanity and considerations of law and order require the State to do so. To abide by the constitutional standards recognised by well accepted principle, it is incumbent upon the State when assigning women and children to these establishments, euphemistically described as "Care Homes", to provide at least the minimum conditions ensuring human dignity".

Peoples Union for Democratic Rights vs Union of India<sup>41</sup>, was a writ petition brought by way of Public Interest Litigation by a non-governmental agencies (NGO) in order to ensure observance of the provisions of various labour laws in relation to workmen employed in the construction work of various projects connected with the Asian Games. The matter was brought by means of a letter addressed to one of the Judges of the Supreme Court. The letter was based on a report made by a team of three social scientists who has been commissioned by the petitioner for

the purpose of investigating and inquiring into the conditions under which the workmen engaged in the various Asiatic projects were working. In this case, among the other things the petitioner requested Supreme Court to ban the childrens employment in the construction work.

P.N.Bhagwati, J. speaking for the court observed that it was a "sad and deplorable omission" that construction activity was not included in the list of banned occupations under the Employment of Children Act, 1938. He also said, this should be immediately set right by every State Government.

So far as the Employment of Children Act (1938), was concerned, the case of the Union of India, the Delhi Administration and the Delhi Development Authority was that no complaint in regard to the violation of the provisions of that Act was at any time received by them. They disputed that there was any violation of these provisions by the contractors. It was also contended on behalf of these authorities that the Employment of Children Act, 1938 was not applicable in case of employment in the construction work of these projects since construction industry was not a process specified in the schedule and was, therefore, not within the provisions of sub-sec(3) of Section 3 of the Act. Now, unfortunately, this contention urged on behalf of the respondents was well founded because construction industry did not find a place in the Schedule of the

Employment of Children Act (1938) and the prohibition enacted in Section 3, Sub-Section (3) of that Act, against the employment of a child who had not completed his fourteenth year, could apply for employment in construction industry. The court said :

This is a sad and deplorable omission which, we think, must be immediately set right by every State Government by amending the Schedule, so as to include the construction industry in its exercise of the power conferred under Section 3A of the Employment of Children Act (1938). We hope and trust that every State Government will take necessary steps in this behalf without any undue delay, because construction work is clearly a hazardous occupation and it is absolutely essential that the employment under the age of fourteen years must be prohibited in every type of construction work. That would be in consonance with Convention No.59 adopted by the International Labour Organisation and ratified by India. But apart from the requirement of Convention No.59, we have Article 24 of the Constitution which provides that no child below the age of 14 shall be



employed to work in any factory or mine or engaged in any other hazardous employment.

Labourers working on Salal Hydro-Project arose from a news item in Indian Express dated 26th August, 1982, that a large number of migrant workmen from different states including the State of Orissa were working at the Salal Hydro-Electric Project in difficult conditions and they were denied the benefits of various labour laws and subjected to exploitation by contractors to whom the different portions of the work were entrusted by the Central Government. The Peoples Union for Democratic Rights thereupon addressed a letter to Mr. Justice D.A. Desai enclosing a copy of the newsreport and requested him to treat the letter as a writ petition so that justice may be done to the poor labourers working at the Salal Hydro-Electric Project. The letter was placed before a Bench of the Supreme Court and it was treated as a writ petition by an order dated 10th September, 1982. In this case the Supreme Court referred to the Asiatic worker's case and ruled that children under 14 must not be employed, as construction was definitely a hazardous activity. It noted that while it was not possible to prohibit child labour altogether in the present socio-economic conditions, because it would be socially unacceptable, the Central Government should provide free education to the children of

labourers.

The above portrayal of seven judgements of the Supreme Court in litigation involving children in state institutions or in construction or other hazardous employment give insights of ground realities on the rights of the children in contemporary times. The Constitution and the laws promise a life with dignity to every child. The State is unable to fulfil even the basic minimum needs to enable the destitute, neglected and the delinquent children (whose number may exceed a hundred million) to develop their full potential and grow as healthy citizens in society. There are many explanations for this apparent failure of the society and the State towards children. The courts have taken Child Rights and principles governing them very seriously and have gone to farthest limits to give every child, particularly the neglected and the delinquent, an opportunity to enjoy the minimum guarantees of law. In 1985 the Prem Bhai Commission of enquiry set up by the Supreme Court, to investigate child bonded labour in the Carpet industry of Bhadohi-Mirzapur, identified and released 1500 children. In 1991 the Chief Justice Ranganath Mishra and Justice Yogeswar Dayal of the Supreme Court declared beedi manufacturing was an hazardous activity and ordered that "Child labour in this trade should be stopped immediately, or in a phased manner within three years.

## A. PUBLIC INTEREST LITIGATION

Public Interest Litigation [PIL] in India has taken deep roots. PIL is a new class of litigation developed which differs from traditional litigation inasmuch as, there are not plaintiffs or defendants nor state/complainant v/s accused; where a government department or a public authority is found to be transgressing the law or committing acts of oppression, injustice, exploitation, or where it is guilty of such acts as pollution of the environment for which there is not provision in ordinary civil or criminal law, anyone who is offended or injured or likely to be affected or any one who feels it is a cause of sufficient public interest can bring an action known as Public Interest Action or Social Interest Action.

As noted in a recent case by the Supreme Court of India itself, seeds of the concept under consideration were sown in India by Justice Krishna Iyer in *Mumbai Kamgar Sabha V/s Abdulbhai*, where he observed : Representative action, *Pro bono publico* and like broadened forms of legal proceedings are in keeping with the current accent of justice to the common man. Even Article 226 may be amenable to ventilation of collective or common grievances Public interest is promoted by a spacious construction of "locus standi" in our socio-economic circumstances<sup>47</sup>.

The concept of PIL had its origin in USA where the strict rule of "locus standi" was liberalised in the interest of justice. In UK, in Attorney General V/s Independent Broadcasting Authority, Lord Denning said that he regarded it "as a matter of high constitutional principle that if there is good ground for suppose as that a government department or a public authority is transgressing the law, or is about to transgress it, in a way which offends or injures thousands of Her Majesty's subjects then in the last resort any one of offended or injured can draw it to the attention of the court of law and seek to have the law enforced<sup>48</sup>.

Within their original jurisdiction under Articles 226 and 32, the High Courts and the Supreme Court can issue writs against the State to set right the grievance of an aggrieved party by issuing writs/orders/injunctions, etc. This, however, is only against public authorities. The Supreme Court has taken the initiative in playing a positive role in espousing the cause of the poor, indigent, undertrials, prisoners, women, bonded and unorganised labour, scheduled castes/ tribes and the downtrodden, etc. In many such cases the court has entertained petitions without court fees and technical requirement of presenting writs, or having a petitioner and even without the aid of lawyers or standard hearing applications. It has acted on complaints even on the strength of a letter<sup>49</sup> by any person

including social worker or a voluntary organisation bringing public injustice before it and given a new definition to the concept of locus standi.

In a case where an organisation formed for protection of democratic rights addressed letters to one of the Judges of the Supreme Court alleging violation of labour laws in respect of workmen engaged in various Asian Games projects. The Supreme Court treated the letter as a writ petition and held that the organisation had locus standi and after hearing the parties, relief was granted. It also further appointed three Ombudsmen and requested them to make periodical inspections of the sites of the construction-work for the purpose of finding out whether the provisions of labour laws were being adhered to and the workers were receiving the benefits and amenities provided for them, under the law. The Ombudsmen were also asked to submit a report to the Court.

#### **B. THE ROLE OF THE NATIONAL HUMAN RIGHTS COMMISSION**

Pursuant to the Protection of the Human Rights Commission Act, 1993, the National Human Rights Commission was established in October, 1993, for the protection of the human rights in India, mainly to seek redressal and remedy for immediate wrongs and to strive for the development of the culture of the human rights over the length and breadth of the country.<sup>43</sup> Amongst priorities of the NHRC has been the protection of civil liberties. For this, the Commission was required to adopt a well informed and unambiguous position on the Terrorist and Disruptive Activities [Prevention] Act [TADA], and follow-through upon its convictions.<sup>44</sup>

Among the numerous priority concerns of the Commission are; female infanticide, child labour, protection from torture, treatment in areas of armed conflict, to mention but a few. Under article 44 of the Convention, States parties are required to undertake the necessary legislative, administrative and other measures for the implementation of the rights recognized in the Convention.

The Commission has been particularly determined to make progress to end child labour, starting with those employed in hazardous industries. The establishment of the National Authority For The Elimination Of Child Labour, headed by the Union Labour Minister, was welcomed by the Commission and is extremely useful to the Commission in specially monitoring child labour and Child Rights-related issues.

The Commission has made a special effort to study and to seek remedies to the problems of child labour in the glassworks and carpet-making industries of Uttar Pradesh. The beedi, match sticks and fireworks industries in Tamil Nadu and the slate-pencil making industry in Madhya Pradesh. It has focused, in particular on a project for the glass-works industry of Ferozabad, Uttar Pradesh, the project is based on three inter-related concepts: income-support for the families from whom children go to work in the glass-ware industry; schooling, including the creation of new facilities, for children weaned away from employment; and rigorous implementation of the Child Labour [Prohibition and Regulation] Act, 1986.

For the persistence of the debilitating practice of Child Labour, it is not the absence of law or treaties that is responsible, but the absence of will to end this practice, and it has been accompanied by a mis-direction of national priorities including financial resources. After over four decades, the provisions of the Directive Principles contained in Article 45 of the Constitution concerning universal primary education remain largely unfulfilled, to the great detriment of the nation and the children in particular. The Commission has recommended the adoption of appropriate legislation on compulsory primary education, matched with the necessary resources required for this purpose. Many laws have been enacted, at regular intervals since the nineteenth century, when the Indian Factories Act was passed in 1881. Even the Constitution under Article 24, prohibits any child below the age of 14 from employment.

The Commission concluded that the prevalence of poverty cannot or should not be permitted to provide an endless alibi for the persistence of child labour in the often brutal and exploitative forms in which it continues, to this day in our country. The Commission understands that legislation has been drafted to amend Child Labour [Prohibition and Regulation] Act with a view to strengthening its provisions. It is both necessary and imperative that early action is taken in this regard.

Despite its dedication to the cause of Child Rights in India, the NHRC has not been able to make any notable progress in accessing to the judiciary on Child Right matters. The Commission has power under Section 18 of the Protection of the Human Rights Act, 1993, to move the Supreme Court on matters relating to its sphere of activity. For instance in the case of the complaint alleging that some 400 children had died in Phulbani district of Orissa, as a result of acute malnutrition, accompanied by repeated attacks of malaria, chicken-pox and various water-borne diseases,<sup>45</sup> it is not clear why NHRC preferred not to go to the Supreme Court.

### **C. NON-GOVERNMENTAL ORGANIZATIONS.**

India has a large number of NGOs, activists and autonomous groups working with children in various parts of the country, and the range of issues they have taken up covers all the rights enshrined in the Rights of the Child Convention. Their involvement in preparation of the country report ensures that it accurately reflects ground realities and incorporates a critical focus on the progress made in translating policies and programmes into action at the grassroots.

There exists a need for a clearly articulated "rights" approach in relation to all children's issues. The "basic needs" or "minimum needs" approaches which formed the basis of several initiatives both governmental and non-governmental in the past were considered no longer valid, since they were essentially Palliative. On the other hand, affirmative of



Children's Rights was the starting point for questioning of structures and systems which result in the denial of these rights, and could form the basis of fundamental and sustainable change in the situation of the children. The large number of successful NGO's approaches and experience in alternative models of development should be incorporated into government strategies.

The Constitution of India, in its Parts III and IV, has provided clear guarantees for most of the rights detailed in the Constitutions. Since 1990, these rights have been enlarged through the process of judicial interpretation and review.

Adequate and reliable data on the situation of the children are not available, either to government or NGOs. This has proved to be a serious constraint in planning, resource allocation and monitoring, for the Government. There exists the need for innovative and effective partnerships between the State, NGOs, professionals and community organisations in planning, implementation and monitoring of interventions and in initiating and supporting collective social action for Child Rights.

NGOs cannot be the vehicle for totally eliminating child labour as they cannot affect the crucial factors responsible for children working i.e., NGOs cannot ensure full employment, bring about a change in wages nor affect structural changes within a trade. At best, NGOs can initiate and support social mobilisation and

public education on the evils of child labour. Further, the NGOs cannot substitute the State. The basic function of NGOs is to empower community groups to raise their voices, initiate mobilization on social issues and make recommendations to the Government policy makers. For playing an effective and useful role, the NGOs need to educate themselves on the various laws/legislations prevailing in the country especially those related to Child Rights and Human Rights, Whenever a child/children/communities are deliberately denied their fundamental rights to survival, growth and development, the NGOs must file cases and writ petitions and do investigative reports which can be verified, and publish them so that a public opinion is created. Indeed many of the PIL petitions emanated from them, as evidenced by the above study of a selected number of cases. NGOs may either move the judiciary directly or alert the NHRC to move the Supreme Court after due investigation.

Conventionally, Indian municipal courts have not entirely followed the same principles of interpretation of treaties as those followed by international tribunals or organizations. However, they are constitutionally duty bound, to adopt principles of interpretation of treaties which have been internationally approved. To a great extent they interpreted those treaties incorporated by legislation, into Indian law. As far as Child Rights are concerned, the Indian judiciary has upheld the principles enshrined in the Connection of the Rights of the Child

and has implemented them in Indian municipal laws and courts, within the limitations under which it usually operates. The Indian judiciary has never failed to fully support, protect and promote Child Rights in India, through its several landmark judgments. Even if the legislature and the enactments fail to fulfill their duties towards children, the children can seek solace in the fact that, the Indian judiciary will uphold and implement Child Rights according to the due process of law.

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## **CHAPTER - V**

## CONCLUSION

Probably no lasting conclusion can be drawn on an evolving a subject as monumental as the Child Rights. It is not at all easy to come to grips with an issue which concerns no less than 1.5 billion children of the world. The present conclusion is therefore rather tentative.

The concept of the Rights of the Child has not had a long history of recognition. Activities in the area of international protection of Children's Rights date back to the period of the League of Nations, with the adoption of the League conventions prohibiting traffic in women and children (1921), and slavery and the slave trade (1929). Moreover, the International Labour Organization (ILO) has, beginning with the year 1919, adopted numerous conventions aimed at the abolition of child labour. The Geneva Declaration of 1924, also known as the Declaration of the Rights of the Child, which was adopted by the Assembly of the League of Nations in the name of "Men and women of all countries" was an international instrument of great importance for the protection of children. Most of the rights of the Universal Declaration of Human Rights, 1948, relate to children either directly or indirectly though some to a greater extent than others. Several of the provisions are particularly or exclusively relevant to children. The Declaration is thus the definitional matrix of internationally proclaimed human rights, in general and Children's Rights in particular.



Eleven years after its proclamation of the Universal Declaration of Human Rights, the United Nations General Assembly unanimously adopted the United Nations Declaration of the Rights of the Child which fully incorporates and builds upon the provisions of the Geneva Declaration of 1924. The linkage between the Universal Declaration and the Declaration of the Rights of the Child also lies in the fact that, for the greater part, the latter amplifies the provisions relevant to children contained in the Universal Declaration where the Declaration of the Rights of the Child breaks new ground. Its provisions are a logical extension of principles articulated in the Universal Declaration.

At the very outset, the study firmly concludes that Child Rights are a part of the Human Rights. Perceptions of human rights are also reflective of social and class positions in society. The economic backwardness of countries has been used to establish the primacy of economic development over human rights. The argument is in part, that civil and political rights are neither meaningful nor feasible in conditions of want or poverty. Therefore the first priority of the state must be to promote economic development. It is implied that economic development may well require restrictions on human rights, both to provide a secure political framework in which it can be pursued and to remove obstacles in its way (e.g., through forced movement of people from lands required for "development").

In addition to the views of non-governmental organisations, non-official voices are many. The views on

human rights of the most oppressed are not articulated, or when articulated, are not heard. They are the worst victims are not of the denial of human rights, and in desperation they turn to violence or other dramatic challenges to authority.

Since human rights are of universal concern and universal value, the advocacy of human rights is not an encroachment upon national sovereignty. International cooperation and solidarity are a must for the promotion of human rights, as a refutation of claims of national sovereignty over human rights issues.

The poor state of human rights is because of the international economic order whose reforms through structural changes as well as the adoption of Convention on the Right to Development. There is a much closer connection between domestic oppression and International exploitation, in the collaboration of local economic and political elites with multinational corporations and agencies. Economic growth must be accompanied by a wide measure of egalitarianism, the protection of the right of the workers, especially child workers, migrant workers and democratic practices at work places. Nor must economic growth be undertaken at the expense of land, customs and autonomy of long settled communities. Unless these and other community concerns are safeguarded in the process of economic growth, development is perverse and adds to the violations of human rights and dignity which includes children as well because Child Rights is a part of human rights.

It is clear that the human rights conventions fully support the objective of "development" in all its forms. At the same time they do not afford to the government of any State that adheres to then any pretext for abridging or denying the human rights of the inhabitants of the State, in the purported interests of economic development alone. Since 1945, human rights have become one of the central pillars of the international political and legal order, together with the outlawing of aggressive war, and the equal rights and the self-determination of all peoples.

Few governments are universally popular with their own citizens, but most citizens will accept even an unpopular government-provided they regard it as legitimate. This sense of legitimacy appears to be deeply rooted in humanity, and is found in virtually all the cultures of the world. Today, it is the human rights performance of the government which provides one of the most important criteria for its legitimacy.

The main contribution of the Convention on the Rights of the Child has been the codification of children's rights into one international document and recognising aspirations, mankind has for its children.

Conventions and Declarations make promises and set high aspirations. But they fail to make an impact mainly because they do not deal with the actual forces that create the need for a right in the first instance, i.e., the socio-economic and cultural and political systems. Secondly, there are no implementing provisions and thirdly, where there is a

provision for this, it is restricted to making reports and recommendations. The states parties are at large and no responsibility is placed on them for their acts and omissions. Unfortunately today the state has the lions share in the violations of human rights, especially children's rights, affected by their socio-economic and political ideologies. States today are unanswerable. So the rights they grant and violate as they please, are no rights at all. The development process which was initiated immediately after independence, inspired by of the Indian constitutional objectives, through progressive legislative and supportive measures, has over time failed to bring out perceptible change in the status of the child because of the rapid growth in population, poverty, illiteracy and the absence of pragmatic approach to resolving these fundamentals social problems.

The Indian society's failure with children is intertwined with its larger ethos of discrimination, injustice and its own brand of racism. The children who get the least are those who need most. The children of the poor have the least protection of the laws, the poorest services, the most vulnerability to bad treatment. They have a right to make claims, and adults must be responsive to these claims. The latter can no longer assume it is only at their pleasure that children are permitted to make claims. Only then can a just society be established.

In the absence of a strong trade union movement in colonial India, labour laws were primarily responses to various conventions of the International Labour Organisation.

After Independence, child labour legislation evolved in response to public pressure in particular situations. Indeed it was a fire in Sivakasi, Tamil Nadu, which gave the impetus for reviewing the regulation of children's work in hazardous occupations. The Child Labour (Regulation and Prohibition) Act, 1986, replaced half a century old law on the same subject. However as of today, there is no legislation on children's work.

Most of the laws pertaining to children's work were enacted within the first two decades of Independence, but did little to check exploitation, even in the most visible conditions. Child labour for economic reasons or for sheer survival has been a social evil, which the Indian society and government have failed to keep in check, let alone eliminate it. Underneath the impressive veneer and national pride about our 5000 year old civilizational legacy lies a history of systematic violations of basic civil, and human rights of large sections of our population.

The problem of human rights, and of Child Rights in India in situations of mass poverty, is basically one of redistribution, access and needs. Economic development must at least mean that, people will be given the right to be and remain human. Total and continuing destitution and impoverishment exposes people to a loss of their humanity. There is a steadily growing emphasis on a conception of development which meets basic needs viz., food, shelter clothing, health and education. Any process of growth that does not lead to their fulfilment or even worse disrupts them,

is a travesty of the idea of development human rights particularly Child Rights. Human rights cannot be divorced from justice.

That is why the Constitution of India has taken an integrated view of justice. It speaks of justice social, economic and political. There has not been any notable progress in the development of human rights in India, in spite of the various Constitutional safeguards and when even the Supreme Court has increasingly sought to merge the Directive Principles of State Policy, unenforceable in a court of law, with the fundamental rights which are enforceable in courts in the field of education environment and health. Directive Principles make it the "primary duty" of the State to raise nutrition levels and public health. In no society that takes human rights seriously should there be allowed a state of affairs where human beings become sub-human .

All the seven sets of fundamental rights in India are available to children with as much authority and accessibility as that with adult citizens. There is a growing body of case law which developed the application of these rights to children and have expanded their scope in order to make them meaningful to children. This was accomplished by the Indian Judiciary using the technique of harmonious construction of Part - III (Fundamental Rights) and Part - IV (Directive Principles of State Policy) of the Constitution side by side with India's treaty obligations and obligations under the U.N. Convention on the Rights of the Child, 1989'. In this regard, the performance of the Indian judiciary stands out as a signal

contribution to the implementation of human rights generally and that of Child Rights in particular.

Despite the inherent limitations of the judicial process (i.e., it cannot legislate, it has to wait for a case to be brought for adjudication, it has to decide on facts and law as presented by the parties etc.), the Courts have taken Child Rights and principles governing them very seriously and have gone to the farthest limits to give every child, particularly the neglected and the delinquent, an opportunity to enjoy the minimum guarantees of law.

Children have an access to justice through public interest litigation (PIL). It is through the High Court and the Supreme Court that judicial remedies and procedural standards have been evolved and accountability established on issues of human rights and Child Rights, in addition to an activist response granting appropriate reliefs and reminding governments of their constitutional obligations towards children. Through a series of decisions mainly rendered during the last 10 to 15 years, the judiciary has succeeded to a large extent in bringing Child Rights to the mainstream of human rights discourse and in extracting greater accountability from governmental agencies to the protection of Child Rights.

However, in one sphere the judiciary has failed in its responsibilities towards children. This is in respect of procedural justice under the Juvenile Justice Act, 1986. The charge of inordinate delay in disposal of cases is indeed a fact in many court proceedings. Unimaginative disposition of

juvenile delinquents and lack of infrastructural support have led the whole system counter-productive, authoritarian and inimical to Child Rights.

It is imperative that the judiciary bestows greater attention to juvenile courts, its personnel, its procedures and infrastructural facilities available to it. Perhaps the system of public participation provided for by law is required the most in the juvenile justice area than in any other field and attitudes and approaches of the judiciary will have to change to attract this necessary input in dealing with children in conflict with the laws.

Today, the demands of the Convention, the occasional directions from the Supreme Court and frequent media coverage on the plight of children are compelling government agencies to correct their record by fresh legislative amendments and collective action.

Taking into consideration the plight of children and the prevalence of child labour, there exists a direct correlation between enrolment in schools and the prevalence of child labour. Based on the data gathered from the Indian experience, it is clear that Indian government policy has not attacked the problem of child labour effectively. Small scale industries are legally permitted to use child labour directly. There is no statutory protection for children in factories that employ people less than ten. The government support for small scale sector promotes the employment of children in unregulated hazardous work.



The prospects for change in the status of children in contemporary India would depend on the initiations of four institutions, namely the media involved in public education of the state of affairs, the non-governmental organizations lobbying for policy changes, the legal profession and the judiciary, and the international organizations committed to welfare of children.

The difficulties especially for children in accessing justice and the delay involved in the judicial process further aggravate the situation and result in non-enforcement, little noticed or challenged. The notion that children have equal value in law as adults is a notion yet not internationalized by social policy and administration. Herein has the basic problem in implementation of child Rights. The result is disastrous for the civil rights and freedoms of the children involved and the well-being of the young citizens of the country. The personnel of the system, the police, the judges, the probation officers the case workers, the voluntary, agencies etc. do not have proper orientation, training or level of commitment required to make a difference in the quality of justice administered to children.

With regard to child labour, the apathy and inability of the state machinery in tackling the problem are quite apparent. This discourages the enforcement machinery from taking up further prosecution and encourages the employer. An effective approach to eliminate and prevent child labour is by way of imparting compulsory primary education to all children below 14 years. The NGOs must be actively associated

in the policy formulation, implementation of legislation, government programmes and monitoring of situation of working children by regular interaction.

In today's economic scenario there is an alarming emphasis on development, almost at any cost. In this steam-rolling process many human beings are marginalised and are treated necessary only as regards their economic input. As objects and subjects of development they are ignored. The child labourers in India form one such group.

The UN Declaration of the Human Right to Development, 1986, emphasises on people centred development, i.e., the interests of those who are poor and less advantaged must be the key concern of development. The people must be active participants in development activities. It is this which has to be borne in mind in dealing with approaches to welfare of child labourers and gradual abolition of child labour.

Penalties presently provided under the various legislations prove counter productive. It has absolutely no deterrent effect. The employer would rather pay the occasional negligible fine than forgo child labourers with all their benefits.

Studies reveal that most of the child labourers come from regions which are economically backward and drought prone. Also, a child's income is a critical input to the family's survival. Not surprisingly then, every third household in India has a working child.

All attempts to make primary education compulsory would have to be addressed within the socio-economic complexities

of India. Making education compulsory alone will not necessarily result in elimination of child labour.

It is evident that imposition of compulsory primary education would result in families dependent on children's income, becoming economically unviable. Education must provide for opportunities to develop technically in artisan craft and diversify the opportunities before them. The educational system should also facilitate multi point exits for those children who would like to pursue alternate specialisation and professions. However any attempt towards formulating a policy of compulsory education must include a nutritional component i.e., high quality of nutrition must be offered to the children via the mid- day meal scheme along with qualitative schooling.

Minimum social security that covers basic needs of food, shelter, clothing and health, is a necessary prerequisite in the present day context of the situation of the child.

The basic needs of children are known- safe water, nutritious food, primary health care, clean environment, basic education, and loving care. These in turn need maternal as well as child care, local production storage and consumption of more and better quality foods, education of the mother, simple technologies to lighten her daily tasks and so on. In so far as families cannot help themselves, the community and then the government have to be responsible for child development.

The social context as well as the development experience of India suggests the need for a massive redirection of public

resources for human, especially child, development. There is an unfortunate tendency to regard child wellbeing as a social service and not as an economic input in a key area of progress.

It has been established that investment in children can be more attractive, even by the narrowly economic measure of rate of return, than physical investments like factories or the cost intensive human development investments. Development policy needs therefore to be imbued, with a child oriented approach. Development efforts ought to lead at least to fulfilling the basic needs of children.

Water and sanitation are inputs for child development no less crucial than nutrition, health care and education. The extent of deprivation of a simple resource like clean water is staggering. Around a third of India's villages do not have access to it. Sanitation in the towns is partial. In the rural areas it is the exception.

It would be wise to make national development children oriented and it would be practical to approach child development from the angle of community-based basic services.

Of the world's 1.5 billion children, four fifths live in the developing countries. Among them, about 600 million suffer from poverty and hunger. The main reason for this is that the international and national economic systems work, in effect, to their disadvantage.

In the field of basic needs of children, the response of governments to reduced resources due to adverse economic factors should take into account its social impact on

children, particularly from low income groups, in order to ensure that basic services for them, (including food, nutrition water, health care and learning opportunities) do not fall below the essential minimum. Uniquely, the development of children embraces a spectrum of basic needs and therefore of basic services. To be effective these have to be concurrently available to the same child.

The core of the study reveals that, to a great extent, the Rights of Child Convention reiterates and elaborates what is already contained in the Constitution of India. In India the Supreme Court has liberalized the rule of "locus standi" which led to the birth of public interest litigation which has undeniably come to the rescue of the cause of children who are in most need of it. NGOs, social organisations and right thinking citizens have used it to enforce implementation of Child Rights in India.

The Non-Governmental Organisations (NGOs) are playing a crucial role in protecting the Rights of the Child through the Indian judiciary but also in the general and special case of children.

The National Human Rights Commission though recently established has not done much work for children. The few cases it has taken up have been lacking in follow-up and failure to enforce the implementation of its decisions. Indeed, it has not actively pursued its access to the Supreme Court to ventilate the Rights of the Child.

As far as the relationship between international law and the Indian law is concerned the Constitution empowers the

Parliament to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body. Generally, Indian courts have held that an international treaty to which India is a party, has to be implemented. Compared with the number of treaties to which India is a party, the number of treaties which have been incorporated into Indian law, either fully or partially, is relatively small.

As a matter of course, the Municipal Courts do not follow the same principles of interpretation of treaties as those followed by international tribunals or institutions. Indian Courts, in this respect are under a constitutional duty to adopt internationally accepted principles of interpretation of treaties. But they are generally not called upon to interpret treaties directly; they interpret treaties incorporated into Indian law by legislation. With regard to Child Rights the Indian judiciary has consistently helped children and has given justice based on the concerned public interest litigation. Except in the area of juvenile justice, the judiciary has become the staunchest supporter and promoter of Child Rights in India.

On the other hand, the executive and the legislature have been woefully lacking in doing their part for Child Rights. Politics has been largely responsible for the miserable plight of the majority of children in India.

With India's ratification of the Convention on the Rights of the Child in December, 1992 more than 90 percent of the world's children became "protected" by this Convention which will become the first human rights treaty in history to be universally ratified.

The study hopes that, as affirmed by the Declaration of the 1990 World Summit for Children and enshrined in the 1989 Convention on the Rights of the Child, nations will always abide by the principle of "first call for children" always-with their survival, protection and development given high priority-in times of adversity as well as in times of beneficence, in times of war as well as in times of peace.

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