

CHILD LABOUR: A CRITICAL LEGAL ANALYSIS

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I. Introduction

Child labour is still a social issue in our country which demand serious attention of the policy makers, executive machineries, academicians and researchers in different fields including law, especially to resolve whether existing laws are really sufficient to curb it or is it just cosmetic effort galvanizing the social attitude to render the market supply with child labour smoothly by way of showing something different that legislative efforts are on to eradicate child labour. It hinders economic development and perpetuate poverty by keeping the children of the poor out of school and limiting their prospects for upward social mobility. This is still a social menace not only in its existing dimension but in newer dimension also. The Existing law² is trying to prohibit and regulate the child labour practices that are going on rampant. With the onset of industrialization and the prospect of wage labour, children become progressively employed in industry as well as in domestic and commercial establishments. As a researcher from the critical point of the view it is to be analyzed whether child laour is purely a phenomenon of poverty directly connected to economic reason or it is due to the social attitude and sensibilities that the problem still persists even after six decades of independence of the country which pose a serious query in mind why child labour has not yet been eradicated fully despite numerous legislative measure³ and social policy goals.

II. Objective of this Article

Of late central government has lent a thought to enhance the deterrent effect of punishment by bringing amendment in child labour legislation. Therefore, this issue began to stair the writer's academic mind to rethink from a socio-legal angle whether giving deterrent effect to the existing legislation is sufficient to address the problem. Hence following objects have been focused.

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² The Child Labour (Prohibition and Regulation) Act, 1986

³ The Children (Pledging of Labour) Act, 1933; The Employment of Children Act, 1938; The Factories Act, 1948; The Bonded Labour System (Abolition) Act, 1976; The Apprentices Act, 1961; The Plantation Labour Act, 1951; The Child Labour (Prohibition and Regulation) Act, 1986; The Right Of Children to Free and Compulsory Education Act, 2009 etc.

- (1) To point out the inbuilt lacunae in various legislations, which has now become inadequate to address the very issue for the purpose of regulating or prohibiting whatever may be.
- (2) To examine the role and importance of education in the eradication of child labour and to analyze how far the Right to Education Act is adequate to address the root of this problem,
- (3) To examine whether the existing statutory protection for children covers the large number of child labour in small-scale sector,
- 4) To examine the role and functions of the inspectors appointed by the appropriate authorities to implement the laws framed by the legislature in this regard,
- (5) To examine whether child labour problem can be eliminated only by focusing on single determinant, for example, enforcement of laws or elementary education policies

III. Defining Child Labour

Child labour is not comprehensively defined anywhere in the legislation but international instruments determine what may amount to child labour. Basically children are not morally bound to enter into economic activities, which are not healthy and generally harmful to their sound growth. Child labour is meant for regular work, 14 to 43 hours/week, which causes physical or psychological damage to their growth and hinders education and mental and /or physical development. Child engaged in hazardous work⁴ is considered as child labour. As regard to the age of a child International Labour Organization has set general guideline where under certain minimum age child may not be employed.⁵ International community has set certain categories as child work, child labour and the worst form of child labour. Generally, child work is meant for light work less than 14 hours/week for 12 to 17 years old which is not harmful to his health and development and not at the cost of schooling or vocational training and which is not hazardous in nature. The worst forms of child labour refers to all forms of slavery, trafficking of children, forced recruitment of children for use in armed conflict, the use of a child for illicit activities such as trafficking of drugs, pornographic performances etc. which is likely to harm the health, safety or morals of children. Though in view of the socio-economic realities of our country the constitutional framers could not prohibit the employment of children generally, they intended to implement prohibition of employment of children below the age of 14 years

⁴ Hazardous work is defined by provisions of ILO Convention No.182

⁵ ILO Convention No.138

in factories or mines or in any other hazardous employment.⁶This provision was incorporated in the Constitution to protect the interest of the children especially in the interest of health and strength of young persons keeping in view of the provisions of the Directive Principles Of State Policy of the Constitution of India.⁷To sum up, child labour is defined nowhere which may be a deliberate omission on the part of legislating work either for the peculiar socio-economic condition of our country or due to an indifferent socio-political attitude of the society. Therefore, it may raise then pertinent question in mind whether existing legislations in this regard are impliedly facilitating supply of child labour for the need of market in disguise of regulating child labour which, may be discussed in elaboration in legal analysis part.

IV. International Background of Child Labour Legislations

There exists an attitudinal difference in treating child labour between industrialized countries and developing countries. In the former child labour means adolescents who are full time students with part time jobs, whereas in the latter the condition is not child interest centric, the economic reason being the main driving force behind that. The European settlers passed the laws that actually required poor children to work as apprenticeship, which gave birth to the institution of slavery encompassing the labour of children born poor. Later on, the industrialized revolution brought the modern factory system. The market surrounding factory towns supplied the labour force comprising women and children as cheap and manageable source of labour. The children work force was employed not as apprentice but as factory labour. In USA child labour were prominent in the early part of 19th century as part of economic reality. The social conscience then began to highlight not the child labour issue itself but against some exploitative features of factory system.

In 1813, Connecticut enacted a law encouraging manufacturers to provide young employees with lessons in reading, writing, and arithmetic, but the law was ineffective. In 1836 Massachusetts passed US's first child labour law that required children under the age of 15 employed in manufacturing to spend at least three months each year in school. A few

⁶ Article 24 of the Constitution of India

⁷ Article 39(e) and (f) of The Constitution Of India as under

The State shall direct its policy towards securing- that health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;

- that children are given opportunity 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 abandonment.

states soon adopted similar laws. After the Civil War, the oppressive child labour practice became rampant with flourishing textile industry in the South demanding long working hours with minimum wages and inhuman working conditions. Later on, few Southern States had passed laws limiting working hours for the children. The early 1900s witnessed growing concern for having general protection of children. In 1909, the Bureau of Labour Statistics issued a landmark report on working -women and children. By 1913, all but nine States had fixed 14 years as the minimum age for factory work. Although Congress had made several attempts to restrict oppressive child labour, the attempts had failed. With the passage of Fair Labour Standards Act (FLSA)⁸ in 1938 meaningful child labour legislation was enacted. The Supreme Court upheld this Act in 1941. This law was concerned mainly to govern minimum wages, overtime, child labour and recordkeeping. Under this Act 16 years was established as the minimum age for non agricultural employment and 14 and 15 years old were allowed to be employed in occupations other than mining and manufacturing subject to the certification of the Secretary of Labour that working time period in such occupation is not at the cost of their schooling and conditions of health and wellbeing; children under 18 years was prohibited to be engaged in hazardous occupation.

IV.I. Role of International Labour Organization (ILO) for Combating Child Labour

One of the major aims set for the International Labour Organization at its foundation in 1919 was the abolition of child labour. ILO set its goal to adopt as a short-term policy to start immediate action to abolish child labour in hazardous employment and for complete abolition to be carried out in a systematic manner in various phases, considering that the complete abolition of child is a complicated task, which is a long- term process. A number of Convention and Recommendation augmented by International Labour conferences since 1919 has now reached to a legally binding international instrument for regulating labour administration, social security and welfare, human rights setting an international labour standard to be observed by member States. The principle adopted by ILO provides that the minimum age for admission to employment shall not be less than the age of completion

⁸ The FLSA remains the Federal Law governing minimum wages, overtime, child labour, and recordkeeping. 16 years was established as the minimum age for covered nonagricultural employment under the Act. The Act had allowed 14 and 15 years old to be employed in occupations other than mining and manufacturing if the Secretary of Labour determines that will not interfere with their schooling and health and wellbeing. The Act also prohibited employment of minors under 18 years of age in hazardous occupations.

of compulsory schooling.⁹ The Convention establishes at least two minimum ages for admission to employment below which no one under that age shall be admitted to employment or work in any occupation. The general minimum age for admission to employment shall not be less than the age of completion of compulsory schooling and, in any case shall not be less than 15 years, 14 years initially for countries whose economy and educational facilities are insufficiently developed.¹⁰ The Convention provides a minimum age for admission to employment that is lower than the general age for the purpose of carrying out light work which be 12 or 13 years respectively depending on fixation of general minimum age at 14 or 15.¹¹ Article 7 of the Convention No. 138 has specified, "Light work".¹² The said Convention is supplemented by ILO Recommendation No. 146 that calls for the minimum age to be progressively raised to 16 and in the case of hazardous employment to 18. The Recommendation demands priority to be given to the need of the children in national development policies and projects, assurance of best possible condition for the physical and mental growth of children and youth which includes measures directed at employment oriented social security, family welfare, appropriate facilities for education, vocational training and the protection and welfare of children (ILO, 1988).¹³ The Minimum Age Recommendation No. 146 provides a list of points regarding conditions of employment to which particular care should be paid.¹⁴ The ILO's adoption of Convention No 182¹⁵ in 1999 consolidated the global consensus on child labour elimination. The said Convention along with Recommendation No. 190 proposes for translating the Convention into national law and practice, considering the view of the children directly, of their families and of NGOs committed to the elimination of child labour, to declare certain worst form of child labour punishable criminal offences making a comprehensive list of measures that can help all

⁹ ILO Convention No. 138 called Minimum Age Convention held in the International Labour Conference in the year 1937.

¹⁰ Article 2, *ibid*

¹¹ Article 7, *ibid*

¹² Work, which is not likely to be harmful to the health or development of children and which is not such as to prejudice attendance at school or their capacity to benefit from the institution received.

¹³ Mahajan, Pramila & Chand, S. Status of Child Labour (1st Edition), New Delhi: Adhyayan Publishers & Distributors, 2006, pp164, 166

¹⁴ The provision of fair remuneration with its protection based equal pay for equal work principle; strict limitation of working hours per day/ week and prohibition of overtime to allow time for education, training, leisure activities; granting of minimum consecutive period of 12 hours' night rest; granting annual holiday of at least four weeks, coverage by social security schemes etc.

¹⁵ The ILO Convention Concerning the prohibition and immediate action for the worst forms of child labour.

concerned to abolish the worst forms of child labour, for instances, training, policy development and monitoring. The Forced Labour Convention¹⁶ along with a protocol adopted in 2014 by the International Labour Conference obliges State parties to provide protection and appropriate remedies, including compensation, to victims of forced labour and to sanction the perpetrators of forced labour. It also obliges the State parties to develop a national policy and plan of action for the effective and sustained suppression of forced or compulsory labour. This protocol 2014 brings into the modern era to address practices such as human trafficking. The ILO's Convention No. 138 and 182 prohibits employment of child labour less than 14 years of age. India is lagging behind due to socio-economic problem and not ratified the core Conventions eliminating the worst form of child labour namely, convention No. 138 and 182.

IV.II. Other International Instruments relating to Child Labour

The need for providing protection and safeguards to children have first been stated in the Geneva Declaration of the Rights of the Child, 1924 and was recognized in the Universal Declaration of Human Rights, 1948¹⁷ and in the Statutes of specialized agencies of UNO. A concrete step has been taken through the Declaration of the Rights of the Child in 1959. The International Covenant on Economic, Social and Cultural Rights¹⁸ enjoins State parties to protect young people from economic exploitation and from employment in work likely to hamper their morals, their health lives or likely to hamper their normal development. The International Covenant on Civil and Political Rights¹⁹ states that no one should be kept in slavery or servitude or be required to perform forced or compulsory labour. Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices similar to Slavery refers to debt bondage of children, which came into force from April 1957. The International Convention on the Rights of Child, 1989 adopted by the General Assembly on 20th November, 1989 is a binding piece of international legislation which provides that children shall be protected from economic exploitation and from hazardous work, drug use and trafficking, sexual exploitation and sexual abuse, and all other forms of exploitation prejudicial to any aspects of

¹⁶ The ILO Convention No. 29 called the Convention Concerning Forced or Compulsory labour.

¹⁷ Article 25 provides that "motherhood and childhood are entitles to special care and assistance. All children whether born in or out wedlock, shall enjoy the same social protection and Article 26 assured the Rights to free and compulsory elementary education to children.

¹⁸ Article 10 of the Interntional Covenant on Economic, Social and Cultural Rights 1966.

¹⁹ Article 8 of the International Covenant of Civil and Political Rights 1966

the child welfare. The Convention defines a 'child' as every human being below the age of 18 years.

V. Constitution of India and Child Labour

Our Constitution makers were wise enough to provide that children should receive distributive justice in free India. The rights against exploitation were mentioned in the draft proposed by Dr. B.R. Ambedkar, K.M. Munshi and K.T. Shah. While Dr. Ambedkar's draft simply provided that subjecting a person to forced labour or involuntary servitude would be an offence, K.M. Munshi's draft article suggested for abolition of all forms of slavery, child labour, traffic in human beings and compulsory labour. The concern for children in general and child labour in particular is reflected through the Articles of the Constitution of India.²⁰ Article 23 prohibits traffic in human beings and beggar and other forms of forced labour and Article 24 lays down that no child under the age of 14 years shall be employed to work in any factory or mine or engaged in any other hazardous employment. Article 24 puts only a partial restriction on employment of child labour. This is because the framers of the Constitution kept in mind the peculiar socio economic condition of the country prevailing at that time, realizing that a total ban on child labour may not be socially feasible as poor parents seek to augment their meager income through employment of their children. Part IV of the Constitution has mandated that the State shall follow certain principles of policy for securing justice for the children so that the tender age of children are not abused and facilitated to enjoy their childhood for sound growth of both their health and personality. The State shall direct its policy towards securing that health and strength of workers, men and women, and tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;²¹ that children are given 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 abandonment.²² These two constitutional provisions have reminded the State of its objectives while making any policy towards securing that childhood and youth are protected against exploitation and against moral and material abandonment. In pursuance of these directives contained in the constitutional provisions the Government of India has evolved a national policy for the welfare of the children. The Constitution also incorporates a few more provisions to promote the welfare of the children.²³

²⁰ Articles 23 and 24 of The Constitution of India.

²¹ Article 39(e) of the Constitution of India

²² Article 39 (f) of the Constitution of India

²³ Article 15(3) of the Constitution of India enables the state to make special provisions for children, Article 24 prohibits employment of children below the

V.I. Indian Statutory Provisions regulating Child Labour

In response to international obligation under the Covenants²⁴ toward eradication of child labour India has legislated the law²⁵ to prohibit as well as regulating the child labour. Prior to 1986 Act, several provisions under various existing labour laws²⁶ have been dealing with the issue of child labour. But the laws were not comprehensive, mainly regulatory in nature and suffer from uniformity in defining child.

V.I.I. The Children (Pledging of Labour) Act, 1933

The Royal Commission on Labour, established in 1929 prepared a Report, which was finalized in 1931. The Commission had felt great concern at the pledging of children by parents to employers in return of small sums of money; the commission recommended that any bond pledging a child should be regarded as void. The recommendations of the Commission was discussed in the legislative Assembly and the Children (Pledging of Labour) Act, 1933 came to be passed, which may be said to be the first statutory enactment dealing with child labour. The main object of this Act was to eradicate the evils arising from the pledging of labour of young children by their parents to employers in lieu of loans for advances. The Act declares that an agreement, oral or written, express or implied to pledge the labour of child below 15 years of age by the child's parents, guardians as void and makes the contracting parties, liable for penalties. Under this Act 'Child' means a person who had not completed the age of 15 years. This Act was passed with an intention to protect child from exploitation in hazardous occupation but it remained a dead letter. No judicial efforts were made to protect the child from exploitation.

V.I.II. The Employment of Children Act, 1938

The Act has now been repealed and replaced by the Child Labour (Prohibition and Regulation) Act, 1986. The main object of the Act was to prevent exploitation of child labour in workshops and other specified

age of 14 in any hazardous employment, and Article 45 provides compulsory and free education for children of the age group 6 to 14 years.

²⁴ Geneva Declaration of Rights of the Child, 1924, Universal Declaration of Human Rights, 1948, The Declaration of the Rights of Child, 1959, International Covenants on the Rights of the child, 1989.

²⁵ The Child Labour (Prohibition and Regulation) Act, 1986

²⁶ The Factories Act, 1948; The Shops and Commercial Establishment Act, 1969; The Apprentices Act, 1961; The Mines Act, 1952; The Merchant Shipping Act, 1958; The Motor Transport Workers Act, 1961; The Beedi and Cigar Workers (Condition of Employment) Act, 1966; The Contract Labour (Regulation and Abolition) Act, 1970; The Plantation of Labour Act, 1951; The Children (Pledging of Labour) Act, 1933; The Employment of Children Act, 1938; The Radiation Protection Rules, 1971

occupations and to regulate the employment of children in certain industrial employments. The key points of this Act are as follows:

(a) Prohibited the employment of children under 15 years in occupations connected with transport of goods, passengers, mails or railways;²⁷ (b) Raised the minimum age for handing goods on docks from 12-14 years; (c) Provided for the requirement of a certificate of age; (d) In pursuance of the International Labour Conference at its 31st session held in 1948 adopted a Convention (No. 90) concerning night works of young person employed in industry. Accordingly, in 1951, a provision was added for prohibition of the employment of the children between 15 and 17 years at night in railways and ports and also provided for requirements of maintaining register for children under 17 years; and (e) In 1978, a provision was added for prohibition of employment of a child below 15 years in occupation in railway premises such as under picking or cleaning of ash pit or building operations, in catering establishments and in any other work, which is carried out in close proximity to or between the railway lines. One of the drawbacks of the Act is that it has not provided any provision in regard to the health, safety, medical examination and welfare of children. This Act was amended as many as 5 times during the year 1939, 1948, 1949, and 1951 only to ameliorate better working conditions to children.

V.I.III. The Contract Labour (Regulation and Abolition) Act, 1970

The Act though has not specified any provision pertaining to employment of child labour, has left ample scope to ignore such a possibility because of the reason that the system of employment of contract labour lends itself to various abuses. The Act has defined the term "worker" which does not include any such person who is an out-worker, that is to say, a person to whom any article or materials are given out by or on behalf of the principal employer to be made up or otherwise processed for sale for the purposes of the trade or business of the principal employer and the process is to be carried out either in the home of the outworker or in some other premises, not being premises under the control and management, of the principal employer.²⁸ As the definition of worker has not covered out-worker within the scope of the Act, there is possibility that lots of child labourers

²⁷ The Employment of Children Acts, 1938, Section 3(3)

²⁸ Section 2(i) of the Contract Labour (Regulation and Abolition) Act, 1970

may be employed as home based out-worker for manufacturing in small enterprises who remained unaddressed beyond the scope of legal protection.

V.I.IV. The Child Labour (Prohibition and Regulation) Act, 1986

The Act is an outcome of various recommendations made by a series of Commissions.²⁹ The Act has repealed the earlier two legislations, the first two statutory enactments³⁰ dealing with child labour. The Act was passed with two contradictory goals i.e. prohibition and regulation of child labour at the same time which is not in conformity with the Constitutional goal to be achieved.³¹ It is well established fact that the International Labour Organization has played its role since its inception in the year 1919 for the abolition of the child labour but on the basis of the experience it has been fully established that the complete abolition of child labour is a complicated task which is going to be a long term process, to be accomplished in systematic manner and in phases. Therefore, the focus is on the immediate action to prohibit child labour in hazardous employment and to regulate this practice in non-hazardous employment by way of regulating working hours, weekly holidays, working conditions, wages etc. Keeping that goal in view and to respond the international obligation for implementing the Convention on Rights of the Child, 1989 India has enacted this Act.

The legislative intent behind the Act, 1986 is not to prohibit the child labour altogether rather to permit it in a regulatory manner. Unlike the Bonded Labour Abolition Act the nomenclature of the Act is both prohibition and regulation encompassing. The Act, therefore, classifies all establishments in two categories, hazardous and non-hazardous employment. The child labour is absolutely prohibited in the former one and in the latter case law for engaging child labour regulates the condition of labour.

V.I.V. Critical Analysis of the Child Labour (Prohibition and Regulation) Act, 1986

The Act has some shortcomings. In developed countries child labours are part time workers with receiving education, formal or informal but in India child labourers are mostly either dropouts or not attending school. The Act has remained silent about any responsibility of the employer to facilitate the children engaged in employment with formal or non formal method of education which gives the basic education to the children engaged in non- hazardous employment. The Act has not talked about rehabilitation

²⁹ The National Commission on Labour 1969; The Gurupadswamy Committee on Labour 1976 and Sanat Mehta Committee 1948

³⁰ The Children (Pledging of Labour) Act, 1933 and The Employment of Children Act, 1938

³¹ Article 24 of the Constitution of India

measures for those children who are rescued from the prohibited employments. Again the Act has omitted to define hazardous employment or industries and therefore certain industries even though hazardous not covered by the Act so long the Central Government notifies it and incorporates in the schedule or in case of executive inaction, instructed by the judicial decisions to schedule a particular industry as hazardous as happened in case of constructional activities³². On the whole, the Act is protecting the interest of child workers only in terms of regulating working hours, leaves and weekly holidays and that only depends upon the observation and inspection by the appointed authorities i.e. inspectors, which may be initiated on the basis of a complaint. When records says about increasing number of child labours throughout the countries, very low rate of complaint and conviction proves the ineffective implementation of the legislation. One of the simplest reasons for non-implementation of the Act is its reliance upon the role of labour inspectors who are few in numbers in comparison to large number of small-scale industrial units, which are highly dispersed and difficult to keep a watch. Lack of proper documentary evidences and especially proper age proof in case of poor illiterate villagers are crucial factors for failure of prosecution. The Act has prohibited engagement of children in certain employment, which is hazardous in nature and regulates the conditions of work of children in certain other employments, which impliedly permits the exploitation of children in occupation and processes other than prohibited ones where child labour is rampant. The agricultural sector, which constitutes 80 percent of the child labour force, appears to be outside the scope of regulation of the Act. Large number of small-scale units that operate as household/family units falls outside the scope the Act.

V.I.VI. The Child Labour (Prohibition and Regulation) Amendment Act, 2016-A Critical Analysis

This new Act has been enacted by the parliament to amend the principal Act³³ with an object to bring the existing law in line with the Right to Free and Compulsory Education Act, 2009 so that the education of children between age group 6 to 14 years is not compromised. The Act, 2016 has received the assent of the President of India on 29th July 2016. The Bill was first introduced in the Rajya Sabha on December 4, 2012 by the Ministry of Labour and Employment to amend the existing law on Child Labour, to introduce stricter punishment for employers who violate the law and also to punish the parents and guardians who send their children for hazardous work. India is moving towards a complete ban on engagement of children below 14 years, in all occupations and therefore, it seems to be a

³² People's Union for Democratic Rights vs Union of India, AIR 1991 SC 417

³³ The Child Labour (Prohibition and Regulation) Act, 1986

progressive legislative step. But proper analysis of the Act may reveal a completely different picture. The Act has introduced the definition of 'adolescent', which was not there in the principal Act. The definition of 'child' and 'adolescent' under this Act is slightly different from the definition as per the Factories Act, 1948³⁴. Though the new Act has imposed a complete ban on employment of children below 14 years of age in any occupation or process, it has provided certain exemptions³⁵ without addressing properly, the possible exploitation of children in industries where the activities may be outsourced to home based unit. Already the principal Act, 1986 has excluded family enterprises, which removed a large number of small-scale units that operate as household units where child labour is rampant, from the purview of law. According to UNICEF there are 33 million child labourers in India of which 80% are Dalits and 20% are from the Backward classes who are mostly engaged in their traditional caste based occupations for generations, as per 2011 census report³⁶. That means that this law has failed to address their fate. The Act has allowed the children to work in the exempted occupation after school hours but it has not clarified the hours of work, which may raise the question whether health aspect of the children has seriously been thought of or not by the legislators.

The new Act has slashed the list of hazardous occupations from 83 (18 occupations and 65 processes as per the schedule of the principal Act, 1986) to include just mining, inflammable substances or explosives and hazardous process as has been mentioned in the Factories Act. This means that work in chemical mixing unit, cotton farms, battery recycling units and brick kilns, among others have been dropped.

The Act has enhanced the punishment for the employer significantly but relaxed the penalty for the parents or guardians of child labour in case of first time offence but for second and subsequent offence committed by the parents or guardians the penalty of a maximum fine of Rs. 10,000 has been prescribed. If it is true that child labour is the result of poverty, then how is

³⁴ 'Adolescent' means a person who has completed his fifteenth year of age but not completed his eighteenth year, Section 2(b) of the Factories Act, 1948 and 'child' means a person who has not completed his fifteenth year of age, Section 2(c) of the Factories Act, 1948

³⁵ Child may be allowed to help his family or family enterprise, which is other than any hazardous occupations or processes set forth in the schedule, after his school hours or during vacations; or may be allowed to work as an artist in an audio-visual entertainment industry, including advertisement, films, television serials or any such other entertainment or sports activities except the circus, subject to such conditions and safety measures, as may be prescribed.

³⁶ <http://www.thehindu.com/opinion/columns/ruchira-gupta-child-labour-prohibition-and-regulation-amendment-act-2016-a-law-that-allows-child-labour/article8964940...p2/2>

the provision of penalty of fine for the poor parents is supportable considering the socio economic reality of the poor peoples who are already the victims of poverty. Such a provision may pave the way for further exploitation of these poor people by both the employers and law enforcing machineries because of their illiteracy and lack of legal knowledge.

The new Act has defined the 'family enterprises' and has expanded the scope of the definition of 'family'³⁷ to include 'father's sister and brother' and 'mother's sister and brother', as newly added into the definition of 'family' which was not there in the definition clause of already in existence other labour laws.³⁸ There are instances in the society that in absence of natural parents, others exploit the children including near relatives even at the cost of their paramount welfare, which in most of the cases remain beyond notice of the law enforcement agencies. Therefore, the definition of 'family' has left a scope of exploitation of the poor children who have lost their parents. So the new Act, though seems apparently a progressive legislation, it suffers from a lot of inbuilt lacunae. Though the main object of the Act is to maintain a balance between the Child Labour law and the Right to Education Act, nowhere throughout the law has mentioned any mechanism relating to the implementation of right to education for those children. Therefore, the new law has just left the scope of implementation of education right in the hand of market force whose operation is run by the demand and supply equation. It may be observed that the new Act, 2016 has just done a cosmetic change to show the stricter punishment but it has no teeth to remedy the situation. More particularly it has bypassed the main issue of addressing vastness of child labour market in small scale and home-based work where the law should have extended its tentacles to reach the root of the problem.

VI. Indian Judiciary as the savour of this menace

It is accepted that the framers of the Constitution of India were very much aware of the prevalence of child labour problem in the society. Due to peculiar socio-economic conditions of the country, they were compelled to accept partially the engagement of child labour but at the same time, the intention of the framers was to prohibit it, which has been reflected in the language of Article 24 of the Constitution of India³⁹. Accordingly, Article 24 puts only a partial restriction on the employment of child labour, below

³⁷ 'Family' in relation to a child, means his mother, father, brother, sister, and father's sister and brother and mother's sister and brother. Explanation attached to Section 5 of the Act, 2016

³⁸ The Employees' State Insurance Act, 1948; The Payment of Gratuity Act, 1972 and The Child Labour (Prohibition and Regulation) Act, 1986

³⁹ No child below the age of fourteen years shall be employed to work in any factory or mine or engage in any other hazardous employment

the age of fourteen years to work in any factory or mine, or in any other hazardous employment. But hazardous employment was not defined by the legislators, which left the job upon the executives by way of scheduling the employments or processes under the Act. In *Asiad Work Case*⁴⁰ the Supreme Court has emphasized that Article 24 embodies the Fundamental Right against exploitation enforceable against everyone, and no one can employ a child below the age of 14 years in a hazardous employment like construction work. The Supreme Court interpreted the meaning of the term 'hazardous employment' and held that engagement of children in the construction work amounted to employment in hazardous employment, thereby nullifying the contention of the Delhi Development Authority that the Act of 1986 is not applicable to construction works as it is not specified in the schedule. The Court pointed out that this was a sad and deplorable omission which must be immediately set right by every State Government by amending the schedule so as to include the construction industry under the schedule. Through this judgment the Apex Court explored the doctrine of 'Locus Standi' to facilitate the poor people's access to justice by the initiative of any public spirited man to invoke the grievance on their behalf by way of filing a PIL matter under Article 32 or 226 of the Constitution of India. The same principle was reiterated in the ruling of the Supreme Court in *Labourers Working on Salal Hydro-Project v State of Jammu and Kashmir*.⁴¹ The Court generally told the Government to persuade the workmen to send their children to school and provide for free education there. Thereafter, the question of employment of child labour has been brought to the attention of the Supreme Court in several cases by way of public interest litigation. In *M.C.Mehta v State of Tamil Nadu*⁴², the Court has considered the Constitutional perspectives of abolition of the child labour in the Sivakasi Match industries. The Court has issued a number of guidelines to eradicate practice of employing children below 14 years of age in the hazardous industry. The Court has again reverted to the same theme in *Bandhua Mukti Morcha v. Union of India*.⁴³ In this case employment of children in the carpet industry in the State of Uttar Pradesh came into focus and matter was brought before the Court for delivering justice to them. The Supreme Court, in this case referred Article 24 read with Article 39 (e) and (f) of the Constitution of India and observed:⁴⁴

⁴⁰ *People's Union for Democratic Rights v Union of India*, AIR 1982 SC 1473: (1982) 3 SCC 235

⁴¹ AIR 1984 SC 177: (1983) 2 SCC 181

⁴² (1996) 6 SCC 756

⁴³ AIR 1997 SC 2218: (1997) 10 SCC 549

⁴⁴ Jain, M.P, *Indian Constitutional law* (Fifth Edition 2008), Nagpur: Lexis Nexis Butterworths Wadhwa, p 1198.

"It would, therefore be incumbent upon the State to provide facilities and opportunities as enjoined under Articles 39(e) and (f) of the Constitution, and to prevent exploitation of their childhood due to indigence and vagary. As stated earlier, their employment- either forced or voluntary- is occasioned due to economic necessity: exploitation of their childhood due to poverty, in particular, the poor and the deprived sections of the society, is detrimental to democracy and social stability, unity and integrity of the nations."

In *Unnikrishnan, J.P. v. State of Andhra Pradesh*⁴⁵ the Supreme Court has implied the right to education from the right to life and personal liberty guaranteed by Article 21 of the Constitution of India and referring the interpretation of relationship between Fundamental Rights and Directive Principles of State Policy the Court has observed that the content of this right are to be deduced in the light of Articles 41, 45, 46, 47 of the Constitution. The Court has emphasized that every child has the Fundamental Right to receive free and compulsory elementary education up to the age of 14 years.

The Supreme Court in *M.C.Mehta v. State of Tamil Nadu*⁴⁶ observed that unless the right to compulsory education to children is to be linked with the child labour welfare nothing substantial will come out. The Court expressed that a National Commission for children's welfare should be set up to prepare a scheme for child labour abolition in a phased manner and such a commission should be answerable to this Hon'ble Court directly and should report at periodical intervals the progress in that regard. The offending employer must be asked to pay a sum of Rs 20,000, which should be deposited in a fund known as Child Labour Rehabilitation cum Welfare Fund, whose corpus shall only be utilized for the purpose of concerned child labour welfare. The offending employer's liability doesn't stop here, he may be obliged by the State directive to give employment to the adult member of the child labour's family in addition to disengaging the child labour concerned. In case of inability to provide job to adult member as mentioned above the appropriate Government would deposit a grant of Rs. 5000 each child employed in a factory, mine or in other hazardous employment towards that Child Labour Rehabilitation cum Welfare Fund. Such Fund may be operated district or area wise for which a district could be the unit of collection so that the executive head of the district keeps watchful eyes on the work of the inspectors. A separate cell in the labour department of the appropriate Government would be created and Secretary of the department could be entrusted with the duty of monitoring the scheme under the overall

⁴⁵ AIR 1993 SC 2178: (1993) 1 SCC 645

⁴⁶ (1997) II Lab. L.J. 724 (S.C.)

supervision of the Ministry of Labour and Employment, Government of India.

VII. Conclusion

The development of a country is hampered when children are employed as labourers, because children are the most important and valuable human resource assets to every nation. It is the positive and mandatory duty cast upon the State to provide free and compulsory education for all children until they attain their fourteen years of age.⁴⁷ It is obvious that State is yet to fulfill this constitutional aspiration which is another root cause of illiteracy, dropouts and child work participation rates in industrial, domestic as well as commercial establishments. Child labour in small- scale sectors is rampant which remain unaddressed because of not being within the scope of existing laws.⁴⁸ Children are not organized in the very sector and mostly the piece-rate system of remuneration is the norm with child labour for which employing child labour is always beneficial to employer. The existing conditions of child labour remind us the socio-legal dimension of the problem to raise a serious moral and ethical question, why after six decades of independence of India and despite numerous legislative measures and social policy goals, the situation continues to be so poor here. Article 21A of the Constitution of India recognizes that the right to education of a child belonging to 6 to 14 years of age-group is a Fundamental Right and it mandates that the state shall provide free and compulsory education to all children of age-group six to fourteen years in such manner as the state may, by law, determine. In pursuance of this provision law has been enacted by the Legislature.

Eradication of child labour is long pending issue and the tag of poverty and poor economic condition of the family as root cause of this problem is not tenable altogether. In our country child labour is seen as a poverty driven phenomenon but in reality it reflects the more or less a social attitudes and sensibilities. Where it is evident that some of the developing countries namely Srilanka, Vietnam, Tanzania, Uganda, Zaire, Burma, Kenya and China show that even in developing countries the program of compulsory education, whether sponsored by the State or a religious or social group can be successfully adopted, with corresponding decreases in

⁴⁷ Article 45 of the Constitution of India

⁴⁸ The Factories Act, 1948 bans employment of children only in units using 10 persons or more with power or 20 persons or more without power. Even the Child Labour (Prohibition and Regulation) Act, 1986 excludes family labour, which removes a large number of small-scale units that operate as household/family units from its purview.

child labour,⁴⁹ the question still remains why India has failed to address it in its true perspective. Obviously, the answer lies in its legislative intent. Child labour is an incentive to the employer and legislative measures rather perpetuates the situation.

Following may be considered as root causes of perpetuity of the problem:

In India, most of the Industries are still running with low-grade technologies with illiterate, low skilled labour force;

Child labour is predominant mostly in small-scale industries where there is no statutory protection for them because The Factories Act, 1948 bans employment of children only in units using 10 persons or more with power or 20 or more persons without power.

The Child Labour (Prohibition and Regulation) Act, 1986 excludes family based labour which removes a large number of small scale units that operate as household or family units from the scope of the Act;

In export oriented small-scale industries child labour is rampant because in export industries demand is variable and there are lots of competition. Children can easily be laid off without paying compensation to them when there is no demand because lay off provisions under Industrial Disputes Act, 1947 are not applicable to children;

Children do not form unions. Therefore, employers can easily control children in an exploitative condition of work, paying lower wages than adults, even for longer duration working hours. The piece rate system of remuneration is generally the norm with the child labour, which benefits the employer.

The Child Labour (Prohibition and Regulation) Act, 1986 has failed to define 'hazardous industry or process' which has left many units or processes beyond the scope of the Act. The Act is silent about rehabilitation for those children rescued from the prohibited places. The Act has not mentioned about any formal or informal way of education for the children permitted to work in non-hazardous occupation.

The very recent legislative measure to cover children under universal schooling, The Right to Compulsory Elementary Education for Children has not covered the right of the children under the age six and above the age fourteen. Therefore, the effort of making compulsory elementary education as fundamental right excluded the fate of child labour that are allowed to work above 14 years under the present Act. Therefore, it

⁴⁹ Bhatta, Kiran. "Child Labour: Breaking the Vicious Cycle". *Economic & Political Weekly*, Vol. 31, No.7 (Feb.17, 1996), pp.384-386

may be understood that Child and his/her family may never gain financially from child labour rather child labour perpetuates poverty. In India despite improvements in poverty levels, there has been no corresponding improvement in the prevalence of child labour.

VIII. Suggestion

It may be accepted that trying to enforce law through labour inspectors is not likely to yield results because law itself has loopholes that can easily be taken advantage of. Very recent effort of the Central Government to enhance penalty through further amendment of the law is likely to yield the same result. Adopting the principle of compulsory elementary education for the children of age group 6 to 14 along with compulsory vocational training cum education for children of age group 14 to 18 who are participating in working market may be the way out to solve child labour problem permanently. To eradicate the problem of child labour permanently notion of penalty oriented law or enhanced penalty to be supplemented by the incorporation of the principle of compulsory education, both formal as well as vocational as a compulsory duty on the part of the employer. It should be introduced into legal system. Emphasis should be given upon village areas. The panchayati raj system could be made responsive to put primary education on their agenda for development ensuring universal literacy program as measure to eradicate child labour. Non-governmental organizations can play a bigger role in identifying and monitoring units where child labour is used and at the same time acting as pressure group stressing the importance of education. With increasing globalization and integration with the world economy, India should gear towards adoption of modern technology with skilled labour forces to compete with global market players.

A child cannot enter into a contract of employment until he/ she attains 18 years of age whereas a child may be engaged in work after he/she attains the age of 14 years. On the other hand, the right to receive compulsory elementary education is restricted to the age group 6 to 14 which means after 14 years a child may stop education and enter into a work/ economic activity in need, thereby, the employment of the children from 14 to 21 as a labour is legal and permitted subject to certain legal guidelines. This is the most controversial area of law, which affects the fate of millions of children in India. Therefore, law needs to be amended and uniform age criteria i.e. 18 years to be prescribed for work permit in order to abolish the child labour keeping pace with the age of majority as per Indian Majority Act.

The stereotypical thinking that poverty is the only root cause of child labour is not supportable always. The social attitude should be changed and strong political will is the need of the hour to address the issue

of child labour with more serious thought which demand blaming not only the supply side but also the demand side too, perpetuated through tacit support of the legal system The principle of compulsory school education as an imperative duty to be cast upon both the parents and employers along with adopting different policies and schemes on the part of Governments to alleviate poverty of the parents supplying child as human capital in the labour market. Early childhood care and system of education should be strengthened to make it more attractive to poor children by way of improving quality of teachers, book, curricula and recreational facilities, midday meals, uniforms, teaching aids, land and buildings Private initiatives could be mobilized to play a vital role in addition to governmental initiatives.