CHAPTER - V
THE ROLE OF THE INDIAN JUDICIARY

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\(^1\) of the citizens and non-citizens alike\(^2\). The twin safeguards of equality before law and equal protection of laws\(^3\) 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 recognized, whether under unwritten or written constitution.

India is the largest democracy in the world, a sovereign, socialist, secular\(^4\), democratic republic with a comprehensive charter of rights written

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\(^2\) The Chairman, Railway Board & Ors. vs. Mrs. Chandrima Das & Ors, Judgment-today; SC Vol.no.10 Feb, 3, 2000. In this case the victim is a Bangladesh National.

\(^3\) Article 14 of the Indian Constitution: The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. The source of article 14 lies in the American and Irish constitutions. It may be mentioned that the Preamble to the Indian Constitution speaks of equality of status and of opportunity and this article gives effect to that principle in the text of the Constitution. In a sense, the demand for equality is linked up with the history of the freedom movement in India. Indians wanted the same rights and privileges that their British masters enjoyed in India and the desire for civil rights was implicit in the formation of the Indian National Congress in 1885. The Commonwealth of India Bill, 1925, in clause 8 demanded, *inter alia* equality before the law and provided especially that there was to be "no disqualification or disability on the ground only of sex", along with the provision that all persons were to have equal right to use of "roads, courts of justice and all other places of business or resort dedicated to the public". See Chakravarty and Bhattacharya, Congress in Evolution, (1940), p.27. The right to equality finds place in the report drawn up by Motilal Nehru as Chairman of the Committee appointed to determine principles of Constitution for India (1928). The Karachi resolution (March 1931), reiterated, *inter alia, this right in the resolution on fundamental rights and economic social change*. The Sapru report 91945) incorporating the proposals of the Sapru Committee, while laying emphasis on "minorities" did enunciate the fundamental rights and in page 260 of the report, described the fundamental rights of the proposed new Constitution as a standing warning to all: "that what the Constitution demands and expects is perfect equality between one section of the community and another in the matter of political and civic rights, equality of liberty and security in the enjoyment of the freedom of religion, worship, and the pursuit of the ordinary applications of life".

\(^4\) Word in italics inserted by the Constitution (42\(^{nd}\) Amendment) Act, 1976 (w.e.f. 03.01.1977).
into its constitution, a party to most international, instruments 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 fifty-one years of independent existence, won through a freedom struggle, which gave to the world the message of non-violence.

The Indian Constitution lays down the 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


6 Art.51: The State shall endeavor to (a) promote international peace and security; (b) maintain just and honorable relations between nations; (c) foster respect for international law and treaty obligations in the dealings of organized peoples with one another; and (d) encourage settlement of international disputes by arbitration. Explanation: This Article embodies the object of India in the international sphere, but it does not lay down that international treaties or agreements entered into by India shall have the force of municipal law without appropriate legislation: Verghese vs. Bank of Cochin AIR, 1980 SC 470; Civil Rights Committee vs. Union of India AIR 1983 Kant 85 Para 18. In order to be binding on municipal courts: Ali Akbar vs. UAR AIR 1966 SC 230 Para 30, legislation under VII, List I (14), would be required if a treaty (a) provides for payment of money to a foreign power, which must be withdrawn from the Consolidated Fund of India: Moti Lal vs. UP AIR, 1951 ALL, 257 FB; or (b) affects the justifiable rights of a citizen: Meghabhai vs. Union of India AIR 1969 SC 783, 789, 807; Berubari Union, inre, AIR 1960 SC 845, or (c) requires the taking of private property, Art.31(1), taking of life or liberty (Art.21), such as extradition: Ali Akbar vs. UAR, AIR 1966 SC 320, or imposition of a tax (Art.265), which under the constitution can be done only by legislation; or (d) modifies the laws of the state (State of West Bengal vs. Jugal SC 1171 Para 6). The Legislative power belongs exclusively to the Parliament (Art.353, post): State of West Bengal vs. Jugal AIR 1969, SC 1171 Para 6. Even an amendment of the constitution would be required where the implementation of treaty would involve cession of Indian territory to a foreign power: Ali Akbar vs. UAR AIR 1966 SC 230 Para 30, but nothing is required where it merely involves the settlement of a boundary dispute not involving ‘cession’: Meghabhai vs. Union of India AIR SC 783, 789, 807, Berubari Union, inre AIR 1960 SC 845. Outside the foregoing specific matters, legislation or constitutional amendment would not be required, and a treaty may be implemented by the exercise of executive power under Article 53: Meghabhai vs. Union of India AIR SC 783, 789, 807, Berubari Union, inre AIR 1960 SC 845. In the absence of contrary legislation, Municipal Courts in India would arespect
Constitution. While introducing this provision in the Constituent Assembly, Dr. B.R. Ambedkar, Chairman of the Drafting Committee, of the Constituent Assembly said: “the propositions contained in the new Article are so simple that it seems to be supererogation to try to explain them to the House by any lengthy speech”.

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. It was proposed that, in addition to laying down India’s foreign policy and 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 encourage settlement of international disputes by arbitration as a means to avoid war. The principles of independence of a state underscore the independence of state and the right of a state to exercise exclusive, limited or concurrent jurisdiction both within and beyond its territory, subject to the limits imposed by international law. 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 judgment of a court.

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7 Constituent Assembly Debates Vol.7 (1948-49), p.595.
9 See statement by B.M. Gupte and M.A. Ayyangar, CAD, n.7, at 603-604.
II. INTERPRETATION OF TREATIES

Under international law, it is well settled that a non-statutory role of construction does not amount to a law in force "within 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 organized peoples with one another". There is thus a constitutional imperative that the interpretation of treaties conforms 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\(^\text{14}\). 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 statute incorporating therein the treaty or the relevant provisions thereof or a statute which translates into terms of municipal law the substantive provisions of the treaty either with or without express reference to the treaty\(^\text{15}\). 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 national courts follow them. Whatever be the position in other jurisdictions, the position in India is that 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 of the Constitution). Article 51 evidently addresses itself to the Central Government and to provincial units of the

\(^{14}\) Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950 p.65 at p.70.
\(^{15}\) P. C. Rao, n. 12, pp. 156-7
country, as the Central Government is competent to undertake international obligations\textsuperscript{16}.

The International Court of Justice and its predecessor, the Permanent Court of International Justice, have pursued the textual interpretation and the teleological approaches at one time or another, generally favouring the textual approach. The International Court of Justice made it clear that it was its duty "to interpret the treaties, not to revise them"\textsuperscript{17}. It has to be noted that the provisions of the Vienna Convention on interpretation of treaties are by no means exhaustive. They emphasize 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 maxims known to customary law, which are now subsumed in the provisions of the Vienna Convention. Yet the Vienna Convention has made a significant contribution towards dispelling the doubts around doctrinarian approach laying down clear directions for the interpretative process.

**INTERPRETATION OF INDIAN LAW IN THE LIGHT OF TREATIES**

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

\textsuperscript{16} See Maghabhai vs. Union of India, AIR 1969 SC 807.

\textsuperscript{17} Factory at Chorzow, jurisdiction, Judgment N.8, P.C.I.J., Series A No.9, p.24.
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\(^\text{18}\).

It has therefore, been aptly remarked by the Supreme Court: “It does not mean that the doors of the 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-recognized 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\(^\text{19}\).” Thus various organs of the state should endeavour to foster respect for international law and treaty obligations in the dealings of organized peoples with one another as enshrined in the Art.51 of the Constitution of India\(^\text{20}\).

\(^{20}\) In the case of Visakha vs State of Rajasthan (1997 (6) SCC241) the Supreme Court held : “...any international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee. This is implicit for article 51 (c) and the enabling power of Parliament to enact laws for implementing the international conventions and norms by virtue of article 253 read with Entry 14 of the Union List of Seventh Schedule of the constitution”. The Court further held that: ‘the international conventions and norms are to be read into them in the absence of enacted domestic law occupying the field when there is no inconsistency between them. It is now an accepted rule of judicial construction that regard must be had to international conventions and norms for constructing domestic law when there is no
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, which 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 becomes part of the municipal law of India if it has been specifically incorporated by parliament into the Municipal Law. The issue of interpretation has three aspects: (i) interpretation of Indian law in harmony/conformity with International law (both customary law and treaty law), (ii) interpretation of treaty law obligation or customary law objectives for purposes of implementation through municipal law, (iii) interpretation of treaty law construing them as part of customary law and hence part of Indian common law.

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 usually interpret treaties incorporated into the law of India by legislation. Article 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 conforms to the objective of fostering respect for international law21.

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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 in the legislation itself. The Supreme Court of India reiterates the "literal rule" when it observed that one of the pillars of statutory interpretation is that the courts must apply regardless of the result. However, an interpretation which violates international obligations specifically undertaken by India and which does not further Article 51 of the Constitution, would undoubtedly allow the judiciary to be a participant in violations of such obligations.

III. THE ROLE OF INDIAN JUDICIARY

Under the Indian 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. In the judicial hierarchy below the Supreme Court stand the High Courts of the different states and under each High Court there are "Subordinate Courts".

The High Court is the Supreme Judicial Tribunal of the State, having both original and appellate jurisdiction. It exercises appellate jurisdiction over the lower courts. There is a High Court for each of the states. The Supreme Court has appellate jurisdiction over the High Courts and original jurisdiction on all constitutional matters. It is the highest tribunal of the land under Article 141 of the Constitution, the law as proclaimed by the Supreme Court shall be the law of the land. It has been rightly said that the jurisdiction and powers of our Supreme Court are in their nature and extend wider than those exercised by the highest

23 Courts subordinate to and under the control of the High Court Article 233-237.
court of any other country"24. It is at once a Federal Court, a court of appeal and
the 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 India25.

Apart from the power to declare a law to be void26 for being in
contravention of the provisions of the Constitution, which guarantee the
Fundamental Rights, the Judiciary has been armed with the power to issue writs;
such as "Habeas Corpus", "Prohibition", "Mandamus", "Certiorari" and "Quo warranto", in order that it may enforce such
rights against the state at the instance of 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 Court27 and the High Courts28.
The power, so guaranteed shall not be suspended except during a proclamation of
Emergency29. 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

(1955), p.15.
745-762.
26 Art. 13 of the Indian Constitution: (1) all laws in force in the territory of India immediately before the
commencement of this Constitution, in so far as there are inconsistent with the provisions of this Part, shall,
to the extent of such inconsistency, be void; (2) the State shall not make any law which takes away or
abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the
extent of the contravention, be void; (3) in this article, unless the context otherwise requires,--(a) "law"
includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the
territory of India the force of law; (b) "laws in force" includes laws passed or made by a Legislature or
other competent authority in the territory of India before the commencement of this Constitution and not
previously repealed, notwithstanding that any such law or any part thereof may not be in operation
either at all or in particular areas; (4) nothing in this article shall apply to any amendment of this
27 Art. 32 of the Indian Constitution.
29 Art. 359 of the Indian Constitution.
in Part III of the Constitution and the right to bring such proceedings before the Supreme Court is itself a distinct Fundamental Right. Article 32 is thus the cornerstone of the entire edifice of human rights set up by the Constitution. Commenting on this article, in the Constituent Assembly, Dr. B.R. Ambedkar said:

“If I was asked to name any one 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 jurisprudence of the Supreme Court has in fact further enhanced the importance of Article 32. It now provides for compensatory remedy as well for violation of fundamental rights. 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 where, but also for the redress of any other injury or illegality, owing to contravention of the “ordinary law”, provided that certain conditions are satisfied.

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33 It should be pointed out in the present context that by the 42nd Amendment Act., 1976 various conditions and limitations had been imposed on the writ jurisdiction of both the Supreme Court and the High Courts. by introducing provisions such as Arts. 32A, 131A, 144A, 226A, 228A and substituting Art/ 226 itself.
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\(^{34}\).

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 \(^{35}\), or

b. That the disputed facts have to be investigated or evidence has to be taken before relief may be given to the petitioner)\(^{36}\),

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)\(^{37}\).

d. Generally only the person affected may move the Court but the Supreme Court has held that in ‘Social’ or ‘Public Interest Litigation’ any person may move the court. This expansion of the “right to be heard” has favoured public interest litigation\(^{38}\).

The above powers of the Indian Judiciary have been well utilized by the courts in respect of cases involving violations of human rights and hence or of particular relevance to promotion of rights of the child.

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34 State of Bombay vs. United Motors, (1953) SCR 1069.
37 Ibid.
A. CHILD LABOUR WELFARE AND THE LOCUS-STANDI

The liberalization of the concept of *locus standi*; to make access to the court easy, is an example of the changing attitude of the Indian courts. It is generally seen that the working children by and large come from the families, which are below the poverty line, and there are no means to ventilate their grievance that their fundamental rights are being breached with impunity. Keeping in view the pitiable conditions of the child workers, the apex court has shown its sensitivity by relaxing the concept of *locus standi*.

This issue of *locus standi* has arisen in number of cases before the Supreme Court. The Supreme Court has very daringly held:

"Where a legal wrong or a legal injury is caused to a person or to a 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 provision or without authority of law, or any such legal wrong or legal injury or illegal burden is threatened, and such persons or determinate class of persons is by reason of poverty, helplessness or disability or socially or 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, Krishna Iyer, J. in Fertilizer Corporation Kamgar Union v. Union of India also stated: "In simple term locus standi must be liberalized to meet the challenge of time". This liberalized rule of locus standi has further been reflected in various Supreme Court's Decision including Ratlam Municipality

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40 See Ratlam Municipality vs Vir Chand, AIR 1980, SC 1622
41 See AIR 1974, SC 2177
Case\textsuperscript{42}, K. R. Shenoy v. Udipi Municipality\textsuperscript{43}, Ram Kumar Mishra v State of Bihar\textsuperscript{44} and Bandhua Mukti Morcha v Union of India\textsuperscript{45}.

One important case in which the Supreme Court entertained a letter, sent by post as public interest litigation in Peoples Union of Democratic Rights vs. Union of India\textsuperscript{46}, commonly known as Asiad case. This case is an epoch-making judgment of the Supreme Court of India, which has not only made a significant contribution to labour laws of India, but also has displayed a creative attitude of judges to protect the interest of the child workers. The facts of the case were that the Peoples' Union of Democratic Rights, an NGO, addressed a letter to the Supreme Court annexing the report of social activists regarding the conditions under which the workmen engaged in various Asiad projects were working. Pointed reference was made in that report that there was violation of Article 24 of the Constitution and of the provisions of Employment of Children Act, 1938, as children below the age of 14 years were employed in construction work of various projects with regard allegation of the provisions of Employment of Children Act, 1938. The Delhi Administration and Delhi Development Authority took the stand that no complaint in regard to the violation of the provision of that Act, was at any stage received by them. They also argued, that this act was not applicable in case of construction work, since construction was covered in the schedule to the Act. The Supreme Court took cognizance of the child workers' interest and observed:\textsuperscript{47}

"Large number of men, women and children who constitute the bulk of our population are today living sub-human existence in conditions of abject poverty."

\textsuperscript{42} See AIR 1980, SC 1622
\textsuperscript{43} See AIR 1974, SC 2177
\textsuperscript{44} See AIR 1984, SC 537
\textsuperscript{45} See AIR 1984, SC 802
\textsuperscript{46} See AIR 1982, SC 1473, Also see Bandhua Mukti Morcha Case AIR 1984, SC 802
\textsuperscript{47} AIR,1982,SC 1473, Bandhua Mukti Morcha vs. Union of India, AIR 1984 p.804.
Utter grinding poverty has broken their back and sapped the moral fibre. They have no faith in the existing social and economic system”.

The Court further remarked as:-

“...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 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 undue 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 International Labour Organization and ratified by India. But apart altogether from the requirement of Convention no.59, we have Article 24 of the Constitution, which provides that 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. This is a constitutional prohibition which, even if not followed up by appropriate legislation must operate proprio vigour and construction work being plainly and indisputably a hazardous employment, it is clear that by reason of this constitutional prohibition, no child below the age of 14 years can be allowed to be engaged in construction work, 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 part of the country”.

A high water mark in the application of Article 24 of the Constitution was reached in the decision of the Court in Salal Hydro Project vs. Jammu & Kashmir\(^{48}\), wherein the Court reiterated the above stand. The Court maintained that the child labour is an economic problem. Poor parents seek to augment their meagre income through employment of children. So, a total prohibition of child labour in any form may not be socially feasible in the prevailing socio-economic environment. Article 24 therefore, puts only a practical restriction on child labour. The Court further observed that so long as there is poverty and destitution in this country, it will be difficult to eradicate child labour.

In M.C. Mehta vs. State of Tamil Nadu\(^{49}\), a petition under Article 32 of the Constitution was brought by way of public interest litigation before the Supreme Court in a case of employment of children in match factories of Sivakasi in Kamraj District of Tamil Nadu State. In this case the Court rightly 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 fireworks should not at all be permitted. Art. 39(f) of the Constitution provides that ‘the state should direct its policy towards securing that children are given opportunities and facilities to develop in healthy manner and in conditions of freedom and in dignity and that childhood and youth are protected against exploitation and against moral and material abandonment’.

\(^{48}\) See AIR 1987, SC 177 and See also Laxmi Kant Pandey v. Union of India, AIR,1990,SC.

\(^{49}\) See AIR, 1991, SC 419.
The Court further observed: “The spirit of the constitution perhaps is that children should not be employed in factories as childhood is the formative period”.

With regard to the welfare of child workers, the Court opined that a compulsory insurance scheme should be provided for both adult and child employment taking into consideration the hazardous nature of employment. The state of Tamil Nadu shall ensure that every employee working in those match factories is insured for a sum of Rs.50,000 and the insurance corporation, if contacted should come forward with a viable group insurance scheme to cover the employees in the match factories of Sivakasi area.

B. CHILD LABOUR AND RIGHT TO EDUCATION

The abolition of the child labour must be preceded by the introduction of compulsory education; compulsory education and child labour laws are interlinked. Article 24 of the constitution bars employment of child below the age of 14 years. 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.

The Court in a series of cases has unequivocally declared that right to receive education by the child workers is an integral part of right of personal liberty embodied in Article 21 of the Constitution. These judicial pronouncements clearly demonstrate that right to the education is necessary for the

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50 See, Constitution of India; Article 24.
proper flowering of man, his mind and personality. Hence the right to education is one of the facets of the right to personal liberty. Further, Delhi High Court in the famous case of Anand Vardhan Chandel vs. University of Delhi\(^5\), has held that education is a fundamental right under our constitution. The court observed that:

> “The law is, therefore, now settled that the expression of life and personal liberty in 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\(^5\).”

This right can be denied only by means of procedure established by the law as contemplated in Article 21 of the Constitution. The procedure to be fair, just and reasonable must pass tests under Articles 14, 19 and 21 of the constitution\(^5\).

Similarly, the Andhra Pradesh High Court in its momentous decision in Murli Krishna Public School case\(^6\) pronounced that:

> “Right to education to Dalits is a Fundamental Right and it is the mandatory duty of the state to provide adequate opportunities to advance educational interests by establishing schools”.

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53 See, AIR 1978, Delhi p.308.
54 Ibid: p.311
56 See AIR 1968, A.P. at p.204.
The decision of the Andhra Pradesh High Court in this case has paved the way for better educational opportunities for Dalit children in the State of Andhra Pradesh. The Dalits, hitherto neglected specimens of humanity, who are dragging their earthly existence under grinding poverty have the Fundamental Right to Education and they can compel the state to take positive action to provide educational facilities to their children. Any failure on the part of the state to provide better and adequate educational facilities, economic support and proper atmosphere to the children belonging to the lower strata of the society is violative of not only Article 45 but also Article 21 of the Constitution. Thus, the judicial response to the right to education has been positive and progressive to secure in particular, to the children of the weaker sections of the society, the proclaimed ‘socio-economic justice’\(^57\).

The court has played a parental role while directing the central government to persuade the workmen to send their children to nearby schools and not only arrange for the school but also provide free of charge, books and other facilities such as transportation, etc. The court also put forth the suggestion that whenever the central government undertake, the central government should provide that the children of the construction workers who are living at or near the project site should be given facilities for schooling and this may be done either by the central government itself or if the central government entrusts the project work any part thereof to a contractor, necessary provisions to this effect may be made in the contract with the contractor\(^58\).

The Supreme Court took realistic view of the position of children and was in agreement with the prevailing condition of Indian society. It agreed that so long as there was poverty and destitution in this country, it was difficult to eradicate

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child labour. It, however, pleaded for a positive role to be played by the Government and desired that attempts must be made to reduce, if not eliminate the incidence of child labour, because it was absolutely essential that every child should be able to receive proper education with a view to equipping itself to become a useful member of the society and to play a constructive role in the socio-economic development of the country.

In a recently decided case, M.C. Mehta vs. State of Tamil Nadu, the Supreme Court held that the children in terms of Article 45 of the constitution are entitled to get free and compulsory education until they completed the age of 14 years. It observed that the Directive Principles of State Policy has 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 grown up children to seek employment.

C. PROHIBITION OF TRAFFIC IN CHILDREN AND FORCED LABOUR

As regards the true scope and meaning of traffic in human beings and other forms labour, the Court has specifically pointed out that Article 23 of the constitution has been intended to protect the individual not only against the state but also against other private citizens. It prohibits traffic in human beings and

61 Art.23: (1) 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. (2) Nothing in this article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or any of them.
beggar and other similar forms of forced labour practiced by anyone else. 

Elaborating the point, Bhagwati, J., observed\textsuperscript{62}:

"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"\textsuperscript{63}.

The Supreme Court has rightly reminded us of the task undertaken by the wise founders of our constitution under Art. 23 as our National Charter. The Court observed\textsuperscript{64}:

"...The constitution-makers, when they set out to frame the constitution found that they had the enormous tasks before them of changing the socio-economic structure of the country and bringing about socio-economic regeneration with a view to reaching social and economic justice to common man. Large masses of people, bled white by well-nigh two centuries of foreign rule were living in abject poverty and destitution, with ignorance and illiteracy accentuating their helplessness and despair. The society had degenerated into a status-oriented hierarchical society with little respect of dignity of the individual who was in the lower rungs of the social ladder or in an economically impoverished condition. The political revolution was completed and it has succeeded in bringing freedom to the country but freedom was not on an end, the end being the raising of the people to higher level of achievement and bringing about their total advancement and welfare. Political freedom had no meaning, unless it was accompanied by social and economic freedom and it was, therefore, necessary to carry forward the social and economic revolution with a

\textsuperscript{62} See, PUCL vs UOI, AIR, 1982, SC 1473.
\textsuperscript{63} Peoples Union for Civil Liberties vs. Union of India, AIR 1982, SC 1473.
\textsuperscript{64} Also see Bandhua Mukti Morcha vs. Union of India, AIR 1984, SC 802.
view to creating socio-economic conditions in which every one would be able to enjoy basic human rights and participate in the fruits of freedom and liberty in an egalitarian, social and economic framework. It was with this end in view that the constitution-makers enacted the Directive Principles of State Policy in Part-IV of the constitution setting out the constitutional goal of a new socio-economic order. Now there was one feature of our national life, which was ugly and shameful, and which cried for urgent attention and that was the existence of bonded or forced labour in large part of the country. This evil was the relic of a feudal exploitative society and it was totally incompatible with the new egalitarian socio-economic order, which "we the people of India" were determined to build and constitutes a gross and most revolting, denial or basic human dignity. It was therefore, necessary to eradicate the pernicious practice and wipe it out altogether from the national scene and this had to be done immediately because with the advent of freedom such practice could not be allowed to blight the national life any longer. Obviously, it would not have been enough merely to include abolition of forced labour in the Directive Principles of State Policy because then the outlawing of this practice would not have been legally enforceable and it would have continued to plague our national life in violation of the basic constitutional norms and value until some appropriate legislation could be brought by the legislature forbidding such practice. The constitution-makers, therefore, decided to give teeth to their resolve to obliterate and wipe out this evil practice by enacting constitutional prohibition against it in the chapter on Fundamental Rights, so that the abolition of such practice may become enforceable and effective in Article 23 was included in the chapter of fundamental rights and beggar and other similar forms of forced labour. "Is clearly intended to
be a general prohibition, total in its effect and all pervasive in its range and its enforcement not only against state but also against any other person including in any such practice."

Similarly, in *Lakshmi Kant Pandey vs. Union of India*\(^{65}\) the Court took active steps to abolish bonded domestic service and slavery of poor children, which had been in practice under the guise of foreign adoptions. But violation of various protective provisions has been pertinently pointed out by the highest judicial tribunal in the country\(^{66}\). Such violation related to the provisions of the Minimum Wages Act, 1948, and the Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979. The Supreme Court has issued directions to safeguard the interests of large number of child workers in *Salal Hydra Project v. Jammu & Kashmir*\(^{67}\).

Despite this judicial activism, there are still many cases where the acute poverty has compelled the parents to sell their children hoping that the children would be engaged only in household duties. There are also persons, who purchase female children for the purpose of forcing them into prostitution. Once these unfortunate children are sold to brothel keepers, they are brutally treated, until they succumb to the desire of the brothel keepers and enter into the unethical and squalid business or prostitution. Some such cases were brought to the notice of the Supreme Court in *Vishal Jeet v. Union of India*\(^{68}\). The Supreme Court referred to Article 23 of the constitution, which prohibits traffic in human beings, and clause (e) of Article 39, which *inter alia*, provides that the tender age of children is not abused and the citizens are not forced by economic necessity to enter into

\(^{65}\) See, AIR 1984, SC 469.

\(^{66}\) See, The observation of Justice P.N. Bhagwati in *Peoples' Union for Democratic Rights vs Union of India*, AIR 1982, SC 1473.

\(^{67}\) See, AIR 1984, SC 802.

work unsuited to their age of strength. The Supreme Court also referred to clause (i) of Article 39, which, *inter alia*, provides that childhood and youth are protected against exploitation and against moral and mental abandonment. These provisions show that the framers of the constitution were anxious to protect and safeguard the welfare of children.

D. CHILD AND JUDICIAL ACTIVISM

The concern of the courts for the under-privileged poor section of the society is aptly reflected in *Bihar Legal Support Society vs. The Chief Justice of India and others*[^69], the court said:

"...that the weaker section of Indian humanity have been deprived of justice for long, long years: they had no access to justice on account of their poverty, ignorance and illiteracy. They are not aware of the rights and benefits conferred upon them by the constitution and the law. On account of their socially and economically disadvantaged position they lack the capacity to assess their rights and they do not have the material resources with which to enforce their social and economic entitlements and combat exploitation and injustice. The majority of the people of our country subjected to this denial of access to justice and overtaken by despair and helplessness, they continue to

[^69]: See, AIR 1987, Delhi p.38. This writ petition has been filed by the Bihar Legal Support Society which is a registered Society having as its main aim and objective provision of legal support to the poor and disadvantaged sections of the community with a view to assisting them to fight for their constitutional and legal rights through the process of law. The occasion for filling the write petition is set out in para 2 where it has been stated that a Bench of the Supreme Court sat late at night on 5-9-1986 for considering the bail application of Shri Lalit Mohan Thapar and Shri Shyam Sunder Lal and the same anxiety which was shown by the court in taking up the bail applications of these two gentlemen must "permeate the attitude and inclination of this Hon'ble Court in all matters where questions relating to the liberty of citizens, high or low, arise" and that the bail applications of "small men" must receive the same importance as the bail applications of "big industrialists". The petitioner therefore prays that special leave petitions against orders refusing bail or anticipatory bail should be taken up by this Court immediately in the same manner in which the special leave petition of these two "big industrials" was taken up by the court.
remain victims of an exploitative society where economic power is concentrated in the hands of a few and it is used for perpetuation of domination over large masses of human beings. This court has always, therefore, regarded it as its duty to come to the rescue of those deprived or vulnerable sections of Indian humanity in order to help them realize their economic and social entitlements and to bring to an end their oppression and exploitation. The strategy of public interest litigation has been evolved by this court with a view to bringing justice within the easy reach of the poor and disadvantaged sections of the community. This court has always shown the greatest concern and anxiety for the welfare of the larger masses of the people in the country who are living a life of want and destitution, misery and suffering and has become a symbol of the hope and aspirations of millions of people in the country…”

Executive is being made more and more accountable to realize its responsibilities. The apex court in *Sheel Barse vs. Union of India* ⁷⁰ has even gone to the extent of holding that child is a national asset. It is the duty of the state to look after the child with a view to assuring full development of its personality. The court has held that incarceration in jail has the effect of dwarfing the development of child, exposing him to baneful influences, coarsen his conscience and alienating him from the society ⁷¹. Justice Bhagwati made a suggestion to formulate and implement a national policy for the welfare of children. He 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

⁷⁰ See AIR,1986,SC 1773.
⁷¹ Ibid.
robust citizens\textsuperscript{72}, physically fit, mentally alert and morally healthy, endowed with the skill and motivations needed by society. Equal opportunities for development of all children during the period of growth should be our aim, for this would serve our large purpose of reducing inequality and ensuring social justice\textsuperscript{73}.

The Supreme Court has directed the state government\textsuperscript{74} to enforce the statutory requirement of the Factories Act for providing recreation facilities and medical aid to the workers of match factories at Shivakasi\textsuperscript{75}. It has also been suggested that every employee working in these factories should be brought under a group insurance scheme\textsuperscript{76}.

There is plethora of statutes\textsuperscript{77} to prevent the misuse of children in hazardous employment and to protect the general rights of the children. But sociological studies have revealed either the ineffective nature of these laws or their blatant violations.

There are numerous cases\textsuperscript{78} where the judiciary has made significant contribution to the cause of child workers. The court has given a new dimension to several areas such as loc\textit{us standi}, minimum wages, and employment of children, the glaring decisions which deal with the payment of minimum wages to children\textsuperscript{79} and protection of their fundamental rights\textsuperscript{80}, sexual exploitation\textsuperscript{81} of

\textsuperscript{72} Ibid.
\textsuperscript{73} See, M.C. Mehta vs State of Tamil Nadu, AIR, 1991, SC, 417.
\textsuperscript{74} See M.C. Mehta vs State of Tamil Nadu, AIR, 1996 (JT, 1996 (11) SC, 685).
\textsuperscript{75} A sum of rs. 50,000/- per children
\textsuperscript{77} See M.C. Mehta vs Union of India; Salal Hydro Project vs Jammu & Kashahmir, Laxmikant Pandy vs. Union of India, Bandhua Mukti Morcha vs. Union of India, M.C. Mehta vs State of Tamil Nadu, Asiad Workers Case.
\textsuperscript{78} See M. C. Meht a AIR 1991, SC 417, also see Lakshmi Kant vs Union of India, AIR 1984, SC 469.
children in hazardous occupation⁸¹, reflect the judicial creativity in the field of the welfare of the children including the child workers. The court has held that at least 60 percent⁸² of the prescribed minimum wage of adult employers doing some job shall be given to the child workers. The court has also felt the necessity that special facilities for improving the quality of life of child-workers should be provided by their employers. According to the apex court these special facilities include facilities of education, scope for recreation as also providing opportunity for socialization. The court held that facilities for general education and also job-oriented education should be available to child workers and their school time should be so adjusted that their employment is not affected. The court also expressed its hope that the state governments would direct their policy towards providing the children opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment⁸³

Summary

The foregoing study of the chapter reveals that the role of judiciary in India has been quite significant in promoting child welfare. The study discloses that judiciary has given a lead to save the child from exploitation and improve their conditions. Judicial mandate clearly demonstrates that right to education is necessary for the proper flowering of children and their personality. The Supreme Court of India held in J. P. Unnikrishnan v. State of Andhra Pradesh and reiterated in Anand Vardhan Chandel v. University of Delhi that the right to education is a fundamental right under our constitution. Child labour cannot be abolished unless and until the education is made compulsory. So the relation of

⁸¹ See, Note 78.
⁸² See Note 79.
⁸³ Ibid., at 418.
child labour is closely related to he child education. In *M.C Mehta's* case the Supreme Court has observed that the children in terms of article 45 of the constitution are entitled to get free and compulsory education till they complete the age of 14 years, but the executive has utterly failed to do this duty. Further the judiciary has a generosity towards poor child workers by relaxing the rules of *locus standi*. It has made efforts to benefit the poor child workers by entertaining their problems and giving relief to them despite the limitations of *locus standi*. The observations made by the judiciary in various decided cases show that it is always committed to the cause of the child workers. Whenever a legal wrong or legal injury is caused to the child workers by their employers, the judiciary has come forward to help them despite the *locus standi* issue. Frankly speaking, the courts have always liberalized the concept of *locus standi* to meet the challenges of time and provide justice to the child workers. The efforts made in this direction are quite evident from the decisions discussed above. To mention a few, the *Asiad case* (1981), *Bandhua Mukti Morcha case* (1984), *Bihar Legal Support Authority case* (1987), *Sheela Barse case* (1986), *M.C Mehta's case* (1991), *L.K.Pandey case* (1994), and *Female foeticide case* (2001), are the glaring decisions where the judiciary has shown enough courage to uphold the interests of the children and spared nothing to improve the working conditions of the child workers. The judiciary has always made concrete efforts to safeguard them against the exploitative tendencies of their employers by regularizing their working hours, fixing their wages, laying down rules about their health and medical facilities. The judiciary has even directed the states that it is their duty to create an environment where the child workers can have opportunities to grow and develop in a healthy manner with full dignity in consonance of the mandate of our constitution.