Chapter IV

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The Constitution, Judiciary and the Child Labour

The United Nations Organization, the ILO and the UNICEF have organised many conventions on the rights of the child in order to elevate the humanitarian responsibilities of the world nations towards children to the level of International Law.

Following the inception of the League of Nations after the end of World War I, there had been a number of treaties and declarations. A comprehensive Human Rights Convention was drafted on the rights of the child, which has a binding effect on all member nations of the U.N.\(^1\) India has not been an exception.

The Constitution of India

In the debates to draft a new Constitution of India, there was no adequate and comprehensive discussion on the status or on the problems of the child.\(^2\) However, when the Constitution was adopted, its preamble importively made it universal and it is
still binding on one and all. The social economic and political justice; liberty of thought, expression, belief, faith and worship; equality of status, of opportunity; and fraternity assuring the dignity of the individual, the unity and integrity of the nation would be secured to all the citizens, implying or for that matter taking it for granted, that the term 'citizens, would and must also include the 'children' in its purview for the reason that they acquire citizenship by virtue of their birth.

The constitutional provisions relating to the welfare of children have been enshrined and incorporated in Parts III and IV which deal with the Fundamental Rights and the Directive Principles of State Policy respectively and the provisions are explicit and implicit as well. The explicit provisions relating to the welfare of the children are found in Articles 15(3), 24, 39(e) and (f) and 45. The implicit provisions are discernible from Articles 14, 23, 38, 41, 42, 46 and 47 of the Constitution.

The Fundamental Rights and the Child

A lengthy list of fundamental rights is contained in Part III of the Constitution. This Part or Chapter is acclaimed as the Magna Carta of India. The fundamental rights impose limitations on all powers of the Government and they are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The rights are regarded as fundamental, because they are fundamental in
the governance of the country. All the more, they are very much essential for the development of the individual’s intellectual, moral and spiritual potentialities. Again, these rights limit the range of government activity, in appropriate directions, in the interests of the liberty of the citizens. The negation or violation of these rights will tell upon the development of the individual. However, these rights are not absolute rights, because they are subject to reasonable restrictions.

While some fundamental rights are guaranteed only to the citizens of India, the others are guaranteed to other persons (i.e., for both citizens and non-citizens) within which the fundamental rights of the children are also implicitly included.

As the children of India are also the citizens of India, they can enjoy all the fundamental rights guaranteed under the Articles mentioned below. The fundamental rights which are available only to the citizens are:

a) The right not to be discriminated against on the grounds of religion, race, caste, sex or place of birth (Article 15).
b) The right to equality of opportunity in the matter of public employment.
c) The right to six freedoms enumerated in Article 19 i.e., freedom of speech and expression, assembly association, movement, residence and profession.
d) Cultural and educational rights conferred by Articles 29 and 30.
There are some fundamental rights especially provided for children, though other fundamental rights are also applicable to them.

Article 14 guarantees equality before law and equal protection of law to all persons within the territory of India. Article 15 prohibits discrimination of persons. But, Article 15(3) enables the State to make special provisions in its laws for giving favourable and special treatment to children and women. Of course, no ground is specified, but preferential and protective treatment is permitted on consideration of the inherent weakness of children. Clause 3 of Article 15 serves as an exception to clauses 1 and 2 of Article 15. But the fact remains that since Article 15(1) does not make age a prohibited ground of discrimination, the reference to children in Article 15(3) seems to be pointless or out of the place. But it cannot be denied that the State can make law for the welfare of the children giving preferential treatment to them as compared to other persons in the society.

Article 21 embarks upon the protection of life and personal liberty of the people, including the children. The “right to life” in the context is held to be not a mere “animal existence”; but it is to be related to, or imbued with, “human dignity and values”

Traffic in human beings and other forms of forced labour, including ‘beggar’ and exploitation are prohibited under Article 23 of the Constitution.
True that this Article does not specifically mention or speak about children. Still, it is applicable to them because they constitute the most valuable section of the society with a predictable future of ruling the country. Not withstanding this truism, numerous children are being exploited with or without the consent and connivance of their parents, because of their poverty. In the absence of parents, their exploitation by their close relatives is still deeper, painful and abominable. They are deprived of education, of other civilities of life. They are compelled to make all sorts of work that are injurious to their health and personality.

In the rural areas, even today, the destitute parents pledge their children to the landlords as full-time servants or part-time workers to do various kinds of activities-domestic or otherwise.

In the urban areas, the exploitation of children exists in various forms as domestic servants, callers, helpers to the artisans and skilled workers, office or errand boys. Millions of children are exploited in violation of this fundamental right and the Governments have not been responsive to this plight or the problem. In fact, the existing legislative and administrative measures are inadequate or the officials was willing to act.

The term 'beggar' carries a wider connotation with reference to children. Beggar does not imply total absence of payment of wages. Even inadequate payment for the work done
by the child amounts to forced labour. As S.K. Sharma observes, “the most atrocious and heinous crime against the helpless children is that they are captured and maimed by the criminal gangs to indulge them in the begging and immoral business. Sometimes, the children of tender age are enticed for flesh trade, thus all in violation of Article 23.\textsuperscript{12}

Article 24 of the Constitution reads: “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”. Be it so. But, under the prevailing condition of poverty in the country, it would be very difficult to implement the above provision. Children below a particular age and in any dangerous work are prohibited because of their frail, physical nature.\textsuperscript{13} Even otherwise, this Article does not impose an absolute bar to the employment of children below 14 years of age in other occupations except in any factory or mine or in any other hazardous employment. Further, even with respect to children above the age of 14 years; it can be inferred that all agreements expressed are of doubtful validity in case of exploitation.

Article 24, is without any doubt, enforceable against everyone and by reason of its compulsive mandate that no one can employ a child below the age of 14 years of age in a ‘hazardous employment’\textsuperscript{14} irrespective of the difficulty in establishing or determining the nature of hazardous employment. But, the Supreme Court has made it clear that “hazardous
employment of children below 14 years is a Constitutional prohibition which, even if not followed up by the appropriate legislation, must operation proprio vigore.” It is indisputable that Article 24 is an additional precautionary measure, securing distributive justice to children.

It is needless to argue whether the fundamental rights available to ‘any person’ can be available to the ‘child’, as well. As a child cannot be and ‘artificial person’, the former is entitled to enjoy those rights meant for ‘any person’ in India.

It is clear from the verdict of the Allahabad High Court, which held that “for the purpose of Section 304-A(x) of the Indian Penal Code, the word ‘person’ includes a child born or unborn. A child in the womb can be regarded as a living entity with a life of its own.” The Hindu Law also holds that a child in womb is deemed to be in existence as a person and is entitled to share the joint family property. Appropriatively, the child care and welfare measures must be co-extensive with those of women, particularly the child-bearing women. Thus, the fundamental rights which are available to any ‘person’ can also be available to a ‘child’.

**Directive Principles and the Child**

Part IV of the Constitution contains the Directive Principles of States Policy which are also fundamental in the governance of
the country. Unlike the Fundamental Rights which are 'justiciable' and 'negative injunctions', the Directive Principles are 'non-justiciable' and 'positive commands'. They also provide the guidelines to the policy makers and administrators of the country and have precedence over the Fundamental Right.

The main thrust of the Directive Principles is "to fix certain social and economic goals for immediate attainment by bringing about a non-violent social revolution". Through such a social revolution, the Constitution also endeavours to achieve the objectives of the child welfare.

For this purpose, the Constitution has certain provisions in Part IV. The Directive Principles have been designed "to strive to promote the welfare of the people by securing and protecting, as effectively as it may be, a social order in which justice, social, economic and political shall inform all the institutions of national life". An effective implementation of this principle, in turn, is expected to promote proportionately, the child welfare also.

**Obligations of State Governments**

The State is obliged under Article 39(e) and (i) to evolve a policy to eliminate the abuse of tender age and to free children from the circumstances forcing them to enter into avocations, non-commensurating with their age or strength and stamina. The State is also directed to create socio-economic conditions and
infrastructure for the healthy development of children and to provide facilities and climate for the exercise of freedoms and maintenance of dignity, leave alone the fact that it is incumbent on the State to protect the children against exploitation and moral, mental and material abandonment under Article 39 of the National charter.

Implicitly, under Article 41, the State has a binding duty to provide social assistance to the children, as in the case of the adults, who suffer for want of the basic necessities of life. The implementation of this provision is also meant to promote the children’s welfare, proportionately in terms of ‘distributive justice’.

Article 42 is also implicitly important for, it calls upon the State to make provisions for securing justice and human conditions of work and for maternity relief. The measures for maternity relief are meant for the expectant mothers during the period of pregnancy and after the birth of the child. These measures of this particular import are expected or interpreted to promote the health of the children and to provide congenial and healthy environments for their upbringing.

Article 45, under the Directive Principles, is supplementary to that of 24 in the Fundamental Rights. When read between the lines of these Articles, a common and undisputable factor can be perceived. While Article 45 imposes the duty upon the State to provide free and compulsory education for all children, until they
complete the age of 14 years within a ten year period of the commencement of the Constitution, Article 24 signifies that the child is to be kept occupied in some educational institution. It is inferred that Article 24, quite undoubtedly, supplements the Clauses (e) and (i) of Article 39, thus ensuring the 'distributive justice' to children in matters relating to education. Obviously, these Articles require an urgent amendment in order to raise the age limit from 14 to 16 years to ensure the children's education upto the level of Matriculation, leave alone the development of their personality.

**Article 46**, provides that the State shall promote with special care, the educational and economic interests of the weaker sections of the people, and in particular, of the SCs, STs and other OBCs, and shall protect them from all forms of exploitation. The implementation of this principle is bound to protect, implicitly, the welfare of the children of these sections of the society, who are more vulnerable to the nefarious problem of child exploitation than others. **Article 47** also imposes a primary duty upon the State to raise the level of nutrition and the standard of its people and improvement of public health. The usage of the term 'people' includes not only the adults but children as well. This provision is more relevant in the case of children as malnutrition can cause irrepairable danger and damage to their personality through mental retardation, blindness and so on.\(^\text{19}\)
These Directive Principles are not enforceable by the judiciary. Yet, they are also fundamental in the governance of the country. The State is obliged to apply these principles while making laws. If they are ignored by the governments, they have to answer before the electorate at the time of the election and they may be thrown out of power. In the democratic set up, vigilant public opinion is the real force behind the political institutions, which exist for the benefit of the people. As such, the governments ought to implement these principles relating to the welfare of the people, including the children.

Constitutionally, these principles may not have legal force behind them, but 'public opinion' is always behind them to serve as the highest tribunal. All the more, Article 31(c) gives precedence to the Directive Principles over the Fundamental Rights. Further, competent courts can examine whether a law is really intended to give effect to the Directive Principles, or it is intended, in the guise of giving effect to the Directives, to achieve some other purpose and take action thereupon.

**Special Laws for Children**

The child has been a subject of special laws and legal provisions. There are about 300 Central and State Laws and Statutes dealing with the concerns of the children and these have been enacted with the avowed intention of protecting, helping the children and achieving the goal of child labour welfare as enshrined
in the Constitution of India. The underlying conviction of all labour legislations is that it is one of the primary and principal duties of the State to protect and safeguard the interests and well-being of the workers, irrespective of age, caste, creed and colour.

India is a Welfare State and she is required to see that childhood is not abused. The dignity of the individual is the basis of the democratic society. Hence, the Constitution has declared the Fundamental Rights on the one hand and forbidden the traffic in human beings etc. On the other, the subject of child does not exclusively fall either in the Union or the State sphere. Different matters relating to child care and development are incorporated in the Union, State and Concurrent Lists. Besides the Constitutional provisions, there are at present 13 major legislative enactments, which provide legal protection to children in various occupations. Many amendments have been made in most of these enactments. Commensurating with the progressive outlook of the governments and to regulate the conditions of child workers and lessen the adverse effect of employment on their health education training. These are in conformity with the National Policy Resolution for Children, of 1974.

In the endeavours of protecting the child from various evils of labour and exploitation, the Indian Judiciary has also been doing its best through what is known as 'judicial activism'.
Judicial Activism and Child Labour

Kids are people too. Children have their own rights and are guaranteed with justice, liberty and equality, under the Constitution of India. While giving the Constitution to ourselves, we sought to achieve administrative and political unity and an economic and social revolution through democratic means. At the same time, the main thrust has been to aim at a ‘synthesis’ which would ensure “economic justice with political safeguards and political justice with economic safeguards”. In order to achieve these objectives, we have the legislative, executive and judicial organs of the government. These organs are supreme within their jurisdictions. However, to interpret the Constitution and to enforce the ‘rule of law’, an independent authority is essential and this is furnished by the courts of justice. The Supreme Court of India and the High Courts have been assigned important roles, and constituted as the guardians of the Constitution. Their role serves as the yardstick of the ground norms for other legislations.24

The Constitution accords a dignified and crucial position to the judiciary. It is the greatest unifying and integrating force our country. The Supreme Court, at the apex, expounds and defines the true meaning of law. It is the ultimate interpreter of the Constitution and this puts a second brake on the legislature and the executive, the first one being the political check of the people themselves.25
The Indian Judiciary is charged with the duty of holding the balance even between a State or States and the Union, and between the State and the citizens, and sometimes between the State and the individual. It has to hold the scales even in the legal combat between the rich and the poor, the mighty and the maimed, without any fear or favour.

The role of the judiciary in India has been quite significant in promoting the child welfare. Suba Rao, the former Chief Justice of India, held that "social justice must begin with child, unless the tender plant is properly nourished, it has little chance of growing into strong and useful tree. So, first priority in the scale of social justice should be given to the welfare of children."

It is in this spirit that the supreme Court has laid emphasis on the fact that the task of social justice is to take care of the child. It is, therefore, pertinent to discuss and assess the judicial response to the child labour welfare as an effective instrument to improve the status of the children in accordance with the spirit of the Constitution. The judiciary has been obliged to transform the 'status-quoante' into a new human order in which there will be equality of status and opportunity for all including children. The judicial mandate on child labour welfare has been examined under the followings heads.
Child Labour and Right to Education

The abolition of child labour is preceded and preconditioned by the introduction of compulsory education, which is interlinked with child labour laws. As per Article 24, employment of children below the age of 14 years is prevented. Article 45 is supplementary to Article 24 for, if the child is not to be employed below the age of 14 years, he must be kept occupied in some educational institution.27

The Court, in series of cases, has unequivocally declared that the right to receive education by the child workers is an integral part of the right to personal liberty embodied in Article 21 of the Constitution. It demonstrates that the right to education is necessary for the proper flowering of man, his mind and personality. Hence the right to education is one of the facts of the right to personal liberty. Further, the Delhi High Court, in the case of Anand Vardhan vs University of Delhi, observed that: "The law is, therefore, now settled that the expression of life and personal liberty under Article 21 of the Constitution includes a variety of rights, though they are not enumerated in Part-III of the Constitution, provided that they are necessary for the full development of the personality of the individual and can be included in the various aspects of the liberty of the individual. The right to education is, therefore, included in Article 21 of the Constitution".28
Similarly, the Andhra Pradesh High Court in its momentous decision in Murali Krishna Public School case pronounced that:

Right to education to Dalits is fundamental right and it is the mandatory duty of the State to provide adequate opportunities to advance educational interests by establishing schools. These decisions have paved the way for better educational opportunities for Dalits children, and they can compel the state to take positive action to provide educational facilities, economic support and proper atmosphere to the children belonging to the lower strata of the society and the failure of that the State to meet them would be violative of not only Article 45 but also Article 21 of the Constitution. Thus, judicial response to the right to education is positive and progressive to secure, in particular, to the children of the weaker sections of the society.

The Court has played a parental role, while directing the Central Government to persuade the workmen to send their children to the nearby schools and arrange not only for the school, but also provide free of charge books and other facilities. The Court also suggested that whenever the Central Government undertakes, it should provide that the children of the construction workers should be given facilities for schooling and this may be done either by the Central Government itself or making it binding on the contractors of the project work.

The Supreme Court has held in M.C. Mehta Vs State of Tamil Nadu that the children are the means under Article 45 of
the Constitution to be subjected to free and compulsory education until they completed the age of 14 years. The Court has, however, observed that the Directive Principles of State Policy have still remained a far cry and though, according to this provision, all children upto the age of 14 years are supposed to be in school, economic necessity forces the children to seek employment.29

Child Labour the Concepts of Locusstandi and Judicial Activism

It is generally seen that all the working children come from the families which are below the poverty line. There are no means to ventilate their grievances and that their fundamental rights are being violated with impunity. Keeping in view the pitiable and miserable conditions of the child workers, the Supreme Court has exhibited its wisdom and generosity by relaxing the concept of 'locus standi' and by encouraging the philosophy of public interest litigation. The judiciary is intended to indicate and promote public interest by rendering help to those people of the society who are unable to approach the court because of their poor economic conditions.

The issue of 'locus-standi' has arisen in a number of cases before the Supreme Court. It has very daringly held: "where a legal wrong or a legal injury is caused to a person or to determinate class of persons by reason of violation of any Constitutional or legal right or any burden is imposed in
contravention of any Constitutional or legal provisions or without authority of law, or any such legal wrong or legal injury or illegal burden is threatened, and such person or determinate class of persons is by reason of poverty, helpless or disability or socially and economically disadvantaged position, unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction or Writ or Order". Similarly Justice Krishna Iyer also observed that "in simple term, locus-standi must be liberalized to meet the challenge of time. In this connection, the following two cases are worth examining.

One important case in which the Supreme Court entertained a letter, sent by post as public interest litigation is People’s Union of Democratic Rights vs. Unions of India, famously known as “Asiad Case”.

The judgement of the Supreme Court in this case has not only made significant contribution to labour laws, but also has displayed a creative attitude of the judges to protect the interests of the child workers. The Court has given a clear dimension to several areas such as locus-standi, public interest litigation, enforcement of labour laws, minimum wages and employment of children.

The People’s Union of Democratic Rights addressed a letter to the Supreme Court annexing the report of the social activists regarding the conditions under which the workmen engaged in
various Asiad projects were working. Pointed reference was made in that report that was violation of Article 24 of the Constitution and of the provisions of the Employment of Children Act, 1938, namely, children below the age of 14 years were employed in construction work of various projects. With regard to the allegation against the provisions of the Employment of Children Act, the Delhi Administration and Delhi Development Authority took the stand that no complaint in regard to the violations of the provisions of that Act was at any stage received by them. They also defended that the Act was not applicable in the case of construction work, since construction industry was covered in the Schedule to the Act. Taking cognizance of the 'child workers' interest, the Supreme Court observed that large number of men, women and children who constitute the bulk of our population are today living a sub-human existence in conditions of abject poverty; utter grinding poverty has broken their back and sapped with moral fiber. They have no faith in the existing social and economic system.

The Supreme Court endeavoured to fight for the cause of these poor children and held that 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 it in exercise of the power conferred under Section 3(A) of the Employment of Children Act, 1938. We hope and trust that every State Government will take
necessary steps in this behalf without any delay, because construction work is clearly a hazardous occupation and it is absolutely essential that the employment of children under the age of 14 years must be prohibited in every type of construction work. That would be in consonance with Convention No.59 adopted by the ILO and ratified by India. Apart form this, we have Article 24 of the Constitution which provides that no child below 14 years of age shall be employed to work in any factory or engaged in any other hazardous employment. There can, therefore be no doubt that notwithstanding the absence of specification of construction industry in the Schedule to the Employment of Children Act, 1938, no child below the age of 14 years can be employed in construction work and the Union of India as also every State Government must ensure that this Constitutional mandate is not violated in any parts of the country.

In the important case, of M.C.Mehta Vs. State of Tamil Nadu, the petition submitted under Article 32 of the Constitution by way of public interest litigation, relating to the problem of employment of children in match factories in Sivakasi, the Chief Justice Ranganath Misra and Justice M.H.Kania, observed: “We are of the view that 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. The spirit of the Constitution perhaps is that children should not be employed in factories as the childhood is the formative period.”31
With respect to the welfare of the child labour, the Court dictated that compulsory insurance scheme should be provided for both the adult and children employees, taking into consideration the hazardous nature of the employment. The State of Tamil Nadu should ensure that every employee working in the match factories in insured for a sum of Rs50,000 and the Insurance Corporation, if contacted, should come forward with a viable group insurance scheme to cover the employees.

Further, the apex Court has also specified the meaning and scope of “traffic in human beings” and other forms of forced labour, including the bonded and pledged child labour. It has specifically pointed out in a plethora of cases that Article 23 of the Constitution has been intended to protect the individual not only against the State but also against other private citizens. Justice Bhagwati opined that “Article 23 strikes at forced labour in whatever form it may manifest itself, because it is violative of human dignity and is contrary to basic human values”. He further observed, “children’s programme should find a prominent part in our national plans for the development of human resources, so that our children grow up to become robust citizens, physically fit, mentally alert, and morally healthy endowed with the skill and motivations needed by the society. Equal opportunities for the development of all children during the period of their growth should be our aim, for this would serve our large purpose of reducing inequality and ensuring social justice.”
In sum, the judiciary has exhibited enough courage to uphold the interests of the children and left no stone unturned to improve the working conditions and other facilities of the child workers. It has made concerted efforts to safeguard them from the exploitative clutches of their employers by regularising their working hours, fixing their wages, laying down the rules about their health and medical facilities and imposing fines on the erring and exploitative employers. The judiciary has even directed the Governments that it is their duty to create an environment where the working children can have opportunities to grow and develop in a health manner with full dignity in consonance with the mandate of our National Charter. The history of child labour legalization laws are enclosed in Appendix V.
REFERENCES


3. Kindly refer to Articles 5-11 of the Constitution of India.

4. Please see Aristotle's "Politics" - Translated by Dunning.


6. 


9. *All India Reporter*, 1981, Supreme Court, 746 (Francis Coralie V. Union Territory, Delhi).

10. Article 23(1) reads: Traffic in human beings and beggar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law".


14. **All India Reporter,** 1964, Supreme Court, 469, Upon the Importance of Child Welfare in India.

15. **Ibid.,** 1982, Supreme Court, 1473 (People’s Union for Democratic Rights Vs Union of India.)

16. Mulla, D.F., **Principles of Hindu Law,** 1974, p.399. Also see **All India Reporter** 196, All. 590.


18. **Article 38** of the Constitution of India.

19. A report of the Indian Council of Medical Research points out not less that 60% of children in India suffer from protein coloria malnutritional anaemia.

20. **42nd Constitutional (Amendment) Act.**


32. **Ibid.**