

## THE BAREFOOT LAWYERS: PROSECUTING CHILD LABOUR IN THE SUPREME COURT OF INDIA

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### I. INTRODUCTION

On the eve of India's independence from British rule, India's first Prime Minister, Jawaharlal Nehru, issued a challenge to the constituent assembly: "We end today a period of ill fortune and India discovers herself again. The achievement we celebrate today is but a step, an opening of opportunity, to the greater triumphs and achievements that await us. Are we brave enough and wise enough to grasp this opportunity and accept the challenge of the future?"<sup>1</sup> For the most part, this challenge has gone unmet in the fifty-seven years since India's independence. In 1999, twenty-six percent of Indians lived below the poverty line; sixteen percent of the population was officially "destitute" in 1998.<sup>2</sup> As of 1997, India's literacy rate was fifty-two percent, amongst the lowest in the world.<sup>3</sup>

Indians respond that their country is the largest democracy in the world, and one of the few democracies in Asia. In the face of economic hardship, communal and religious strife, the horrors of partition and the legacy of colonialism, India has remained a democratic country. Even then, democracy has not achieved for India the position of influence in the world and the more widely shared prosperity that its citizens hoped for their country. Too many Indians are poor, hungry, illiterate and view their government with contempt. For example, Indian newspapers estimate that hundreds of suspected criminals stood for election in the 1997 municipal votes in Delhi and Mumbai.<sup>4</sup> Transparency International, a German anti-corruption organization, ranks India amongst the most corrupt

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1. Jawaharlal Nehru, "Address" (Speech presented to the Constituent Assembly, Delhi, Aug. 14, 1947) in Brian MacArthur, ed., *THE PENGUIN BOOK OF TWENTIETH-CENTURY SPEECHES* 235 (1993).

2. Brooke Unger, *Survey: The Rich get Richer*, *ECONOMIST*, June 2, 2001, at 7.

3. *Happy anniversary?*, *ECONOMIST*, Aug. 16, 1997, at 19.

4. *Id.* at 20.

countries in the world.<sup>5</sup> Bureaucrats and politicians are beholden to power, money and influence, not the public good that Nehru and Mohandas Karamchand Gandhi, the Mahatma, envisioned for a free and independent India.

In response to the political corruption that plagued India in the 1970s, the Supreme Court of India developed a new type of litigation aimed at better protecting the poor, destitute, illiterate and disadvantaged. By relaxing the rules of standing and becoming more flexible with regards to its procedures and remedies, the Court hoped to expand judicial access for ordinary Indians. Cases brought under these reforms are known as public interest litigation (PIL) actions. Since the 1980s, the Supreme Court of India and the state High Courts have heard numerous PIL cases, involving all segments of Indian society.<sup>6</sup>

In the 1990s, child labour advocates petitioned the Supreme Court of India to enforce India's *Child Labour (Prohibition and Regulation) Act, 1986*.<sup>7</sup> India has an extensive domestic legislative and policy framework for regulating and prohibiting child labour. In addition, it has signed numerous international conventions regarding the issue. Nonetheless, child labour continues to be a problem in that country. Depending on the definition of child labour, there might be as many as 100 million children working in India.<sup>8</sup> Critics argue that India's legislation is full of loopholes and poorly enforced.<sup>9</sup> As such, employers can evade its penalties by either changing their production structures or influencing government officials. Further, the *Child Labour Act* does not target the root causes of child labour in India: poverty, caste discrimination, a lack of educational opportunities, and myths about the nature of children's work. The Supreme Court's order in the two child labour PIL cases attempted to rectify these inadequacies in the law.<sup>10</sup>

It is generally thought that child labour is caused by poverty and inadequate economic growth.<sup>11</sup> Even statistical data demonstrates that there is a link between child labour, poverty, and economic development.<sup>12</sup> Further, there is

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5. Press Release, Transparency International, Corrupt Political Elites and Unscrupulous Investors Kill Sustainable Growth in its Tracks, Highlights New Index (Aug. 28, 2002).

6. See PEOPLE, LAW AND JUSTICE: CASEBOOK ON PUBLIC INTEREST LITIGATION (Sangeeta Ahuja, ed., 1997).

7. Child Labour Act, No. 61 (1986) (India).

8. Rajyasri Rao, *India 'Losing' Child-Labour Battle*, BBC NEWS, May 2, 2002, at [http://news.bbc.co.uk/1/hi/world/south\\_asia/1970708.stm](http://news.bbc.co.uk/1/hi/world/south_asia/1970708.stm).

9. See Section II, below, for more on this topic.

10. *Mehta v. Tamil Nadu*, A.I.R. 1991 S.C. 417 [hereinafter *Mehta No. 1*]; and *Mehta v. Tamil Nadu*, A.I.R. 1997 S.C. 699 [hereinafter *Mehta No. 2*].

11. Carol Bellamy, THE STATE OF THE WORLD'S CHILDREN: FOCUS ON CHILD LABOUR 27-28 (1996); INTERNATIONAL LABOUR ORGANIZATION, COMBATING THE MOST INTOLERABLE FORMS OF CHILD LABOUR: A GLOBAL CHALLENGE 9-11 (1997); and Timothy A. Glut, Note, *Changing the Approach to Ending Child Labor: An International Solution to an International Problem*, 28 VAND. J. TRANSNAT'L L. 1203, 1207-10 (1995).

12. BELLAMY, *supra* note 11, at 27.

numerical data showing that children in developing countries are more likely to be employed than children in industrialized countries.<sup>13</sup> Nonetheless, India's development experience suggests that child labour is unlikely to be eradicated simply through economic growth. Since liberalizing its economy in 1991, India has seen unprecedented levels of growth. Foreign direct investment has risen from next to nothing to over two billion dollars (U.S.) per year.<sup>14</sup> India's share of world exports was 0.4% in 1980; in 2000 it was 0.7%.<sup>15</sup> Consumer-price inflation has decreased to four per cent from a staggering fourteen percent in 1991.<sup>16</sup> Notwithstanding these economic successes, the number of children working in India has not decreased significantly and may have even increased. This fact suggests that India must do more to combat child labour, especially if the causes of child labour include caste discrimination, little or no educational opportunities for young people, and misconceptions about children's work.

The decision to resort to PIL is an example of the rights-based approach to solving problems associated with development. By pursuing the issue at the Supreme Court of India, child labour advocates are not only seeking the enforcement of the law, but also the empowerment of child labourers. The hope is that the Supreme Court will not only punish employers for violating the law but also give children and their families the tools to escape a life of poverty and discrimination.

This article is an assessment of PIL as a tool in furthering India's economic development. It seeks to examine whether PIL has successfully liberated India's child labourers and, in doing so, what effect PIL might have on political life in India. These problems lead to a framework of analysis that considers several questions. Section II, A Rights-Based Approach to Development, introduces the conceptual framework for this project. This section defines the approach and discusses its different elements and also compares the rights-based approach to a needs-based approach. Instead of focusing solely on economic growth or social investment, the rights-based approach emphasizes participation in the development process. The section concludes by examining the contribution of Dr. Amartya Sen, the Nobel-prize-winning economist and philosopher, to this theory.

Section III, Child Labour in India, is an introduction to the problem of child labour. To better understand the problem, this section attempts to define the scope of the issue, including the number of children currently employed in India and the types of work children are doing. It also analyses the legislative and policy framework developed by the Indian government to combat the problem. This section concludes that the legislative and policy framework is unable to effectively

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13. ILO, INTERNATIONAL PROGRAM ON THE ELIMINATION OF CHILD LABOUR, *Governing Body Document on Child Labour Committee on Employment and Social Policy*, ILO Doc. GB.264/ESP/1 (November 1995) available at <http://www.ilo.org/public/english/standards/ipecc/publ/gb/index.htm>.

14. Brooke Unger, *Survey: The Plot Thickens*, *ECONOMIST*, June 2, 2001, at 3.

15. *Id.*

16. *Id.*

eradicate child labour for two reasons: the law is poorly enforced, and the law fails to target the root causes of the problem.

Section IV, *The Development of Public Interest Litigation in India*, describes the development of this unique type of litigation. This section begins by defining PIL in the Indian context. PIL is similar to public interest law in the United States of America in that it is a reform of the traditional model of public law adjudication. On the other hand, India's poverty and high illiteracy means that PIL has different characteristics when practiced in the Indian context. This section identifies those characteristics as well as the source for PIL, the Constitution of India. Finally, it surveys the criticisms being made of PIL, including the concern that PIL advocates are more concerned with publicity than with the public interest.

Section V, *The Supreme Court's Response to Child Labour*, is a comment on the two leading PIL cases dealing with this issue. This section argues that the Supreme Court of India's decisions in these two cases are far-reaching in their potential impact on businesses that continue to employ children. On the other hand, the Supreme Court of India did not fix the glaring loopholes in India's child labour legislation. Further, it did not target the government's failure to enforce the law, nor did it deal with other causes of child labour besides poverty. The Supreme Court of India's decisions in these two cases will help combat child labour in the short-run but it is unclear whether the Court's order is enough to eradicate the problem permanently.

It will be many years before India has successfully banned the practice of child labour. Doing so will require a commitment by India's political leaders to effectively enforce its laws and policies. It will also require the concerted effort of non-governmental organizations (NGOs), social activists and the international community to bring to light violations of the law. The Supreme Court of India, through PIL, can play an important role in assisting the Indian government and other agencies in this goal. Doing so will be an important step in realizing the "triumphs and achievements" Nehru promised on the eve of India's independence.

## **II. A RIGHTS-BASED APPROACH TO DEVELOPMENT**

Nobel laureate Dr. Amartya Sen has argued that development is a "process of expanding the real freedoms that people enjoy."<sup>17</sup> This view informs the conceptual framework for this article. Popularly known as the rights-based approach to development, this section defines the approach and its major elements. Further, this section compares the rights-based approach to other theories of international development, including the needs-based approach. Finally, the contribution of Dr. Sen to understanding the intersection of human rights and international development is examined.

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17. AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 3 (1999).

### **A. Defining the Approach**

There is no agreed-upon definition of the rights-based approach to development. Former United Nations High Commissioner for Human Rights, Mary Robinson, says the approach “means describing situations not in terms of human needs, or areas of development, but in terms of the obligation to respond to the rights of individuals. This empowers people to demand justice as a right, not as a charity.”<sup>18</sup> The Human Rights Council of Australia argues that “human rights and development are *not* distinct or separate spheres and, therefore, that the question is *not* how to identify points of actual or potential intersection but to accept that development should be seen as a subset of human rights.”<sup>19</sup>

Another view is that the rights-based approach to development “has to do with the rethinking of our problems looked at through a production and growth-focused framework, and shifting towards an approach more in tune with our objectives as society.”<sup>20</sup> Finally, the United Nations Office of the High Commissioner for Human Rights (UNOHCHR) states, “a rights-based approach integrates the norms, standards and principles of the international human rights system into the plans, policies and processes of development.”<sup>21</sup>

### **B. Elements of the Rights-Based Approach to Development**

Though these definitions differ, there is some consensus as to the elements included in a rights-based approach to development. These elements include:

- an express linkage to rights;
- accountability;
- empowerment;
- participation; and
- non-discrimination and attention to vulnerable groups.<sup>22</sup>

The rights-based approach seeks to define the objectives of development in terms of particular rights. Further, the approach seeks to create express normative links between development objectives and international, regional and national human

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18. Marta Santos Pais, *A Human Rights Conceptual Framework for UNICEF*, iv (1999), at <http://www.unicef.org/crc/essay-9.pdf>.

19. HUMAN RIGHTS COUNCIL OF AUSTRALIA, *THE RIGHTS WAY TO DEVELOPMENT: A HUMAN RIGHTS APPROACH TO DEVELOPMENT ASSISTANCE* 25-26 (1995).

20. Jorge Daniel Taillant, *A Rights Based Approach to Development*, at <http://www.cedha.org.ar/docs/doc78.htm>. (Mar. 2, 2002).

21. United Nations Office of the High Commissioner for Human Rights, *What is a Rights-Based Approach to Development?*, at <http://193.194.138.190/development/approaches-04.html>. (last visited Nov. 3, 2004) [hereinafter UNOHCHR].

22. *Id.*

rights instruments. As the United Kingdom's Department for International Development notes, "At the local level, people need a clear understanding of what particular rights mean in terms of concrete entitlements to be able to claim them."<sup>23</sup> By creating an express linkage to rights, people have recourse to the law, as opposed to only relying on policy-makers when seeking development objectives.

The rights-based approach to development identifies claim-holders (and their entitlements) and corresponding duty-holders (and their obligations). The approach seeks to make duty-holders accountable to claim-holders, both in terms of protecting, promoting, and providing rights and in terms of abstaining from violating those rights. The ultimate objective is to create locally determined benchmarks for measuring the progress of the approach against universal standards. These benchmarks can include the "development of laws, policies, institutions, administrative procedures and practices, and mechanisms of redress and accountability that can deliver on entitlements, respond to denial and violations, and ensure accountability."<sup>24</sup>

The third element, empowerment, gives preference to strategies for empowerment over charitable responses. The goal of empowerment is to give people "the power, capacities and access needed to change their own lives, improve their own communities and influence their own destinies."<sup>25</sup> This element of empowerment links the rights-based approach to development to Dr. Sen's notion of "development as freedom."

Another element of the approach is participation. Participation is different from empowerment in that it seeks to increase access for people to development processes, institutions, information and redress or complaints mechanisms. Access to the justice system is an important part of increasing participation of people in the development process, especially if their rights can only be secured by recourse to law.

Finally, the rights-based approach promotes inclusion by being attentive to legal inequalities in status and entitlements. These inequalities can arise through discriminatory "practices in households, communities and the implementation of policies."<sup>26</sup> The UNOHCHR highlights women, minorities, indigenous peoples and prisoners as particularly vulnerable and needing attention.<sup>27</sup> Though there is debate as to the definition of the rights-based approach to development, these elements are generally universal. They are accepted by most intergovernmental

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23. U.K., DEPARTMENT FOR INTERNATIONAL DEVELOPMENT, REALIZING HUMAN RIGHTS FOR POOR PEOPLE 15 (2000).

24. UNOHCHR, *supra* note 21.

25. *Id.*

26. *Id.*

27. *Id.*

organizations and bilateral aid agencies, including the Canadian International Development Agency (CIDA).<sup>28</sup>

### **C. The Revolt Against a Needs-Based Approach**

The rights-based approach to development is a relatively new theory in development thought. In the post-World War II era, development theories were dominated by economists.<sup>29</sup> The primary goal of development was economic growth and transformation. As such, development theory was focused on state and macro-phenomena. Though social aspects did play a small role in development thought, they were to ensure a more effective use of resources. The 1960s was the United Nations' Decade of Development. Industrialized countries agreed on a target for development aid: one percent of the gross national product.<sup>30</sup> The objective was to cure underdevelopment through a program of investment in infrastructure and technical expertise.<sup>31</sup> By 1969, it was clear that the Decade of Development had produced few results. Though bilateral aid had increased, poverty had also increased since the beginning of the 1960s.<sup>32</sup>

In the 1970s, development theory became multi-disciplinary and micro-oriented. Social investment was seen as a contribution to, rather than a drain on, economic productivity. "Redistribution with growth" and "meeting basic needs" became mantras of this neo-classical contra revolution. International organizations, including the World Bank and the United Nations, attempted to reorient their policies and practices. The UN General Assembly, in 1974 and 1975, called for a New International Economic Order.<sup>33</sup> Then World Bank President Robert McNamara challenged developing countries to focus their efforts on the poorest forty percent of the population.<sup>34</sup> The World Bank developed policies aimed at structural adjustment, economic efficiency and macro-regulation.<sup>35</sup>

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28. See Canadian International Development Agency, Government of Canada Policy for CIDA on Human Rights, Democratization and Good Governance (1996).

29. Hans-Otto Sano, *Development and Human Rights: The Necessary, but Partial Integration of Human Rights and Development*, 22 HUM. RTS. Q. 734, 739 (2000).

30. MAGGIE BLACK, THE NO-NONSENSE GUIDE TO INTERNATIONAL DEVELOPMENT 19 (2002).

31. *Id.*

32. *Id.* at 20.

33. Raw Materials and Development, GA Res. 3201 and 3202, UN GAOR, 6<sup>th</sup> Spec. Sess., Supp No. 1, UN Doc. A/9559 (1974); and Development and International Economic Cooperation, GA Res. 3362, UN GAOR, 7<sup>th</sup> Spec. Sess., Supp. No. 1, UN Doc. A/10301 (1975).

34. *Official aid – a brief history*, NEW INTERNATIONALIST 285 at <http://www.newint.org/issue285/history.html/>.

35. Sano, *supra* note 29, at 740.

The advent of the rights-based approach began with publications by three major international organizations. In 1987, UNICEF published *Adjustment with a Human Face*,<sup>36</sup> the first major opposition to the micro-oriented approach of the 1970s and the 1980s. In 1990, the United Nations Development Programme published its *Human Development Report*<sup>37</sup> and the World Bank published the *World Development Report*.<sup>38</sup> The *Human Development Report* focused on human development and the issue of empowerment. It diverged from the 1980s thinking, which focused on economic solutions. Development was defined as the ability to choose.<sup>39</sup> The World Bank report argued that poverty reduction could be obtained through other means than simply economic growth.<sup>40</sup> At their core, these three publications emphasized participation for poor people in development policies and processes.

#### **D. Social Initiatives and Good Governance**

The rise of a rights-based approach to development can be traced to two predominant tendencies in the 1990s.<sup>41</sup> First, developing countries began demanding social provisions in international agreements, which became internationally accepted norms or entitlements. For example, at the UN Social Summit Meeting in Copenhagen in 1995, there was an emphasis on common principles for social initiatives (i.e. the 20/20 principle).<sup>42</sup> At the World Conference on Human Rights in Vienna in 1993, the principle of the indivisibility of human rights and the right to development were accepted unanimously.<sup>43</sup>

The other tendency was the increasing weight being placed upon good governance and democratization in the development discourse.<sup>44</sup> Good governance is a response to the failure of bureaucracies to create enabling environments in developing countries. It seeks to achieve development objectives cost-effectively

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36. ADJUSTMENT WITH A HUMAN FACE: PROTECTING THE VULNERABLE AND PROMOTING GROWTH, (Giovanni Adrea Cornia, Richard Jolly & Frances Stewart, eds., 1987).

37. United Nations Development Programme, Human Development Report 1990 (1990).

38. World Bank, World Development Report 1990 (1990).

39. United Nations Development Programme, *supra* note 37, at 10.

40. World Bank, *supra* note 38.

41. Sano, *supra* note 29, at 735.

42. The 20/20 principle calls on donor countries to allocate twenty per cent of their official development assistance and twenty per cent of their government budgets, respectively, to basic social services such as basic schooling and primary health services. See Report of the World Summit for Social Development, U.N. GAOR, 50th Sess., 14th plen. mtg. At 83, UN Doc. A/CONF.166/9 (1995).

43. See Vienna Declaration and Programme of Action, U.N. World Conference on Human Rights, U.N. GAOR, UN Doc. A/CONF.157/23 (1993).

44. Sano, *supra* note 29, at 736; and BLACK, *supra* note 30, at 122-23.



and accountably. Democratization is not necessarily about democracy as a form of government.<sup>45</sup> Instead, it is about developing a political culture or behavioural norms that protect individual and group rights in the political process.

### **E. The Contribution of Dr. Amartya Sen**

The rights-based approach to development was further developed by Dr. Sen's notion of "development as freedom." In his view, development requires: "The removal of major sources of unfreedom: poverty as well as tyranny, poor economic opportunities as well as systematic intolerance of overactivity of repressive states."<sup>46</sup> If these freedoms are assured, then people can live productively so as to promote their own and other's social development. He argues: "Civil and political rights ... give people the opportunity to draw attention forcefully to general needs and to demand appropriate public action. Whether and how a government responds to needs and sufferings may well depend on how much pressure is put on it, and the exercise of political rights (such as voting, criticizing, protesting, and so on) can make a real difference."<sup>47</sup>

Sen relies on two examples to demonstrate this proposition. First, the denial of human rights can be an obstacle to human development. In Asia and North Africa, there are higher female mortality rates than in North America or Europe.<sup>48</sup> According to Sen, there are more than one hundred million "missing women" in these parts of the world. Though the excess mortality in women of a childbearing age or older may be a result of maternal mortality, there is no explanation for this phenomenon amongst infants or children. The lower female-male ratio suggests that female health and nutrition is being neglected.

Second, civil and political rights can promote economic security. In an oft-quoted fact, Sen states that no major famine has occurred in a country with a democratic form of government and a relatively free press.<sup>49</sup> This fact applies to both developed countries in Europe and North America and developing countries such as Botswana and India. In a country with functioning opposition parties and a free press, the government will come under severe criticism and pressure to prevent a famine. Conversely, authoritarian countries do not have to reckon with such criticism and there is no political incentive to prevent a famine. These examples demonstrate that there is a connection between development and social factors, suggesting that solely economic solutions will not be enough to correct the problem of underdevelopment.

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45. Sano, *supra* note 29, at 736.

46. SEN, *supra* note 17.

47. Amartya Sen, *Human Rights and Economic Achievement*, in THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS 88, 92 (J.R. Bauer & D.A. Bell, eds.1999).

48. SEN, *supra* note 17, at 104-07.

49. *Id.* at 178-80.

## **F. Conclusion**

After the Second World War, economists and international bureaucrats struggled with a model for international development assistance. In the 1960s, the primary goal of international development was economic growth. As such, government policy focused on the state and macro-phenomena. After no real advances in international development, states began adopting a needs-based approach to international development. The World Bank championed this theory by promoting structural adjustment, economic efficiency and macro-regulation.

In the 1990s, demands for social provisions and the emphasis on good governance and democratization in the development discourse gave rise to a new theory of international development: the rights-based approach to development. Though there is no accepted definition of this approach, some characteristics are common to all descriptions of it. These include: an express linkage to rights; accountability; empowerment; participation; and non-discrimination and attention to vulnerable groups. The approach received more attention after Dr. Amartya Sen's use of it in his book *Development as Freedom*. He argued that development requires the removal of sources of unfreedom. Further, civil and political rights can actually protect a people's economic security. This integration of economic, social and political activities by a Nobel-prize winning economist gave the rights-based approach to development more legitimacy amongst policy-makers, planners and even the general public.

The rights-based approach has not supplanted the needs-based approach amongst development practitioners or aid agencies. Nonetheless, it is being used increasingly more by bilateral aid programs and multilateral institutions. Most importantly, the rights-based approach recognizes the importance of human rights and the rule of law in the development process. The needs-based approach fails to integrate fundamental freedoms, legal processes or minimum rights into development planning. It focuses almost exclusively on market-oriented solutions to underdevelopment. As this paper demonstrates in the following sections, a human rights focus can aid in economic and social development.

## **III. CHILD LABOUR IN INDIA**

As early as 1878, social activists lobbied to ban the practice of child labour in India. Lord Shaftesbury, writing to the *London Times*, said: "The remedy of the evil is a matter of both humanity and justice—humanity to the oppressed women and children and of justice to the millowners of Lancashire, who are laid under restrictions from which the Indian millowners are entirely free."<sup>50</sup> This section introduces the problem of child labour in India. It begins by describing the

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50. Lord Shaftesbury, Letter to the Editor, *TIMES* (London), Oct. 3, 1878. *See also* Sorabjee Shapuree Bengalee, Letter to the Editor, *TIMES* (London), Sept. 13, 1878.

scope of the problem, including an assessment of the number of child labourers, the industries in which they are employed and the reasons why children enter the workforce. It also outlines the legislative and policy framework in India for regulating and prohibiting child labour. Finally, this section concludes by analysing the reasons why, notwithstanding this legislative framework, child labour still exists in India.

### **A. The Scope of the Problem**

The problem of child labour in India is difficult to characterize. It is estimated that at least eleven million children are at work in India, if not more.<sup>51</sup> Further, these children are employed in hazardous industries with little government protection.<sup>52</sup> Child labour affects children in a number of ways. It can be harmful to their health and safety, they are often underpaid, and child labourers rarely attend school. Finally, though there is no clear evidence why children enter the workforce in India, for many, it is because of poverty and cultural norms.<sup>53</sup>

#### **1. The Number of Child Labourers**

Human Rights Watch estimates that there are more child labourers in India than any other country in the world.<sup>54</sup> India's 1991 national census found 11.285 million child workers out of a five to fourteen year-old population of 210 million.<sup>55</sup> In a 1996 public address, then Prime Minister Narasimha Rao suggested that there were twenty million children employed in India's hazardous industries alone.<sup>56</sup> More disturbing, the 1991 census revealed that only half of children between the ages of five and fourteen were attending school. The census could not account for children neither in school nor at work. The International Labour Organization (ILO) has classified these children as "nowhere" children.<sup>57</sup>

NGOs and intergovernmental organizations cite higher estimates of child labour in India. For example, UNICEF estimates between seventy-five and ninety-

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51. INTERNATIONAL LABOUR OFFICE, YEARBOOK OF LABOUR STATISTICS 1997, 19 (1997).

52. Further discussion of this issue will be found at 15-16, below.

53. Further discussion of this issue will be found at 16-17, below.

54. HUMAN RIGHTS WATCH CHILDREN RIGHTS PROJECT AND HUMAN RIGHTS WATCH/ASIA, THE SMALL HANDS OF SLAVERY: BONDED CHILD LABOUR IN INDIA 1 (1996).

55. INTERNATIONAL LABOUR OFFICE, YEARBOOK OF LABOUR STATISTICS, *supra* note 51.

56. HUMAN RIGHTS WATCH, *supra* note 54, at 119.

57. U.S. DEPARTMENT OF LABOR, BUREAU OF INTERNATIONAL LABOR AFFAIRS, BY THE SWEAT & TOIL OF CHILDREN: EFFORTS TO ELIMINATE CHILD LABOR, vol. 5 (1998) at 152.

five million child workers are under the age of fourteen.<sup>58</sup> The Operations Research Group of Baroda completed an all-India sample survey in 1980-81 and found forty-four million working children.<sup>59</sup> The Balai Data Bank of Manila and the Centre for Concern for Working Children cites recent estimates of one hundred million working children.<sup>60</sup> Human Rights Watch believes that the Indian government has been “negligent in its refusal to collect and analyze current and relevant data regarding the incidence of child labour.”<sup>61</sup> Because of this discrepancy in estimates of child labour in India, the U.S. government uses forty-four million to fifty-five million as a working figure.<sup>62</sup>

The problem in estimating the number of child labourers in India is the lack of a working definition of both “child” and “labour.” In 1971, the government census did not include unpaid workers in its estimate of child labourers.<sup>63</sup> In 1981, though unpaid workers were included in official estimates, children who tend cattle, fetch water and wood, and prepare meals as part of their household duties, were not classified as working children.<sup>64</sup> Children working alongside their parents, even though they may be paid, and street children, such as beggars and prostitutes, are either underreported or not reported at all. Children working as apprentices for newspaper vendors, shoe shiners, and hawkers, or children in school part-time are also underreported. It is unclear whether this underreporting was corrected in subsequent censuses. Other factors, such as child homelessness, poor birth records, informal sector employment, and large refugee populations, can also lead to underreporting.<sup>65</sup>

## 2. Categories of Work

The 1991 Census of India divides child labour into nine categories: cultivation; agricultural labour; livestock, forestry, fishing, plantation; mining and quarrying; manufacturing, processing, servicing and repairs; construction; trade

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58. GERRY PINTO, *CHILD LABOUR IN INDIA: THE ISSUE AND DIRECTIONS FOR ACTION* 2 (1995).

59. MYRON WEINER, *THE CHILD AND THE STATE IN INDIA* 21 (1991); and MANJARI DINGWANAY, *CHILDREN OF DARKNESS* 4 (1988).

60. U.S. DEPARTMENT OF LABOR, BUREAU OF INTERNATIONAL LABOR AFFAIRS, *supra* note 57.

61. HUMAN RIGHTS WATCH, *supra* note 54, at 122.

62. *Id.* See also Telegram no. 01401, from U.S. Embassy-New Delhi, (Feb. 20, 1998) (on file with author).

63. R. Devi, *Prevalence of Child Labour in India: A Secondary Data Analysis*, in, *CHILD LABOUR AND HEALTH: PROBLEMS AND PROSPECTS* 37 (U. Naidu & K. Kapadia, eds., 1985).

64. WEINER, *supra* note 59, at 20.

65. U.S. DEPARTMENT OF LABOR, BUREAU OF INTERNATIONAL LABOR AFFAIRS, *supra* note 57, at 15.

and commerce; transport, storage, and communication; and other services.<sup>66</sup> Urban child labourers are employed in all categories of work, though most are employed in manufacturing, processing, servicing, and repairs. Conversely, rural children are employed overwhelmingly in cultivation and agricultural labour.

The majority of child labour is casual work. Employers are usually “unregistered and undercapitalized productive enterprises, operating generally in a competitive and often highly volatile or seasonal market.”<sup>67</sup> This characteristic of child labour in India distinguishes it from child labour in England and the United States during the nineteenth century.<sup>68</sup> In those countries, children were employed in larger factories and mines due to industrialization. In India, children work in the unorganized informal sector. There is no system of apprenticeship and the majority of skills children learn are not transferable. Children begin work at a young age and are largely illiterate. Their early entry into the work force is no guarantee of a higher wage in the future. Most importantly, there is a notion of “children’s work” in India. This work requires speed, patience, manual dexterity and suppleness. This “nimble fingers” theory is most prevalent in the carpet, silk, bidi, and silver industries.<sup>69</sup>

### 3. The Effects of Child Labour

Child labour has serious socio-economic effects. First, child labourers face major health and physical risks. They often work long hours and are required to undertake tasks that they are physically and developmentally unprepared to do. Carpet weaving, for example, can damage children’s eyes. Leather tanning can result in physical deformity. These physical dangers are compounded, as children are “more liable than adults to suffer occupational injuries, owing to inattention, fatigue, poor judgement and insufficient knowledge of work processes.”<sup>70</sup> These health and physical effects are not limited to industrial occupations. The introduction of advanced farming techniques, new technologies, and chemicals can cause the same physical hazards in agricultural labour.<sup>71</sup>

Second, child labourers are often underpaid, if at all. Children receive a fraction of the wage adults earn, even when employed in the same type of work.

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66. D.P. CHAUDHRI, *A DYNAMIC PROFILE OF CHILD LABOUR IN INDIA: 1951-1991*, 45 (1996).

67. Assefa Bequele & Jo Boyden, *Child Labour: Problems, Policies, and Programmes*, in *COMBATING CHILD LABOUR 1* (Assefa Bequele & Jo Boyden eds., 1998).

68. WEINER, *supra* note 59, at 33.

69. Lee Tucker, *Child Slaves in Modern India: The Bonded Labor Problem*, 19 *HUM. RTS. Q.* 572, 579 (1997).

70. WORLD HEALTH ORGANIZATION, *CHILDREN AT WORK: SPECIAL HEALTH RISKS: TECHNICAL REPORT SERIES 756* (1987).

71. Bequele & Boyden, *supra* note 67, at 3.

Also, children do not receive employment benefits, insurance, or social security.<sup>72</sup> Thus, the employment of children becomes a competitive advantage for employers and even whole industries.

Finally, it is difficult for children to attend school or receive vocational training. Obviously, children working long hours have trouble attending school on a regular basis, if at all. Since children in the Indian workforce are uneducated, the work they do is often unskilled and simple and provides little opportunity for further training. Even if children are not working long hours, stress and fatigue affects their attendance and participation in school activities. In Varanasi, the government of India has implemented training programs for child labourers in the carpet manufacturing industry.<sup>73</sup> Each training centre accommodates fifty children for one year of training. Children are paid one hundred rupees per month for the duration of their training. Though the government centres are better staffed and equipped than apprenticeship programs offered by factory owners, there is little incentive to enrol. Most factories pay 150 to 200 rupees per month. This government program provides some children with paid labour and skills training but, unfortunately, there is no facility for basic, formal education.

#### 4. The Causes of Child Labourer

Ozay Mehmet, Errol Mendes, and Robert Sinding identify seven cultural entrapments that cause child labour.<sup>74</sup> They are:

- (a) Cultural expectations of children as an integral part of the socio-economic survival of the family and community.
- (b) Unrelenting poverty that mandates, in the logic of the prisoners of such poverty, larger families for greater chances of economic survival, further enlarging the potential pool for exploitation. This is especially true in the rural areas where the overwhelming percentage of child labour, including bonded labour, is found.
- (c) The environmental degradation of the countryside, causing mass flight to the cities and the slow death of rural economies.
- (d) On arrival in overcrowded cities, the disintegration of family units through alcoholism, unemployment, etc., setting the stage for the emergence of armies of street children, child labourers and child prostitutes.
- (e) The emergence in the cities of export industries based on small to medium-size sweatshops utilizing low skill technologies and

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72. WEINER, *supra* note 59, at 33.

73. Ramesh Kanbargi, *Child Labour in India :The Carpet Industry of Varanasi*, in COMBATING CHILD LABOUR, *supra* note 67, at 99-100.

74. OZAY MEHMET ET AL, TOWARDS A FAIR GLOBAL LABOUR MARKET: AVOIDING A NEW SLAVE TRADE 50-51 (1999).

maintaining competitive positions though low wages and low labour standards.

- (f) Lack of effective enforcement of the right to free and compulsory elementary education, even where such rights exist under national laws and constitutions.
- (g) Cultural discrimination against the female child.

All of these factors exist in India. Overwhelming poverty in India drives most child labourers into the workforce. In some cases, children work alongside their parents in an effort to raise their household income. This practice is prevalent in agricultural and domestic labour. Many children are forced into industrial labour. Some of these children have migrated to urban centres with their families to escape rural poverty. Others move to urban centres to look for work and send their families monthly income supplements.

Interviews by an Indian researcher in Khurja's pottery industry revealed these and other reasons why children seek employment.<sup>75</sup> For example, Laxman Das, a twelve year-old boy, and his younger brother are the sole earning members of their seven-person family. Das does not reveal to the researcher why his parents do not work, but the boy's employer suggests it is because their father is an alcoholic and their mother is lazy. In another example, Opal's parents needed money for the marriage of his older sister. Another parent brought her children to work to supplement her low wages. This anecdotal evidence reinforces poverty as the main motivation for child labourers.

In India, there are strong cultural motivations as well. Many parents believe that work provides valuable skills that school does not. Though parents recognize the importance of basic education, including reading and writing skills, they do not see these skills as significantly advancing a child's future employment chances. Some parents hope that their children will eventually be promoted to manager or supervisor. Parents' perceptions of social relationships strongly influence whether a child enters the workforce in India. For example, if a parent is uneducated or believes that women should be economically dependent on their husbands, there is less encouragement for girls' education. Parents in India see education and idleness as more harmful than labour in some cases.

## **B. Legislation and Policy**

India has a developed regulatory infrastructure prohibiting work by children under a certain age and regulating conditions of work for older children. The framework for these regulations is the Constitution of India. Article 24 prohibits the employment of children below the age of fourteen in factories or

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75. NEERA BURRA, A REPORT ON CHILD LABOUR IN THE POTTERY INDUSTRY OF KHURJA, UTTAR PRADESH 22 (1987).

mines or any other hazardous employment.<sup>76</sup> Article 21 protects the right to life and liberty, which the Supreme Court of India has interpreted as including the right to the integrity and dignity of the person and the right to the benefits of protective labour legislation.<sup>77</sup> The Directive Principles, which are not binding, provide that “the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age and strength.”<sup>78</sup> The Directive Principles also encourage the provision of free and compulsory education for all children less than fourteen years of age.<sup>79</sup> Finally, in *People’s Union for Democratic Rights v. India*,<sup>80</sup> a case dealing with the problem of bonded labour, the Supreme Court of India held that all labour where the individual is paid less than the minimum wage is bonded labour, and therefore violates the Constitution’s protection against debt bondage.<sup>81</sup>

### 1. International Obligations

India has ratified three ILO conventions on child labour. These include: the *Minimum Age (Industry) Convention, 1919*<sup>82</sup> (Convention No. 5); the *Forced Labour Convention, 1930*<sup>83</sup> (Convention No. 29); and the *Minimum Age (Underground Work) Convention, 1965*<sup>84</sup> (Convention No. 123). *Convention No. 5* prohibits the employment of children under the age of fourteen in any industrial

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76. INDIA CONST., art. 24 states: “No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.”

77. Tucker, *supra* note 69, at 579.

78. INDIA CONST., art. 39(e).

79. INDIA CONST., art. 45 states: “The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years.”

80. A.I.R. 1982 S.C. 1473, 1486.

81. INDIA CONST., art. 23(1) states: “Traffic in human beings and begar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with the law.”

82. Convention Fixing the Minimum Age for Admission of Children to Industrial Employment, Nov. 28, 1919, International Labour Organization Convention No. 5 (entered into force June 13, 1921, ratified by India Sept. 9, 1955) [hereinafter Convention No. 5].

83. Convention Concerning Forced or Compulsory Labour, June 28, 1930, International Labour Organization Convention No. 29 (entered into force May 1, 1932, ratified by India Nov. 30, 1954) [hereinafter Convention No. 29].

84. Convention Concerning the Minimum Age for Admission to Employment Underground in Mines, Nov. 10, 1957, International Labour Organization Convention No. 123 (entered into force Nov. 10, 1967, ratified by India Mar. 20, 1975) [hereinafter Convention No. 123].



undertaking, unless it is a family undertaking.<sup>85</sup> *Convention No. 29* prohibits the Indian government from imposing or permitting forced or compulsory labour.<sup>86</sup> *Convention No. 123* prohibits the employment of children under the age of sixteen in mines.<sup>87</sup> India has also ratified the *Convention on the Rights of the Child*.<sup>88</sup> Article 32 of that Convention requires India to establish a minimum employment age, provide for the appropriate regulations of hours and employment conditions, and provide for appropriate penalties or other sanctions to ensure that children are not economically exploited.<sup>89</sup>

India has not ratified the ILO's two major conventions on child labour: the *Minimum Age Convention, 1973*<sup>90</sup> (Convention No. 138), and the *Worst Forms*

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85. Convention No. 5, *supra* note 82. Art. 2 states: "Children under the age of fourteen years shall not be employed or work in any public or private industrial undertaking, or in any branch thereof, other than an undertaking in which only members of the same family are employed."

86. Convention No. 29, *supra* note 83. Art. 1(1) states: "Each Member of the International Labour Organisation which ratifies this Convention undertakes to suppress the use of forced or compulsory labour in all its forms within the shortest possible period."

87. Convention No. 123, *supra* note 84. Art. 2(1) states: "Persons under a specified minimum age shall not be employed or work underground in mines."

88. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990, ratified by India Dec. 11, 1992).

89. The Government of India, upon ratifying the *Convention on the Rights of the Child*, *supra* note 88, said:

While fully subscribing to the objectives and purposes of the Convention, realizing that certain of the rights of the child, namely those pertaining to the economic, social and cultural rights can only be progressively implemented in the developing countries, subject to the extent of available resources and within the framework of international co-operation; recognizing that the child has to be protected from exploitation of all forms including economic exploitation; noting that for several reasons children of different ages do work in India; having prescribed minimum ages for employment in hazardous occupations and in certain other areas; having made regulatory provisions regarding hours and conditions of employment; and being aware that it is not practical immediately to prescribe minimum ages for admission to each and every area of employment in India—the Government of India *undertakes to take measures to progressively implement* the provisions under article 32, particularly paragraph 2(a), in accordance with its national legislation and relevant international instruments to which it is a State Party.

*See* V.S. Mani, *The Rights of Children*, *The Hindu* (May 14, 2002) available at <http://www.hinduonnet.com/thehindu/2002/05/14/stories/2002051400171000.htm>

90. ILO Convention (No. 138) Concerning the Minimum Age for Admission to Employment, June 26, 1973 (entered into force June 19, 1976) [hereinafter Convention No. 138].

of *Child Labour Convention*<sup>91</sup> (Convention No. 182). *Convention No. 138* requires states to establish minimum age laws in a number of industries.<sup>92</sup> “Child labour” is described as any economic activity performed by children under the age of fifteen.<sup>93</sup> The Convention specifies that not all work is exploitive. For example, children over thirteen years of age may perform light work after school or legitimate apprenticeship programs.<sup>94</sup> The goal of the Convention is to prohibit work that prevents school attendance<sup>95</sup> or likely to jeopardize the health, safety or morals of a child.<sup>96</sup>

*Convention No. 138* has been identified by the ILO’s Governing Body as one of eight conventions fundamental to the rights of human beings at work.<sup>97</sup> Since 1995, the ILO has embarked on a campaign to encourage the universal ratification of all eight fundamental conventions. In August 2001, the Director-General sent a circular letter to India asking its government to indicate India’s position with regard to these fundamental conventions. In regards to *Convention No. 138*, India’s response, as summarized by the Director-General, is that it “is unable to ratify Convention No. 138 because there is no central legislation fixing a minimum age for admission to employment and work.”<sup>98</sup> According to the Indian government, an omnibus bill, fixing a minimum age of fourteen years for admission to all employment or work (excluding agriculture for family consumption) and a minimum age of eighteen years for admission to hazardous employment, is required.<sup>99</sup> Further, the Indian government believes that suitable enforcement machinery must first be implemented, a task that it states is difficult in a developing country like India.<sup>100</sup> As discussed below, the principles grounding *Convention No. 138* are not the same as those underlying the *Child Labour Act*.

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91. ILO Convention (No. 182) Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, June 17, 1999, 38 I.L.M. 1207 (entered into force Nov. 19, 2000) [hereinafter Convention No. 182].

92. Convention No. 138, *supra* note 90, art. 2(1).

93. *Id.*, art. 2(3).

94. *Id.*, art. 7.

95. Convention No. 138, *supra* note 90. Art. 2(3) states: “The minimum age specified in pursuance of paragraph 1 of this Article shall not be less than the age of completion of compulsory schooling and, in any case, shall not be less than 15 years.”

96. *Id.* Art. 3(1) states: “The minimum age for admission to any type of employment or work which by its nature or the circumstances in which it is carried out is likely to jeopardise the health, safety or morals of young persons shall not be less than 18 years.”

97. International Labour Organization, Report of the Chairperson of the Governing Body to the International Labour Conference for the year 1995-96 (June, 1996), available at <http://www.ilo.org/public/english/standards/relm/gb/refs/report96.htm>.

98. International Labour Office, Governing Body, Committee on Legal Issues and International Labour Standards, Ratification and promotion of fundamental ILO Conventions, ILO Doc. GB.282/LILS/7 (Nov. 2001) para. 57.

99. GOVERNMENT OF INDIA, MINISTRY OF LABOUR, INDIA AND THE ILO, at <http://www.labour.nic.in/ilas/indiaandilo.htm> (last visited Nov. 1, 2004).

100. *Id.*

Unlike the ILO, which seeks to prohibit all child labour under the age of fourteen, the Indian law only prohibits child labour in some industries.

*Convention No. 182* identifies the worst forms of child labour and requires governments to ban them. These include forced military service, child prostitution and hazardous work.<sup>101</sup> Unlike *Convention No. 138*, India is currently undertaking negotiations regarding ratification with the ILO's International Programme on the Elimination of Child Labour.

## 2. Current Child Labour Laws

India has seven federal acts regulating child labour. Specific legislation regulates the minimum age and conditions of employment in mines<sup>102</sup>, factories<sup>103</sup>, the bidi industry<sup>104</sup>, apprenticeships<sup>105</sup>, motor transport<sup>106</sup> and shipping.<sup>107</sup> The benchmark law is the *Child Labour Act*. This law is important as it distinguishes between child labour, which is regulated, and the exploitation of children, which is banned. This distinction is the result of a legislative review conducted by Indian lawmakers in the 1980s.<sup>108</sup> That legislative review came to four important conclusions. First, children working with their parents or in the home are less susceptible to exploitation as compared to children engaged in wage labour. Second, the prohibition of child labour is not practical. It is better to regulate the conditions of work, including the hours of work and wages. Third, children removed from prohibited work must be rehabilitated, especially to avoid a return to work in secret. Finally, areas of high child labour must be targeted. The objective is to strengthen income and employment generating programs in those areas. These conclusions form the basis of India's child labour regime.

The *Child Labour Act* specifies a minimum age of fourteen for employment in certain sectors. These include: bidi making, rail and road transport, carpet weaving, cloth printing, dyeing and weaving, match manufacturing, explosives and fireworks, mica cutting and splitting, shellac manufacturing, soap manufacturing, tanning, wool cleaning, building and construction work, abattoirs/slaughter houses, printing, cashew descaling and processing, and soldering.<sup>109</sup> The Child Labour Technical Advisory Committee may add new

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101. Convention No. 182, *supra* note 91, art. 3.

102. Mines Act, No. 35 (1952).

103. Factories Act, No. 63 (1948).

104. Beedi and Cigar Workers (Conditions of Employment) Act, No. 32 (1966).

105. Apprentices Act, No. 52 (1961).

106. Motor Transport Workers Act, No. 27 (1961).

107. Merchant Shipping Act, No. 44, (1958).

108. Ashok Narayan, *Child Labour Policies and Programmes: The Indian Experience*, in *COMBATING CHILD LABOUR*, *supra* note 66, at 145.

109. Child Labour Act, *supra* note 7, s. 3, Sch. A & B, as am. by Government Notification Nos. SO.404(E) (June 5, 1989) and SO.263(E) (Mar. 29, 1994).

industries or sectors to the *Child Labour Act* as it sees fit. The law does not regulate children outside these industries. Further, if the child is working alongside a family member or in a school receiving government support, the law does not apply, regardless of whether the work is in a prohibited industry.<sup>110</sup> Child workers regulated by the law may only work six days out of every seven and may not work between 7:00 PM and 8:00 AM.<sup>111</sup> They must also receive a one-hour break after every three hours of work.

A first conviction under the law can result in imprisonment of three to twelve months and a fine of ten thousand to twenty thousand rupees.<sup>112</sup> A second conviction results in mandatory imprisonment of six months to two years.<sup>113</sup> The law states that the central and state government can appoint inspectors to enforce its provisions. That being said, any person may file a complaint about child labour under the Act's auspices to a court of competent jurisdiction.<sup>114</sup>

Obviously, this law has been quite controversial. Some ILO and UN members, including Assefa Bequele, William Cousins, Dr. P.M. Shah and Abdelwahab Bouhdiba, support India's approach. At a 1984 conference on this issue, one participant noted:

...in many developing countries, child labour was unavoidable, in particular child labour performed within the family, mostly in rural areas, in order to supplement the family's income. This type of work could not be considered as exploitive.... It was further observed that there were certain positive aspects of some forms of child labour. In certain particular contexts, work formed a part of the training process of the child and prepared him for adult life and did not involve exploitation.<sup>115</sup>

Though this progressive approach to solving the problem of child labour is to be commended, it fails to recognize the specific problems faced by the Indian government in its implementation of the law. For example, the law requires the state governments to create act-specific regulations. By 1996, only a handful of states had done so.<sup>116</sup> Further, in most states, the responsibility of enforcing this new law has been apportioned to existing labour inspectors. In addition to saddling

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110. *Id.*, s. 3.

111. *Id.*, s. 7.

112. *Id.*, s. 14(1).

113. *Id.*, s. 14(2).

114. *Id.*, s. 16.

115. International Labour Organization, Seminar on Ways and Means of Achieving the Elimination of the Exploitation of Child Labour in All Parts of the World, ILO Doc. ST/HR/Ser.A/18 (Jan. 22, 1986) at 6.

116. HUMAN RIGHTS WATCH, *supra* note 54, at 36.

already overworked inspectors with new responsibilities, there is the concern that these inspectors are corrupt and susceptible to bribery.<sup>117</sup>

The biggest loophole in the legislation is its failure to regulate family-run businesses or businesses supported by government training programs. Most children at work in India are doing so in the informal sector.<sup>118</sup> Further, if an employer's children are working beside him or her, that is enough to take the business outside the purview of the Act. Some charge that employers, even if their family members are not working in the business, are likely to say they are.<sup>119</sup> The Act creates no serious disincentive for employers that lie to the inspectors, especially if those inspectors are corrupt or susceptible to bribery.

The failure to regulate government-training programs is also problematic. Essentially, industries considered harmful by the law are non-harmful if the work is conducted under government supervision. In Varanasi, there are two hundred government-run carpet weaving training centres.<sup>120</sup> These centres can employ child labourers, but private businesses or even private training centres are prohibited from doing so. Most remarkably, this exception for government-run training centres is a violation of the Constitution. Article 24 states: "No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment." The Act clearly makes carpet-weaving a hazardous industry. This conflict has yet to be reviewed by any court in India.

### 3. National Child Labour Projects

This child labour law is complemented by India's national policy on child labour. In 1987, the government implemented National Child Labour Projects (NCLP) in the twelve Indian states where child labour was endemic.<sup>121</sup> Today, there are one hundred projects in thirteen states.<sup>122</sup> The government has earmarked fifty million dollars (U.S.) for these projects between 1997 and 2002.<sup>123</sup> Further, it hoped to increase this allotment to one hundred million dollars for the following five years.<sup>124</sup> The projects focus on non-formal education, health, and skills training. They are implemented and managed by NGOs but the Indian government provides grants to cover up to seventy-five percent of the project costs. All

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117. Tucker, *supra* note 69, at 584.

118. *Id.*

119. *Id.* at 585.

120. *Id.*

121. NATIONAL RESOURCE CENTRE ON CHILD LABOUR, V.V. GIRI NATIONAL LABOUR INSTITUTE, VOCATIONAL TRAINING FOR CHILDREN IN NCLP SCHOOLS 61 (1998).

122. Intervention by P.D. Shenoy, Union Labour Secretary, Government of India, to Chairman of the International Labour Organization On The Global Report, (June, 2002), at <http://www.labour.nic.in/ilas/secyinter.htm>.

123. *Id.*

124. *Id.*

projects must include education, health, and skills training components to qualify for the grant.

According to a 1998 evaluation by the V.V. Giri National Labour Institute, the non-formal schools were experiencing problems with their projects.<sup>125</sup> NCLP schools implement a unique teaching style meant to help disadvantaged students assimilate into traditional educational models. Activities and methods include storytelling, puppet shows, singing, games, and community activities.<sup>126</sup> The problems discovered by the evaluation included: irregular supply of teaching and learning materials, sporadic supervision of centres, little monitoring and no feedback from school administrators to teachers, inadequate teacher salaries, late payment of teacher salaries, and no training or orientation for instructors. Further, the U.S. Department of Labor discovered that NCLPs were failing to address the needs of migrant children, many of who work under far worse conditions than local children with some degree of family support.<sup>127</sup> The Ministry of Labour was to undergo a review of all NCLPs in 1998. Its objective was to consolidate some NCLP centres, close underutilized centres, and increase funding to areas where child labour is most prevalent.<sup>128</sup> It is unclear whether this review was successfully conducted. In 2001, the V.V. Giri National Labour Institute was to conduct a further evaluation of the NCLPs.<sup>129</sup>

From 1987 to 1993, only twelve NCLPs had been established. In 1994, then Prime Minister Rao announced the Elimination of Child Labour Programme.<sup>130</sup> His goal was to eliminate hazardous child labour by 2000. The programme called for incentives for children that attended school: one meal a day and a one hundred rupee payment.<sup>131</sup> The plan was abandoned due to high costs.<sup>132</sup> Further, the programme was too narrow in its focus: it aimed to free only two million child labourers. Compared to the estimated forty-four million children working in India, this amount was insignificant. Instead, the government has focused on expanding the NCLPs. As noted above, today there are one hundred projects in thirteen states. This Ministry hopes to rehabilitate two million child workers through these projects.<sup>133</sup> That same year, the government also organized the National Authority for the Elimination of Child Labour. Its goals are: (a) to establish policies and programs for the elimination of child labour; (b) to monitor

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125. HUMAN RIGHTS WATCH, *supra* note 54, at 105.

126. *Id.*

127. *Id.*

128. Telegram no. 07257, from U.S. Embassy-New Delhi, (Sept. 4, 1998) (on file with author).

129. GOVERNMENT OF INDIA, MINISTRY OF LABOUR, CHILD LABOUR REPORT, *available at* <http://www.labour.nic.in/cwl/welcome.html>.

130. HUMAN RIGHTS WATCH, *supra* note 54, at 120.

131. *Id.*

132. *Id.*

133. GOVERNMENT OF INDIA, MINISTRY OF LABOUR, *supra* note 129.

the progress of implementation of these programs; and (c) to coordinate the implementation of child labor elimination in related projects.<sup>134</sup>

### **C. Weak Enforcement**

The lack of reliable statistics makes it difficult to conclude whether the problem of child labour in India is worse today than it was in the early 1980s. Anecdotal evidence and the work of NGOs would suggest that child labour rates are likely the same, if not worse than twenty years ago. Though India has undergone extensive reforms in its legislative framework and national policy with respect to child labour, weak enforcement and systematic problems are likely to blame for this stagnation.

#### **1. Enforcing the Law**

Intergovernmental organizations, NGOs, and academics have concluded that the weak enforcement of the *Child Labour Act* is a major concern. UNICEF reported in 1994 “an analysis of data indicating the number of prosecutions launched under the Act and convictions obtained would clearly indicate that this act ... has achieved very little.”<sup>135</sup> In one study, the author found forty-five children employed in two carpet factories in Varanasi.<sup>136</sup> The children were paid three hundred to six hundred rupees per month and they had full access to medical facilities. Nonetheless, their employment, as it was not in a family-run business or government-training centre, was in clear violation of the law. The author argued that if the government closed these two factories, the children would likely take up work in other industries or in family-run establishments.<sup>137</sup>

In 1995, Human Rights Watch analyzed the enforcement and penalty provisions of the *Child Labour Act*.<sup>138</sup> Between 1990 and 1993, 537 inspections were conducted by the federal government, resulting in 1,203 violations.<sup>139</sup> Of these 1,203 violations, only seven prosecutions were launched. State governments conducted 60,717 inspections in the same period. These inspections revealed 5,060 violations and resulted in 772 convictions. Between 1986 and 1995, eighty-seven percent of first-time offenders received a fine of less than two hundred rupees,

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134. Katherine E. Cox, *The Inevitability of Nimble Fingers? Law, Development and Child Labour*, 32 VAND. J. TRANSNAT'L L. 115, 132 (1999).

135. Dept. of Women and Child Development, Indian Council for Child Welfare and UNICEF-India, *Rights of the Child: Report of a National Consultation* 102 (Nov. 21-23).

136. Kanbargi, *supra* note 73.

137. *Id.*

138. HUMAN RIGHTS WATCH, *supra* note 54, at 133.

139. COMMISSION ON LABOUR STANDARDS AND INTERNATIONAL TRADE, *Child Labour in India: A Perspective*, June 19, 1995, at 33.

even though the minimum fine under the Act is ten-thousand rupees.<sup>140</sup> Human Rights Watch was unable to find a single case that resulted in imprisonment.<sup>141</sup> Moreover, government inspectors deny any knowledge of child labour even where NGOs have found violations of the law. Mr. B.K. Singh, assistant labour commissioner in Firozabad said, “There is no child labour in the district now.”<sup>142</sup> To the contrary, Human Rights Watch estimates that fifty-thousand children are employed in Firozabad’s glass factories.<sup>143</sup>

The failure to effectively enforce the law is the result of three factors. First, labour inspectors, as noted above, are overworked and susceptible to corruption and bribery. Human Rights Watch further charges that district magistrates consider child labour a low priority.<sup>144</sup> Secondly, employers, seeking a competitive advantage by using child labourers, may obstruct the legal process.<sup>145</sup> This obstruction can include the bribery of labour inspectors, police and medical officers and the intimidation and threats of physical violence against labourers. Finally, even if inspectors are attempting to enforce the law, there is a shortage of staff. Human Rights Watch found that “at the state and the district level, the number of personnel devoted to enforcement of child and bonded labour laws is blatantly inadequate.”<sup>146</sup> The Indian Commission on Labour Standards observed that inspectors are poorly trained and do not understand the law.<sup>147</sup>

## 2. Targeting Systemic Problems

The child labour regime in India does not target systemic problems, including caste, religion and tradition. These systemic issues may also be related to the apathy of government officials responsible for enforcing minimum age laws. In Varanasi, the majority of child workers are Muslims or from the scheduled castes and scheduled tribes.<sup>148</sup> In addition, families without land are less likely to send their children to school than families with land.<sup>149</sup> Even amongst the families with land, the “advanced” castes are more likely to send their children to school.<sup>150</sup> In rural communities, Muslim families and scheduled caste families are more likely

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140. Molly Moore, *Poverty Weaves Harshness Into Lives*, GUARDIAN WEEKLY, June 4, 1995, at 19.

141. HUMAN RIGHTS WATCH, *supra* note 54, at 133.

142. *Id.*

143. *Id.*

144. *Id.* at 139.

145. *Id.* at 141-42.

146. HUMAN RIGHTS WATCH, *supra* note 54, at 144.

147. COMMISSION ON LABOUR STANDARDS AND INTERNATIONAL TRADE, *supra* note 139, at 40.

148. Kanbargi, *supra* note 73, at 93-108.

149. *Id.*

150. *Id.*



to earn a poor and irregular income.<sup>151</sup> Children from these groups are more likely to be at work.

Children from poor families suffer other biases. Their ability to learn is considered substandard as compared to that of children from middle-class families: “A distinction...between children as ‘hands’ and children as ‘minds’; that is between the child who must be taught to ‘work’ and the child who must be taught to ‘learn,’ the acquisition of manual skills as distinct from cognitive skills.”<sup>152</sup> The Hindu concept of class and social ranking compounds this stereotype and it can inform attitudes about child labour and education. In the space of a few generations, low caste and poor Indians enter a cycle of poverty and illiteracy. Since children from poor families must be “taught to work,” they often abandon school and join the workforce.

Another problematic attitude is the belief that an education, however limited, inculcates in children a preference for white-collar, urban jobs. These jobs are highly valued amongst rural families as they provide an assured income and prestige. In recent years, there has been increased competition for these jobs, resulting in underemployment and unemployment. As such, middle-class government officials believe the competition for these jobs must be culled. Their concern is that the semi-educated, when unemployed, are more likely to be exploited by radical political groups seeking to destabilize India’s social and political system. As Weiner notes, “a high dropout rate in the schools can be regarded as contributing to social stability.”<sup>153</sup> At the same time, government officials believe that children from rural families can gain valuable skills, attitudes, and work habits by being employed at a young age. Even if only a small portion of bureaucrats hold these beliefs, there is a strong impetus for rural and poor children to enter the workforce at an early age.

#### **D. Conclusion**

Obviously, child labour presents a huge problem for India. It is difficult to estimate how many children are at work but most observers agree that the amount is between forty-five and fifty-five million. This section identifies that the majority of these children are employed in the informal sector, including cultivation and agricultural labour. Children enter the workforce for a number of reasons, including poverty and cultural biases.

To combat this problem, India enacted the *Child Labour Act* in 1986. Concurrently, it implemented the National Child Labour Policy. Along with India’s international commitments and the guarantees against hazardous child labour in its Constitution, one would surmise that India has had some legislative

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151. *Id.*

152. WEINER, *supra* note 59, at 186.

153. *Id.*

success at tackling the problem. But in reality, estimates suggest that child labour is as prevalent today as it was before the introduction of these legislative and policy initiatives. The reasoning is deceptively simple: India has a poor record in enforcing the law. In some cases, it is because labour inspectors are overworked or susceptible to bribery and corruption. In other cases, there are systemic biases and beliefs about the nature of children's work and the role of poor and rural families in Indian societies.

Mostly though, the legislation has loopholes that are easily exploited by employers. The law does not prohibit all child labour; it only seeks to ban child labour in hazardous industries. Even then, if the child is working alongside a family member or in a government training centre, the work is considered non-hazardous and outside the purview of the Act. The following sections examine the response of the Supreme Court of India to human rights violations and, specifically, the problem of child labour.

#### IV. THE DEVELOPMENT OF PUBLIC INTEREST LITIGATION IN INDIA

Since the early 1980s, the Supreme Court of India and its state High Courts have wielded an enormous amount of power in the area of human rights. Public interest litigation (PIL) claims have been used to defend the rights of the poor, illiterate, disadvantaged, and impoverished people of India. This section explores the development of this transformative type of litigation and its impact on India's legal system. It begins by defining public interest litigation, generally and specifically in the Indian context. This section also examines some of the concerns that commentators have about the rise of PIL.

##### A. Defining Public Interest Litigation

Defining PIL in the Indian context is not an easy task. Generally, public interest litigation is described as "something in which the public, the community at large, has some pecuniary interest or some interest by which their legal rights or liabilities are affected."<sup>154</sup> In many ways, public interest litigation, or public law litigation as it is sometimes called in the United States, represents a revolt against the traditional model for adjudication.<sup>155</sup>

Professor Abram Chayes identifies four characteristics of public law litigation in the United States. These characteristics are common to PIL actions in

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154. BLACK'S LAW DICTIONARY 1229 (7<sup>th</sup> ed. 1990). See also *Russell v. Wheeler*, 439 P.2d 43, 46 (Colo. 1968).

155. See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV L.REV. 1281 (1976).

India. First, the joinder of parties has been liberalized.<sup>156</sup> Today, all parties with an “interest” in the controversy can join the litigation.<sup>157</sup> Though “interest” has been defined narrowly sometimes to preserve efficiency concerns, the courts have responded by allowing class-action claims that are more flexible with regards to the parties.<sup>158</sup>

Second, the courts have given increasing importance to equitable relief.<sup>159</sup> Professor Chayes focuses on injunctive relief as an example of this procedural development.<sup>160</sup> He argues that injunctions are a much greater constraint on a party’s future actions than the risk of future liability.<sup>161</sup> Further, the injunction is continuing and a party may seek a further order from the court to change or modify the injunction if the circumstances so require.<sup>162</sup> Finally, through an injunction, “the court takes public responsibility for any consequences of its decree that may adversely affect strangers to the action.”<sup>163</sup> This type of equitable relief is more concerned with balancing the interests of the parties than the traditional form of monetary relief.

Third, public law litigation, unlike traditional forms of litigation, is concerned not only about past instances or occurrences but also about protecting against acts that are ongoing or that may occur in the future.<sup>164</sup> Professor Chayes describes this model of fact-finding as “fact evaluation.”<sup>165</sup> Public law litigation concerns not only the parties, representing two sides of a disagreement, but also the public interest. As such, the court must play a role in finding and evaluating those facts that might have an impact on the outcome of the suit.

Finally, the decree must be different in public law litigation. The court is seeking to modify future instances or conduct; therefore, its decision cannot be logically deduced from the “nature of the legal harm suffered.”<sup>166</sup> Professor Chayes suggests a model for developing this type of decree.<sup>167</sup> He argues that the court should act as a mediator between the parties, in part to guarantee their ongoing compliance.<sup>168</sup> Further, the court should develop its own expertise and

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156. *Id.* at 1289.

157. *See e.g.*, HANDBOOK OF THE LAW OF CODE PLEADING §57 (1947); and CODE REMEDIES §113 (1929).

158. Chayes, *supra* note 155, at 1289-90.

159. *Id.* at 1292.

160. *See* Abram Chayes, *Developments in the Law—Injunctions* (1965).

161. Chayes, *supra* note 155, at 1292.

162. *Id.*

163. *Id.*

164. *See e.g.*, *Sierra Club v. Morton*, 405 U.S. 727 (1972); and *Coppar v. Rizzo*, 357 F. Supp. 1289 (E.D. Pa. 1973), *aff’d sub nom.* *Goode v. Rizzo*, 560 F.2d 542 (3d Cir. 1975), *rev’d*, 96 S.Ct. 598 (1976).

165. Chayes, *supra* note 155, at 1297.

166. *Id.* at 1298.

167. *Id.* at 1298-99.

168. *Id.*

information to ensure that the decree will resolve the dispute.<sup>169</sup> As he says, “the trial judge has passed beyond even the role of legislator and has become a policy planner and manager.”<sup>170</sup> As this section demonstrates, many of these characteristics have been employed by Indian courts when adjudicating PIL disputes.

There are some important difference between the United States’ experience with public law litigation and PIL in India. Former Chief Justice of India, P.N. Bhagwati, contrasts the two models of PIL in three ways.<sup>171</sup> First, public interest litigation in the United States “requires substantial resource investment....”<sup>172</sup> This investment includes both manpower and financial resources. In India, because of a lack of such resources, large-scale poverty and general ignorance about the law or human rights, PIL cannot be based on the same model.

Second, the issues espoused by PIL in India are different from the issues taken up by PIL in the United States. According to Bhagwati, the primary focus of PIL in India is “state repression, governmental lawlessness, administrative deviance, and exploitation of disadvantaged groups and denial to them of their rights and entitlements.”<sup>173</sup> He labels these issues as “turn-around situations” for India’s disadvantaged and vulnerable groups. In the United States, public interest litigation generally deals with civic participation in governmental decision-making.<sup>174</sup> It is more concerned with defending “interests without groups” such as consumerism and environmentalism.

Bhagwati’s view is not entirely accurate today. Supreme Court Advocate Rajeev Dhavan argues that PIL in India has “transcended its earlier self-imposed limitation of considering and enlarging the cause of the disadvantaged. It was appropriated in the service of a range of public causes....”<sup>175</sup> For example, the High Court of Bombay at Goa has developed an expertise in “eco-PIL” or PIL cases dealing with environmental issues. Professor Upendra Baxi argues that such cases should be labelled “social action litigation” actions.<sup>176</sup> He believes that PIL should be reserved for issues directly concerned with the predicament of the disadvantaged. Despite Professor Baxi’s criticism, it is unclear whether the blurring of the line between PIL actions and so-called social action litigation has negatively affected human rights jurisprudence in India. In fact, “as the definition of success in a PIL petition in India has had to extend beyond Court orders,

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169. *Id.*

170. Chayes, *supra* note 155, at 1302.

171. P.N. Bhagwati, *Judicial Activism and Public Interest Litigation*, 23 COLUM. J. TRANSNAT’L L. 561, 569-70 (1985).

172. *Id.* at 570.

173. *Id.*

174. LAW AND POVERTY 389 (Upendra Baxi, ed., 1988).

175. Rajeev Dhavan, *Law as Struggle: Public Interest Law in India*, 36 J.I.L.I. 302, 310 (1994).

176. Bhagwati, *supra* note 171.

increasingly, it is in the cases which have mobilized PIL for general public interest issues that real successes have been achieved.”<sup>177</sup> At its core, PIL is a tool for protecting the rights of India’s disadvantaged and impoverished. At the same time, it has been appropriated by civil and political society in hugely diverse ways, making it increasingly similar to public law actions in the U.S.

Finally, the Anglo-Saxon approach to jurisprudence is not adaptable in India. Bhagwati argues that Anglo-Saxon law is “transactional, highly individualistic, concerned with atomic justice incapable of responding to the claims and demands of collectivity, and resistant to change.”<sup>178</sup> On the other hand, PIL in India is concerned with combating exploitation and enforcing collective rights, an objective that is inconsistent with a private rights model of public law litigation.

This comparison suggests that public law litigation or public interest litigation is similar around the world. In both India and the United States, public law litigation arose as a challenge to the traditional model of adjudication. Though they do share similar characteristics, the Indian variation is unique in that it must serve the needs of a poorer and more impoverished society. To that end, PIL in India is less resource-based and more focused on collective rights.

## **B. Legal Basis for PIL in India**

The Constitution of India provides the legal basis for the development of public interest litigation. Under Article 32, the Supreme Court of India has original jurisdiction over all cases concerning fundamental freedoms enumerated in Articles 14 thru 25.<sup>179</sup> These fundamental freedoms include: equality of all persons

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177. PEOPLE, LAW AND JUSTICE: CASEBOOK ON PUBLIC INTEREST LITIGATION, *supra* note 6, at 7.

178. Bhagwati, *supra* note 171, at 570.

179. INDIA CONST., art. 32 states:

(1) The right to move the Supreme Court by appropriate proceeding for the enforcement of the rights guaranteed by this Part is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

(3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).

(4) The right guaranteed by this Article shall not be suspended except as otherwise provided for by this Constitution.

before the law;<sup>180</sup> no discrimination for religion, race, caste, sex or place of birth<sup>181</sup>; freedom of speech, association, assembly, movement and residence location, and of career or occupation<sup>182</sup>; no deprivation of life or liberty “without procedures established by law”<sup>183</sup>; no bonded labour or slavery<sup>184</sup>; no child labour<sup>185</sup>; and freedom of religion<sup>186</sup>. The state High Courts have similar jurisdiction.<sup>187</sup>

If a fundamental freedom has been allegedly violated, the complainant may seek redress directly from the Supreme Court of India. Article 32 specifically allows this method of redress. The Supreme Court has suggested that Article 226 is broader and, as such, if the complaint is of a “legal wrong” the correct forum is the state High Court.<sup>188</sup> In *Gupta v. India*, the Supreme Court of India upheld this interpretation of these articles as gateways to PIL actions.<sup>189</sup>

In addition to the fundamental freedoms outlined above, the Constitution of India also includes “Directive Principles of State Policy.”<sup>190</sup> These principles are not enforceable in any court but they are fundamental to the governance of India and the legislature must apply these principles in making the law.<sup>191</sup> They include directions to the state to reduce inequalities in status and opportunity<sup>192</sup> and distribute society’s resources to serve the common good.<sup>193</sup> Bhagwati suggests that

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180. INDIA CONST., art. 14.

181. INDIA CONST., art. 15.

182. INDIA CONST., art. 19.

183. INDIA CONST, art. 21.

184. INDIA CONST, art. 23.

185. INDIA CONST, art. 24.

186. INDIA CONST, art. 25.

187. INDIA CONST, art. 226 states:

Every High Court shall have the power...to issue to any person or authority, including in appropriate cases any Government...directions, orders or writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III [fundamental freedoms] and for any other purpose.

188. The inclusion of the words “. . . and for any other purpose” in Article 226 makes its application broader than Article 32. In Jill Cottrell, *Courts and Accountability: Public Interest Litigation in the Indian High Courts*, THIRD WORLD LEGAL STUD. 199, 200 (1992), the author says: “in recent years the Supreme Court has on a number of occasions refused to entertain writ petitions, saying that they ought to be taken to the High Court first.”

189. A.I.R. 1982 S.C. 149.

190. INDIA CONST, arts. 36-51.

191. INDIA CONST, art. 37 states: “The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.”

192. INDIA CONST, art. 38(2).

193. INDIA CONST, art. 39(b).

it is these principles that are at the heart of PIL, and that they inspired judges to become social activists.<sup>194</sup>

### **C. Characteristics of PIL**

Public interest litigation is characterized by a unique bundle of procedures: procedural flexibility, relaxed rules of standing, an activist interpretation of fundamental freedoms, remedial flexibility, and ongoing judicial participation and supervision.<sup>195</sup>

#### **1. Procedural Flexibility**

The Supreme Court of India can be flexible regarding the rules of procedures in PIL actions. To broaden access to justice, actions may be commenced by a formal petition or by just writing a letter to the court. The motivation behind allowing this epistolary jurisdiction is fairness: a person acting *pro bono publico* should not have to incur personal expenses for the preparation of a regular petition that seeks to guarantee the rights of the poor.<sup>196</sup> Judges have been known to encourage and even invite public interest actions. For example, in *Advani v. Madhya Pradesh*, the court accepted a clipping of a newspaper story about bonded labourers as the basis for a PIL action.<sup>197</sup>

Building on this principle of access to justice, the courts have established legal aid as a fundamental right in criminal cases and courts will often waive fees, award costs, and provide other assistance to public interest lawyers.<sup>198</sup> Further, the courts have established socio-legal committees or commissions of inquiry when facts are difficult or expensive to uncover. For example, in *Wangla v. India*, the Court appointed a special committee to investigate the quality of imported butter shortly after the Chernobyl nuclear disaster.<sup>199</sup> Though defendants have challenged these innovations as violations of the canons of procedure, the Court has upheld them as necessary for the protection of fundamental freedoms: “The constitution-makers deliberately did not lay down any particular forms of proceedings for enforcement of fundamental rights nor did they stipulate that such proceedings should conform to any rigid pattern or straight-jacket formula.”<sup>200</sup>

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194. Bhagwati, *supra* note 171, at 568.

195. See Jamie Cassels, *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?* AM. J. COMP. L. 495, 498 (1989).

196. Bhagwati, *supra* note 171, at 571.

197. A.I.R. 1985 S.C. 1368.

198. Cassels, *supra* note 195, at 500.

199. 1988 S.C.A.L.E. 118.

200. *Bhandua Mukti Morcha v. India*, A.I.R. 1984 S.C. 802, 814, (1984) 3 S.C.C. 161, 186.

## 2. Relaxed Rules of Standing

The traditional rules of standing require that the participants have some real interest in the action in order that the “truth” will be properly revealed through the legal proceedings.<sup>201</sup> Often, this “real interest” is property and other financial interests. As early as 1976, the Supreme Court of India relaxed the rule of *locus standi*.<sup>202</sup> Academics, journalists, social activists and NGOs have initiated public interest actions. As former Chief Justice Bhagwati noted in *Gupta v. India*:

Where a legal wrong or a legal injury is caused to a person or to determinate class of persons...and such a person 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 appropriate direction....<sup>203</sup>

The Supreme Court of India and each of India’s state High Courts have upheld this proposition without exception. Examples of these relaxed rules of standing are numerous. In *Sharma v. Himachal Pradesh*, members of an impoverished caste living in the snow-bound state of Himachal Pradesh were given standing to pursue an action in respect of public expenditure on projects such as highway construction.<sup>204</sup> Even broader, the Supreme Court of India recognized a lawyer’s challenge to the inadequate censorship of a film on the grounds that the film was detrimental to communal and ethnic harmony in India.<sup>205</sup> Environmental groups, social workers, and journalists have all enjoyed standing before India’s courts on a variety of issues. Further, the Supreme Court of India has awarded costs to these varied petitioners as an expression of the community’s appreciation.<sup>206</sup>

## *3. Activist Interpretation*

Through PIL, the Indian courts have expanded their interpretation of the fundamental freedoms protected in India’s Constitution. The right not to be deprived of life and personal liberty is an excellent example of this activist interpretation of the Constitution through PIL.<sup>207</sup> In *Gopalan v. Tamil Nadu*,<sup>208</sup> the

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201. Cassels, *supra* note 195, at 498.

202. *Singh v. Uttar Pradesh*, A.I.R. 1976 S.C. 2602, 2609.

203. *Gupta v. India*, *supra* note 189, at 189.

204. (1986) 2 S.C.C. 68.

205. *Dalal v. India*, (1988) 1 S.C.C. 668.

206. In *Rural Litigation and Entitlement v. Uttar Pradesh*, (1986) Supp. S.C.C. 517, and *Barse v. India*, (1986) 3 S.C.C. 596, the petitioners were awarded ten thousand rupees as costs of the proceedings.

207. INDIA CONST., art. 21 states: “No person shall be deprived of his life or personal liberty except according to procedure established by law.”



Supreme Court understood this provision as only procedural: the state only has to demonstrate that its interference with the individual is in accordance with the procedure laid down by a properly constituted law.<sup>209</sup>

Conversely, in its landmark 1978 judgment, *Gandhi v. India*, the Supreme Court of India held that any state action interfering with life or liberty must be “right, just and fair” in addition to procedurally authorized.<sup>210</sup> Further, in *Tellis v. Bombay (Municipal Corporation)*, the Court held that the right to life “is wide and far reaching” and includes the right to a livelihood.<sup>211</sup> In *Bhandua Mukti Morcha*, the Court found that the right to life includes the right to be “free from exploitation” and that “protection of the health and strength of workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief.”<sup>212</sup> These decisions demonstrate the Court’s willingness to convert a formal guarantee in India’s Constitution into a positive human right.<sup>213</sup>

#### 4. Remedial Flexibility

The Indian courts have flexibly interpreted their inherent power to do justice. Whereas the traditional understanding of judicial remedies requires finality, short lawsuits, and no supervision of the ongoing matter, courts in India have pushed the boundary of this power. For example, petitions may be made directly to the Supreme Court of India, rather than through the usual civil process. The Court has awarded damages to compensate the victim and punish the wrongdoer.<sup>214</sup> Most importantly, the Courts have fashioned remedial strategies that require administrative supervision. Bhagwati argues that existing remedies intended to deal with private rights situations were inadequate, thus demanding these innovations.<sup>215</sup>

Professor Cassels identifies two examples of this remedial strategy.<sup>216</sup> In *Mehta v. India*, a chemical plant was closed after a gas leak.<sup>217</sup> The Court allowed it to reopen only after the plant satisfied a number of conditions. The Court

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208. A.I.R. 1950 S.C. 27.

209. *See also* *Jabalpur v. Shukla*, (1976) 2 S.C.C. 521.

210. (1978) 2 S.C.R. 621, A.I.R. 1978 S.C. 597.

211. A.I.R. 1986 S.C. 180, (1985) 3 S.C.C. 545

212. *Bhandua Mukti Morcha v. India*, *supra* note 200, at 811-12.

213. *See generally*, Cassels, *supra* note 195, at 501-505. The author identifies other formal rights that have been converted into positive human rights by the Supreme Court of India. *Id.*

214. *Id.*

215. Bhagwati, *supra* note 171, at 575.

216. Cassels, *supra* note 195, at 506.

217. A.I.R. 1986 S.C. 965, (1986) 2 S.C.C. 176.

ordered specific technical, safety and training improvements on the recommendation of four separate technical teams appointed by the court. An independent committee was established to visit the plant biweekly and a government inspector was ordered to make surprise visits once a week. The Court went so far as to suggest that the Indian government establish an Ecological Sciences Resource Group to assist the Court in future environmental actions.

Similarly, in *Bhandua Mukti Morcha*, the Court ordered local officials to locate and identify bonded labourers, have them released, and provide economic and psychological rehabilitation.<sup>218</sup> The government was ordered to seek the assistance of social action groups, carry out surprise inspections on local quarries, and set up legal education programs for labourers.

The Court itself has limited its interpretive power in some cases. For example, it has refused to force the state to enact legislation to protect fundamental freedoms or the Directive Principles.<sup>219</sup> As Professor Cassels notes, “The true measure of judicial activism in India, therefore, is found less in the rhetoric of rights definition than in the remedial strategies deployed and actual outcomes in PIL cases.”<sup>220</sup> These boundaries established by the Court suggest that it is sensitive to its role in India’s political framework but, at the same time, is willing to push the limits of its constitutional powers to secure basic human rights for India’s people.

#### **D. Criticisms of PIL in India**

Despite its success at protecting the rights of India’s impoverished and disadvantaged groups, PIL has been criticized as being overly activist and prone to judicial despotism. Further, some commentators fear that groups working counter to the public interest are abusing PIL.

##### **1. Judicial Activism**

PIL has been criticized for encouraging judicial activism. Sri Krishna Agrawala argues: “India being a welfare state, legislation already exists on most

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218. *Bhandua Mukti Morcha v. India*, *supra* note 200, at 834-37.

219. *See e.g. Id, Tellis v. Bombay (Municipal Corporation)*, *supra* note 211, and *Himachal Pradesh v. A Parent of a Student of Medical College, Simla*, A.I.R. 1985 S.C. 910 [Medical College, Simla]. In *Medical College, Simla*, a court-appointed committee recommended that the state enact legislation to prevent the hazing of freshman students by senior students in the state’s post-secondary institutions. The High Court of Himachal Pradesh ordered the state government to report to it regarding this recommendation. The Supreme Court of India, on appeal by the state, vigorously criticized the High Court for its attempt to compel the state to enact legislation.

220. Cassels, *supra* note 195, at 505.

matters.... If the Court starts enforcing all such legislation under the specious plea that non-enforcement is violative of Article 21, perhaps no state activity can be spared from the purview of the Supreme Court as a PIL matter. Its logical extension could mean the taking over of the total administration of the country from the executive by the Court.<sup>221</sup> PIL has clearly resulted in Indian judges encroaching upon parliament's policy and administrative functions. The Supreme Court of India's strong recommendations to the government in *Bhandua Mukti Morcha* and *Shiriam Fertilizer* are excellent examples of this activism.

The Court has not been indifferent to this criticism. In fact, in *Bhandua Mukti Morcha*, Judge Pathak noted that the judiciary runs the risk of being mistaken for a political authority if it continues to take on a policy role: "In the area of judicial functioning where judicial activism finds room for play, where constitutional adjudication can become an instrument of social policy forged by the personal political philosophy of the Judge, this is an important consideration to keep in mind."<sup>222</sup> Suffice it to say, Indian judges have nonetheless defended against charges of activism on a number of grounds. As Jamie Cassels notes, "the doctrine of separation of powers, while suggesting good reasons why such lines must be drawn (judicial non-accountability, institutional competence, etc.), does not of itself indicate precisely where they should be placed."<sup>223</sup> Judges in all legal systems, when asked to scrutinize a government decision or operation, are engaged in policy analysis and politics.<sup>224</sup> In India, by relaxing the rules of standing, justiciability, and judicial deference, judges have drawn the lines differently than their counterparts in North America and Europe but are not in danger of usurping parliamentary authority.

Bhagwati argues that if India's judges are guilty of activism, it is justified as a means for achieving distributive justice.<sup>225</sup> Comparing India to the United States again, Bhagwati sees the role of Indian judges as similar to American judges who struck down social legislation pertaining to the working hours of men, women, and children.<sup>226</sup> This type of social activism by the judiciary is especially important in developing countries not just because "judges owe a duty to do justice with a view to creating and moulding a just society, but because a modern judiciary can no longer obtain social and political legitimacy without making a substantial contribution to issues of social justice."<sup>227</sup> Of course, this justification does not answer the concern of commentators like Sri Agrawala, who argues that, in addition to being activist, the Court has assumed a strong policy-making role.

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221. Sri Krishna Agrawala, PUBLIC INTEREST LITIGATION IN INDIA 37 (1986).

222. *Bhandua Mukti Morcha v. India*, *supra* note 200, at 843.

223. Cassels, *supra* note 195, at 513.

224. Bhagwati, *supra* note 171, at 562.

225. *Id.*

226. *Id.*

227. *Id.*

## 2. "Publicity" Interest Litigation

Another recent concern is that PIL is being used by corporations and elites to further their interests in the name of the "public." Some commentators describe this phenomenon as "publicity interest litigation." For example, in 2001, a petitioner filed a PIL at the Delhi High Court to stop a visit by Pakistan's President, Gen. Pervez Musharraf. The court dismissed the petition, saying that the judiciary "should not be allowed to be polluted by unscrupulous litigants by resorting to the extraordinary jurisdiction."<sup>228</sup> Similarly, the High Court of Madras dismissed a petition seeking a stay of the 2002 presidential election. The petitioner argued that the Constitution of India should be interpreted to allow all citizens to directly elect the President, not just the state legislators and the federal Members of Parliament. In that case, the court not only dismissed the petition, but it also charged the petitioner twenty-five thousand rupees in costs.<sup>229</sup> In both cases, the courts labelled the petitions "publicity interest litigation."

A more complex issue is the action in which each litigant claims that his or her proposal best serves the public interest. In Goa, the government routinely allows private corporations to renovate historical landmarks, usually forts. These forts are converted into resorts and the government does not have to pay the expense of upkeep or restoration. Three hotel companies and a private corporation, Lady Hamlyn Trust, were bidding to restore the Reis Magos fort and convert it into a resort. Lady Hamlyn's proposal was accepted by the government, but it included plans for a private residence, leased to Lady Hamlyn, for fifteen years.<sup>230</sup> The hotel companies filed a PIL action, claiming that their proposals better serve the public interest and, as such, should be accepted over the proposal of Lady Hamlyn Trust. In response, Dr. Joe D'Souza, a conservationist at Goa University, filed a PIL in response, arguing that the Goan government should be restoring the fort, not private corporations.<sup>231</sup> At the time of writing, this issue had not been resolved.

Another growing criticism is that lawyers are more concerned with the publicity generated by a large-scale PIL case than by the actual outcome of that case. Advocate Ramesh Aggarwal believes that the high costs and time involved in litigating before India's Supreme Court are transforming PIL.<sup>232</sup> Lawyers working

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228. Nirimesh Kumar, *India: Pacific International Lines on Musharraf*, HINDU, July 14, 2001, at <http://www.hinduonnet.com/thehindu/2001/07/14/stories/02140009.htm>.

229. *HC Dismisses Petition Challenging Presidential Poll*, PRESS TRUST OF INDIA, June 17, 2002, at <http://www.rediff.com/news/2002/jun/17prez8.htm>.

230. Frederick Noronha, *Goa's Forts, Decaying by 19th Century, Worse in the 20th*, June 30, 2000, at <http://www.goacom.com/news>; and Mario Cabral e Sa, *No Problems*, NAVHIND TIMES, June 13, 2000, available at <http://www.navhindtimes.com>.

231. Personal communication with Dr Joe D'Souza, Professor, Goa University, Panjim (July 26, 2000) (on file with author).

232. Personal communication with Ramesh Aggarwal, Director, Public Interest Law Support and Research Centre, New Delhi (Aug. 1, 2000) (on file with author).

*pro bono publico* must generate an income to sustain their practice. As such, many lawyers with an expertise in PIL will only represent high-profile clients or get involved in cases of a national or international interest.

The rise of “publicity” interest litigation thus has two effects. First, some disadvantaged or impoverished groups or people might not be able to secure counsel to forward their genuine PIL claims. Second, the courts’ dockets are being crowded with so many PIL cases, plaintiffs might be dissuaded from seeking a judicial remedy or the case might take too long for the remedy to be effective. As an example, between January 1987 and April 1988, the Supreme Court of India received 23,772 PIL petitions in the form of letters alone.<sup>233</sup> The Court was so concerned that, in 1999, the Chief Justice declared that year the Year of Action: “There is a docket explosion where cases have gathered twenty times more than they had in the last ten years.”<sup>234</sup> Such crowding becomes a concern when a PIL case might not genuinely be in the “public interest” and are actually corporate or private interests dressed up as PIL cases.

## **E. Conclusion**

India faced a political crisis in 1975.<sup>235</sup> Indira Gandhi, India’s Prime Minister, declared an emergency in June 1975 and suspended all democratic rights and judicial procedures. The emergency lasted until the 1977 general elections. During the emergency, India’s courts were also embroiled in the controversy, as they were expected to display “commitments” to the government’s policies and agenda.<sup>236</sup> Any legitimacy the judiciary enjoyed before the emergency was wiped out during this period. The courts made many questionable decisions, infringing upon the guaranteed rights in India’s Constitution.<sup>237</sup>

At the end of the emergency, as Rajeev Dhavan has noted, “an alliance of protest and thinking was overdue, both amongst Indian’s [sic] extremely articulate middle class intellectuals as well as the disadvantaged whose cause some of them espoused.”<sup>238</sup> The Supreme Court of India, and in particular former Chief Justice Bhagwati, responded by developing the framework for PIL. Dhavan says, “The

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233. Cassels, *supra* note 195, at 508.

234. *Clean up Backlog: Chief Justice*, INDIAN EXPRESS (Jan. 23, 1999), available at <http://www.expressindia.com/ie/daily/19990123/02350465.html>.

235. See generally MAX ZINS, STRAINS ON INDIAN DEMOCRACY: REFLECTIONS ON INDIA’S POLITICAL AND INSTITUTIONAL CRISIS (1988); and Sudipta Kaviraj, *Indira Gandhi and Indian Politics*, ECONOMICS & POLITICS WEEKLY, Sept. 20, 1986, at 38-39.

236. For example, judges were punitively transferred to other jurisdictions for giving relief against the central government. See *India v. Sheth*, A.I.R. 1977 S.C. 2328.

237. See e.g., *Gandhi v. Narain*, (1975) Supp. S.C.C. 1. See also J. DUNCAN & M. DERRETT, *RULE, PROTEST, IDENTITY: ASPECTS OF MODERN SOUTH ASIA* (P. Robb and D. Taylor, eds., 1978).

238. Dhavan, *supra* note 175, at 306.

adventures of Indian PIL started in the Supreme Court.<sup>239</sup> Bhagwati himself argues that PIL is “a sustained effort on the part of the highest judiciary to provide access to justice for the deprived sections of Indian humanity.”<sup>240</sup> Through relaxed rules of procedure and standing, remedial flexibility and an activist interpretation of the Constitution, public interest litigation has become a powerful tool for social activists, lawyers and individuals seeking to protect fundamental human rights.

PIL in India is different than its counterpart practiced in North America. It is much less resource-based and it focuses on collective claims of India’s underprivileged. At the same time, it has invited criticism. In addition to claims that it is being appropriated by “interests without causes,” some commentators argue that PIL has led to an activist court not afraid to encroach on parliament’s policy-making powers. Others claim that PIL has become beholden to corporate interests and profile-seeking lawyers. These claims are valid, but PIL, for the most part, is an indispensable tool for the protection of human rights in India.

## V. THE SUPREME COURT’S RESPONSE TO CHILD LABOUR

This section is an examination of the response of the Supreme Court of India to the problem of child labour. In two decisions, the Supreme Court of India attempted to tackle the failings of the legislation and the overarching problem of poverty.<sup>241</sup> Though the Court could be criticized for not closing the loopholes in the legislation, its orders are still an activist approach to guaranteeing fundamental rights for Indian child labourers.

### A. The Situation in Sivakasi

Sivakasi is the home of India’s match and fireworks industries. It is the largest municipality in the Virudhunagar district. Virudhunagar is home to 1.751 million people.<sup>242</sup> Almost all of the region’s fireworks factories and seventy-five percent of the district’s match factories are located in Sivakasi.<sup>243</sup> The remaining factories can be found in other villages in the district.

There are two industry-associations regulating the manufacture of matches and fireworks in Sivakasi. The All India Chamber of Match Industries (AICMI) has 135 members, though it is estimated that there are at least one

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239. *Id.*

240. Bhagwati, *supra* note 171, at 568.

241. Mehta No. 1, *supra* note 10; Mehta No. 2, *supra* note 10.

242. GOVERNMENT OF INDIA, OFFICE OF THE REGISTRAR GENERAL AND CENSUS COMMISSIONER, CENSUS OF INDIA, 2001 (2001), at [http://www.censusindia.net/results/2001\\_Census\\_Data\\_Release\\_List.htm](http://www.censusindia.net/results/2001_Census_Data_Release_List.htm).

243. Asha Krishnakumar, *Children Still at Work*, FRONTLINE, Apr. 29, 2000, at <http://www.flonnet.com/fl11709/17099400.htm>.

thousand match-producers in Sivakasi alone.<sup>244</sup> The Tamil Nadu Fireworks and Amorges Manufacturers Association (TFAA) has 152 members.<sup>245</sup> Estimates suggest that there are at least 450 fireworks manufacturers in Sivakasi. Child labour has been a continuing problem in both industries; the NCLP identifies the match industry in Sivakasi as one of nine industries for priority action.<sup>246</sup>

Information on the number of child workers in Sivakasi is difficult to find. The 1991 census estimates thirty thousand child labourers between the ages of six and fourteen in Sivakasi.<sup>247</sup> In 1994-95, the State of Tamil Nadu and UNICEF sponsored a joint study on child labour. This study revealed thirty-three thousand child labourers—three thousand in the fireworks industry and thirty thousand in the match industry.<sup>248</sup>

Attention has been drawn to the industry and the employment of children by NGOs, the media, trade unions, and academics in addition to well-publicized accidents involving child workers. In 1976, a bus full of child workers employed in the match industry turned over, injuring many of the children.<sup>249</sup> In 1981, an accident at the Aruna Fireworks factory in Mettupatti killed thirty-two workers, including children.<sup>250</sup> These incidents prompted the Tamil Nadu government to study the issue. In 1976, a government committee, chaired by Harbans Singh, recommended the amelioration, rather than abolition, of child labour.<sup>251</sup> The committee argued that abolition would negatively affect the families of child labourers and the welfare of the match and fireworks industries. In 1983, Land Reforms Commissions N. Haribhasker chaired another government committee recommending a similar approach to that of Singh.<sup>252</sup>

Though these reports were well received by child labour opponents and government officials, the state failed to act on their recommendations. This inaction prompted a writ petition by Indian lawyer and social activist M.C. Mehta in 1983. The Supreme Court of India has responded to Mehta twice, in 1990 and again in 1993. On both occasions, the Court has sympathized with the plight of child labourers in Sivakasi and attempted to craft a remedy to protect their rights and livelihood.

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244. *Id.*

245. *Id.*

246. *Mehta No. 2, supra* note 10, at 710.

247. Office of the Registrar General, District Profile 1991- Tamil Nadu (1991).

248. R. Vidyasagar, A Status Report on Child Labour in Tamil Nadu: Based on an Annotated Bibliography of Studies/Surveys on Child labour in Tamil Nadu (1995).

249. Krishnakumar, *supra* note 243.

250. *Id.*

251. *Id.*

252. *Id.*

### **B. The Court's 1991 Judgment**

Mehta's 1983 petition was first resolved by the Supreme Court of India in 1990. Mehta argued that the employment of children in the match and fireworks industry in Sivakasi was a violation of India's Constitution, the *Factories Act*,<sup>253</sup> the *Minimum Wages Act*,<sup>254</sup> and the *Employment of Children Act*.<sup>255</sup>

The Court, consisting of Chief Justice Ranganath Misra and Justice M.H. Kania, held that "employment of children within the match factories directly connected with the manufacturing process upto [sic] final production of match sticks and fireworks should not at all be permitted."<sup>256</sup> The Court found that the employment of children in the production of matches and fireworks violated the spirit of the Constitution of India, in particular its Directive Principles. As discussed above, the Directive Principles cannot be enforced in any court of law. Nonetheless, it appears from the decision that the Supreme Court relied on articles 39(f) and 45 in making their final order.

The order had five elements. First, in line with the Constitution's prohibition on the employment of children in hazardous employment, the Court said that "children can, therefore, be employed in the process of packing but packing should be done in an area away from the place of manufacture to avoid exposure to accident."<sup>257</sup> The Court acknowledged that the Directive Principles recommend that children should be in school until the age of fourteen, but "economic necessity forces grown up children to seek employment."<sup>258</sup>

Second, the Court ordered that children be paid sixty percent of "prescribed minimum wage for an adult employee in the factories doing the same job."<sup>259</sup> The Court stated that if the state should feel that a higher wage is viable, this decision "should not stand in the way."<sup>260</sup>

Third, the Court believes that special education facilities (both formal and job training), recreation and socialization should be made to provide for the quality of life of working children.<sup>261</sup> To pay for these facilities, the Court ordered the creation of a welfare fund, to which registered match factories would be made to contribute. Upon the recommendation of the counsel for the State of Tamil Nadu,

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253. *Factories Act*, *supra* note 103.

254. *Minimum Wages Act*, No. 11, (1948).

255. *Employment of Children Act*, No. 26 (1938).

256. *Mehta No. 1*, *supra* note 10, at 418, para. 5.

257. *Id.*, para. 7.

258. *Id.*, para. 6.

259. *Id.*, para. 7.

260. *Id.*

261. *Mehta No. 1*, *supra* note 10, at 419, para. 8.



the Court also ordered that the government should make a matching grant to the fund.<sup>262</sup>

Fourth, the Supreme Court ordered the State of Tamil Nadu to provide “facilities for recreation and medical attention.”<sup>263</sup> These facilities were to include “provision of a basic diet during the working period and medical care with a view to ensuring sound physical growth.”<sup>264</sup> It was recommended that the state work with UNICEF in making these facilities available.

Finally, the Court ordered the creation of a compulsory insurance scheme for both adults and children employed in the Sivakasi match factories. All employees were to be insured for fifty thousand rupees, and the premiums were to be paid for by the employer.<sup>265</sup> The Court concluded its decision by awarding Mehta three thousand rupees in costs.<sup>266</sup>

In some quarters, this decision is not progressive enough and, in fact, incorrect at law. The *Factories Act* states: “No child who has not completed his fourteenth year shall be required or allowed to work in any factory.”<sup>267</sup> It is unclear how the Supreme Court reconciled this prohibition on work “in any factory” with its decision to allow children to work in factories, provided they are packing matches, and not manufacturing them.

The other concern is that the Court appeared to give credence to the “nimble fingers” theory of children’s work. It stated: “We take note of the fact that the tender hands of the young workers are more suited to sorting out the manufactured product and process it for the purposes of packing.”<sup>268</sup> This nimble fingers theory has been criticized by a number of human rights organizations, including Human Rights Watch: “In this view, child labor is not an evil, but a production necessity. This rationalization is a lie. In fact, children make the cheaper goods; only master weavers make the best quality carpets and saris.”<sup>269</sup>

Finally, the Court did not create a disincentive for employers violating the law or its order. Though the Court emphasized that employers must play a role in maintaining the well-being of children at work, either through an insurance scheme or contributing to the welfare fund, it did not even mention the possible penalties they might incur for either failing to pay children a minimum wage or employing children in the manufacturing process.

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262. *Id.*

263. *Id.*, para. 10. The Court is basing this order on its interpretation of statutory requirements in the *Factories Act*, *supra* note 103. No such provision can be found in that Act. It is unclear whether the Court is interpreting some other section of the Act or whether there is typographical error in the decision.

264. *Id.*

265. *Id.* at 419, para. 11.

266. *Mehta No. 1*, *supra* note 10, at 419, para. 13.

267. *Factories Act*, *supra* note 103, s. 67.

268. *Mehta No. 1*, *supra* note 10, at 418, para. 7.

269. HUMAN RIGHTS WATCH, *supra* note 54.

These issues notwithstanding, this decision was an important first-step in protecting the rights of India's child labours. The Court recognized that poverty is the main incentive for children to enter the workforce. By ordering employers to pay these children a minimum wage and to ensure that they are insured, the Court attempted to protect against the exploitation of child workers. The order regarding the welfare fund and the facilities for recreation and medical attention was an attempt to balance the children's need to work with the Constitution's requirements that they enjoy a suitable standard of living. The Supreme Court of India could have banned child labour outright. Its failure to do so is indicative of the Court's respect for the constitutional separation of powers. Though the judiciary has, as discussed above, made policy through its PIL orders, it is loath to order the enactment of legislation. Instead, the Court in this case hoped to quell (sidestep?) the problem by using existing statutory means.

### **C. The Court Revisits the Issue of Child Labour**

Not surprisingly, the Supreme Court of India revisited the issue of child labour in 1997.<sup>270</sup> In 1991, after an accident at a Sivakasi firecracker factory, the Supreme Court took *suo moto cognizance* of the issue of child labour.<sup>271</sup> It ordered that compensation be paid to the victims of the accident and created a three-person committee to investigate and make recommendations regarding child labour in Sivakasi.

The committee made ten recommendations, including the establishment of a national commission for children's welfare.<sup>272</sup> The majority of their recommendations followed the Court's original 1991 order, including the creation of a welfare fund, an insurance scheme, and the enforcement of minimum wage laws. Of course, the TFAA and the AICMI disputed the findings of the committee.<sup>273</sup> The Court also heard evidence, by way of affidavit, from NGOs, the State of Tamil Nadu, and the Government of India.

Before making its order regarding the Committee's recommendations, the Court reviewed the problem of child labour in India. Its summary is the most comprehensive evaluation of this issue. Most importantly, it expanded its order to include not only the fireworks and match factories in Sivakasi, but also all industries in India employing children. It held: "We have, therefore, thought it fit to travel beyond the confines of Sivakasi to which place this petition initially related. In our view, it would be more appropriate to deal with the issue in wider spectrum and broader perspective taking it as a national problem and not

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270. *Mehta No. 2*, *supra* note 10.

271. *Id.* at 702, para. 4.

272. *Id.*, para. 5.

273. *Id.*, para. 7.

appertaining to any one region of the country.”<sup>274</sup> Unlike the 1991 decision, this order was meant to apply to all employers across India.

The Court relied on India’s Constitution, India’s international commitments, and domestic legislation as the basis for its decision. Article 24 of India’s Constitution, which prohibits the employment of children in hazardous employment, is a fundamental right. The Court also found that Article 45, the provision for free and compulsory education, “has been raised to a high pedestal.”<sup>275</sup> In addition, the Court also relied upon Article 39(e) (protection of the health and strength of workers), Article 41 (right to work, to education and to public assistance in certain cases) and Article 47 (duty of the state to raise the level of nutrition and the standard of living and to improve public health) in making its decision. These provisions are Directive Principles and “it is the duty of all the organs of the state (a la Article 37) to apply these principles.”<sup>276</sup>

In regards to international commitments, the Court noted that India is a party to the *Convention on the Rights of the Child*.<sup>277</sup> In its instrument of accession to the Convention, India undertook: “to take measures to progressively implement the provisions of Article 32, particularly paragraph 2(a), in accordance with its national legislation and relevant international instruments to which it is a State Party.”<sup>278</sup> Article 32 of the Convention states that state parties shall take action to provide for a minimum age for admission to employment, as well as to regulate the hours and conditions of employment and sanction employers that violate such provisions.

The Supreme Court then detailed the legislative history regarding the issue of child labour. It concluded: “The legislature has strongly desired prohibition of child labour.”<sup>279</sup> In particular, it analyzed the *Child Labour Act*. The Court noted that the Act provides for punishments up to one year or a fine of up to twenty thousand rupees. Nonetheless, the Court said, “it is common experience that child labour continues to be employed.”<sup>280</sup> It took note of the loopholes in the Act, including that children can work if they are part of a family of labour.<sup>281</sup> The Court also noted that the Act, unlike the Constitution or other labour laws, does not use the word “hazardous” anywhere.<sup>282</sup> To the Court, the implication is that “children may continue to work in those processes not involving chemicals.”<sup>283</sup>

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274. *Id.* at 705, para. 12.

275. *Mehta No. 2*, *supra* note 10, para. 14. *See also* *Krishnan v. Andhra Pradesh*, A.I.R. 1993 S.C. 2178.

276. *Mehta No. 2*, *supra* note 10, para. 14.

277. *Convention on the Rights of the Child supra* note 88.

278. *Id.*

279. *Mehta No. 2*, *supra* note 10, at 707, para. 22.

280. *Id.*, at 708, para. 24.

281. *Id.*, para. 24.

282. *Id.*

283. *Id.*

Beyond failures in the Act, the Court also identified causes of child labour. To the Court, poverty is the “basic reason which compels parents of a child, despite their unwillingness, to get it employed.... Otherwise, no parents, especially no mother, would like that a tender aged child should toil in a factory in a difficult condition, instead of it enjoying its childhood at home under the paternal gaze.”<sup>284</sup> This concern about poverty informed the Court’s ultimate order. Rather than absolutely prohibiting child labour, the Court sought to regulate it so as to protect the dignity and the standard of living of working children. It stated: “...till an alternative income is assured to the family, the question of abolition of child labour would really remain a will-o-the wisp.”<sup>285</sup>

In terms of policy, the Court expanded the role of the Welfare Fund established after its 1991 decision. All employers contravening the Act must now pay twenty thousand rupees per child to the Child Rehabilitation-cum-Welfare Fund, regardless of whether the employer wishes to terminate the child’s employment or not. It is unclear from the decision whether this contribution is an addition to the penalties provided for in the Act. The objective of the Fund is to provide an income for the child previously employed in a prohibited occupation. The twenty thousand rupees contribution can even be invested in a “high yielding scheme of any nationalized bank or other public body” so as to generate a greater return for the child.<sup>286</sup> The Court also considered the possibility of a policy whereby the state would be required to find alternative employment for a family member of every child removed from employment in a hazardous industry. In the end, it held that doing so “would strain the resources of the State.”<sup>287</sup> It did recommend that this policy be adopted and, if the state cannot find alternative employment, that an additional five thousand rupees be deposited in the child’s name in the Fund.

To give shape to this new policy, the Court also made a number of administrative orders. For example, it demanded a survey of child labour to be completed within six months of its decision.<sup>288</sup> That survey should be conducted in the most hazardous industries first. Income generated by the Fund should be paid monthly to the child and will not be paid if the child is not enrolled in an educational program. Responsibility for ensuring that contributions are made to the Fund and that the child is enrolled in an educational program is the duty of local labour inspectors. Recognizing that labour inspectors have not been enforcing the law, the Court also ordered the creation of a separate cell in the Labour Department of each state to monitor this scheme.<sup>289</sup> The Court also recommended that, in the case of non-hazardous employment, children should not work more

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284. *Mehta No. 2*, *supra* note 10, at 709, para. 27.

285. *Id.*

286. *Id.*

287. *Id.* at 710, para. 29.

288. *Id.*, para. 31.

289. *Mehta No. 2*, *supra* note 10, at 711, para. 31.

than four to six hours per day and they should be in school at least two hours per day. The cost of this schooling should be the responsibility of the employer.<sup>290</sup>

The Supreme Court of India's decision in this case was aimed at alleviating poverty as the motivation for children to work. The hope was that if families have a steady income, then there would be no need for children to work. Further, by having employers contribute to the Welfare Fund, the Court attempted to ensure that at least some of the penalty collected from an offender would be paid to benefit the child and would not go directly into government coffers. In its conclusion, the Court hinted that poverty is not the only factor in the rise of child labour: "...India is a significant exception to the global trend toward the removal of children from the labour force.... This shows that has caused the problem of child labour to persist here is not really dearth of resources, but lack of real zeal."<sup>291</sup>

### 1. Analyzing the Court's Decision

Similar to *Mehta No. 1*, the Court's decision can be criticized as not going far enough. Rather than prohibiting child labour, the Court again sought to balance the child's economic needs against his or her fundamental rights. This decision, unlike the Court's previous order, directly targeted the problem of poverty. It involved the state, employers, families, and working children in a scheme to help reduce the causes of child labour. The Court determined that if poverty is eradicated, child labour will cease to exist. To this end, it hopes that state governments will replace child workers with adult workers. The reasoning is that if there is a low unemployment rate, then children will be less likely to have to work and more likely to attend school. Alternatively, if no other employment is available, then the hope is that the Welfare Fund will provide some income to the family.

In this decision, the Court was restrained in its policy-making role. It did not close any of the loopholes in the *Child Labour Act*, though it did acknowledge that such loopholes exist. This deference to the legislature is in keeping with the Court's previous PIL decisions. On the other hand, the Court did make substantial policy through the expansion of the Welfare Fund. Though its aim appeared to be good, there have been some problems with the scheme it has suggested. To begin, the income generated from twenty-five thousand rupees is not enough to prevent parents from putting their children to work. At current State Bank of India interest rates, the annual income generated from the Fund will be 1562.50 rupees or \$35.50 (U.S.)<sup>292</sup> The Court recognized this fact in its decision: "As the aforesaid income

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290. *Id.*

291. *Id.* at 711, para. 32.

292. Based upon a fixed-term deposit at the State Bank of India, paying 6.25% annually.

could not be enough to dissuade the parent/guardian to seek employment of the child, the State owes a duty to come forward to discharge its obligation in this regard.<sup>293</sup>

The Court's solution was its recommendation regarding alternative employment for the child's family members. However, that recommendation is not binding on the state. The Court stated: "We are not issuing any direction to do so presently. Instead, we leave the matter to be sorted out by the appropriate government."<sup>294</sup> In Tamil Nadu, this recommendation has not been implemented. The cost of doing so is likely prohibitive. Employers do not want to employ adults, in part because adult workers are subject to minimum wage and safety laws and they are probably better versed in their rights as compared to children.

The Court also hoped that local labour inspectors would enforce its decision. As discussed above, labour inspectors are overworked and susceptible to corruption and bribery. More importantly, if labour inspectors were doing their jobs, more employers would be facing prosecution and the need for a court order would probably not exist. As noted in *The Hindu*: "The apex court presumes that all the labour inspectors will discharge their duty honestly. This you will agree is a fairytale where money speaks, bends and silences."<sup>295</sup>

It should be noted that in neither decision did the Court focus on the social causes of child labour. The Court is correct in that poverty is the reason why children work in India. But, in addition, the Court should have considered other factors, such as caste discrimination, a lack of educational opportunities and myths about the nature of children's work. By ignoring these other factors, especially in the drafting of its order, the Court reinforces poverty as the only cause of child labour. For child labour to be effectively attacked in India, there must be recognition by all sectors of society that other factors contribute to the problem and must be addressed.

The most problematic aspect of these decisions is that they did not afford relief for children employed outside of the enumerated hazardous industries. India's legislative regime revolves around protecting children from the dangers associated with working in an unsafe environment. On the other hand, there is no comparable regulation for children working in so-called non-hazardous employment. Though the state might be successful in ending child labour in hazardous industries, there is always the concern that that labour will either go underground or those children will seek employment in jobs outside of the purview of the Act or the Court's order. In short, the Court gave tacit approval to child labour, provided it is conducted in non-hazardous industries, in a family enterprise or in a government-training centre.

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293. *Mehta No. 2*, *supra* note 10 at 709, para. 28.

294. *Id.* at 710, para. 29.

295. Goutam Ghosh, *An Endless Tunnel?* HINDU, Feb. 7, 1999, at <http://www.hinduonnet.com/fo9902/99020460.htm>.

#### **D. Child Labour in Tamil Nadu Today**

In response to the Supreme Court's decision, Tamil Nadu implemented a fifteen-point programme to tackle the problem of child labour. In its most recent policy note on the problem of child labour, the state government notes that in 2001, 105 cases had been filed against employers violating the *Child Labour Act*.<sup>296</sup> The state collected eighteen thousand rupees in fines from these prosecutions.

In 1997, immediately after the Court made its order, the state conducted a survey. It found 10,118 children employed in hazardous industries and 9,052 children in non-hazardous industries.<sup>297</sup> Unfortunately, the state has only collected one hundred and sixty thousand rupees from eight employers for deposit in the Welfare Fund.<sup>298</sup> The state has deposited 47,465,000 rupees in the Fund. It has removed 157 children from hazardous employment and launched 8,799 cases against employers for violating the Act.<sup>299</sup> Finally, the state, as per the Court's direction, established a Child Labour Cell in the Department of Labour.

Clearly, the Court's decision has had little effect on either curbing the problem of child labour or persuading the state to implement the Act more effectively. With over ten thousand children employed in hazardous industries, why has Tamil Nadu only removed 157 children from the workplace and ordered only eight employers to contribute to the fund? The Court's decision did not require children to be removed from hazardous employment, but a contribution must be made to the Fund regardless. Even then, the state has the power to remove children from hazardous employment if the employer is violating the Act or harming the child in some other way.

Even if the state was effectively implementing the Court's order, the decision has not had any effect on curbing employer practices. In November 2001, the Campaign Against Child Labour (CACL) conducted a fact-finding mission in Sivakasi.<sup>300</sup> It found six children employed in two fireworks factories. Further, it found several children manufacturing fireworks at home. The CACL reported that these home-based units are on contract to three fireworks factories in Sivakasi. An earlier investigation by CACL in 1999 found that thirty percent of the employees working for subcontractors and contractors were children.<sup>301</sup> Over fifty percent of the fireworks factories' work done at home was by children. In May 2002, an

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296. Tamil Nadu, Labour and Employment Department, "Policy Note on Labour, Factories, Employment and Training: Demand No. 31 (2002-2003)", at <http://www.tn.gov.in/policy2002-03/le2002-03-7.htm>.

297. *Id.*

298. *Id.*

299. *Id.*

300. S. Annamalai, *Fireworks Units Still Employ Child Labour*, HINDU, Apr. 30, 2002, at <http://www.thehindu.com/thehindu/2002/04/30/stories/2002043000690500.htm>.

301. Krishnakumar, *supra* note 243.

early-morning inspection of twenty-five buses found fifty-seven children working in match factories.<sup>302</sup> Further, the age certificates of eighty-five more children were sent for inspection. It was alleged that a government medical officer was issuing the fake certificates. Also, children were packed into the buses and many were forced to leave home at 3:30 A.M. and did not return until 8:30 P.M.

Employers are either disobeying the law or exploiting loopholes in the Act. Children are being coached to state that their age is fourteen or fake age certificates are being procured for them.<sup>303</sup> By hiring contractors and sub-contractors, the factories can avoid fines under the Act but still keep labour costs low. The contractors hire children to work for them or, in turn, subcontract the work to households, where the Act's provisions do not apply.<sup>304</sup> Though government officials boldly state that the problem of child labour is being curbed in Tamil Nadu, anecdotal evidence suggests that prosecutions under the Act, if an employer is caught, are rarely successful.<sup>305</sup> In 1998, twenty-six of the fifty-five cases that went to trial were dismissed. In 1999, 125 employers were charged, but thirty-four cases were dismissed. According to Deputy Chief Inspector of Factories, K. Sidhaiyan, employers are being acquitted because of loopholes in the legislation: "If the law is to be implemented strictly, a lot of loopholes need to be plugged."<sup>306</sup> He suggests that the Act should regulate child labour in the home. Further, there should be a provision for reviewing a child's aid certificate by a medical board of review. Even if this anecdotal evidence is the exception and not the rule in Sivakasi, it suggests that the Court's decision, never mind the *Child Labour Act*, did not provide enough of a disincentive for employers seeking to hire children in their factories.

## **E. Conclusion**

In recent decisions, the Supreme Court of India has refused to tackle the blatant loopholes in the statutory regime regulating child labour. Though some critics might suggest that this refusal is a failing of the Court, it in fact demonstrates that the Court is unwilling to transgress the boundaries between it and the legislature. Though it recognized that the law has its failing, the Court prefers to make orders to ensure the implementation of the law. Hence, the situation in Sivakasi appears to be as desperate today as it was before the Court's order. The Court's objective of reducing poverty has not changed attitudes towards child labour or children's work.

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302. *Wee Hour Raid Exposes Child Labour*, HINDU, May 29, 2002, at <http://www.hinduonnet.com/thewindu/2002/05/30/stories/2002053004460400.htm>.

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.*



## VI. SUMMARY AND CONCLUSION

Child labour in India is a notorious problem that has not been solved through either government regulation or international pressure. In the traditional approach to international development, problems of underdevelopment can be solved through macroeconomic growth and poverty reduction. By expanding the economy and reducing poverty, development theory argues that the problem of child labour can be curbed. In India, that has not happened. Since 1991, India's economy has grown at an unprecedented level. Nonetheless, child labour appears to be at the same levels in the 1990s as it was in the previous decades. This fact suggests that poverty alleviation alone will not end child labour.

The Indian government has attempted to respond to the problem by enacting laws that make it illegal to employ children in enumerated hazardous industries. In addition to the law, India has implemented the National Child Labour Project. This project seeks to end child labour by encouraging children to attend school or work in non-hazardous industries or in government training centres. Even these reforms have not made a serious impact on the problem.

In the early 1980s, in an attempt to secure human rights guarantees for India's impoverished and disadvantaged people, the Supreme Court of India developed a new type of human rights litigation, known as PIL. Indian advocate M.C. Mehta petitioned the court in 1983 in a PIL action, charging that the Indian government was not enforcing its labour laws and, therefore, allowing child labour to continue unabated. In the 1990s, the Supreme Court of India finally answered his petition. In two separate decisions, it held that the Indian government must implement a policy aimed at reducing poverty and, hopefully, affecting child labour. It created the Welfare Fund. The aim of this Fund is to provide income to the families of former child labourers. The Court's objective was to create an incentive for children to attend school and not to work.

For some critics, the Supreme Court of India did not do enough for India's child workers. To abolish child labour in India, the government must attack the socio-economic causes that force children to work. Age-old prejudices about women's education, the value of formal schooling, and systemic problems related to caste, religion and class must be targeted if child labour is to be eradicated. The legislative framework in India does not go far enough in solving these problems. Instead, the *Child Labour Act* and the government's child labour policies are focused on creating disincentives for employers and parents. Even worse, the Act is full of loopholes that employers can exploit and the law is rarely enforced. Further, there is no protection in the law for children working in non-hazardous industries. The Act makes local labour inspectors responsible for enforcing these provisions. As discussed above, these labour inspectors are overworked and susceptible to corruption and bribery. Even if the labour inspectors are able to arrest employers for violating the Act, the evidence suggests that very few employers are actually prosecuted. Even worse, it appears that, at least in Tamil

Nadu, factories are employing contractors and sub-contractors to manufacture fireworks and matches.

For lawyer M.C. Mehta and other social activists, recourse to human rights protections in India's Constitution are the only alternative for securing minimum rights for India's child labourers. A rights-based approach to development seeks to empower people in developing countries. Rather than making them the subject of charitable relief, the rights-based approach aims to make people in developing countries participants in the development process. It encourages a link between development processes and fundamental freedoms and rights. Further, it aims to make government institutions accountable to the people in the hope that this accountability will deliver the entitlements that these people deserve. India's experience with PIL is an excellent example of the rights-based approach to development at work. It was encouraged by the Supreme Court of India for the express purpose of protecting people's rights in the face of government indolence. Indians are encouraged to petition India's courts if they believe their rights or the rights of their fellow citizens are being denied. The Supreme Court has responded by encouraging its own investigations into human rights violations, circumventing the state if need be. The result is that Indians have an avenue to voice their concerns with government policy. Moreover, this avenue has the force of the Constitution of India behind it.

The Supreme Court of India has followed an interventionist approach to PIL. It has not shied away from developing policies to aid in the protection of human rights if it believes that the state has failed in that regard. On the other hand, the Court has not assumed the role of the legislature: it will not make laws or change existing laws. To do so would be to violate the allocation of responsibilities between the organs of government in India's political structure. It is for this reason that its decisions on the issue of child labour have been only a partial solution that problem in India. Child labour can be solved. It may not be eradicated but it can be regulated to protect Indian children from the harmful effects of working in hazardous industries or for long hours and with little pay. The key is for the Indian government to enforce its own laws in an equitable manner. The Supreme Court of India cannot do that for the government. The best that the Court can do is establish policies in discreet areas in the hopes that those policies will have some effect on the problem. It now remains up to India's national legislature to revise the *Child Labour Act* or to better enforce the Act's provisions.

To this end, the rights-based approach to development cannot be considered a panacea. For the rights-based approach to be ultimately effective, there must be an express linkage between the development objective and a particular right. In India, the Supreme Court has identified certain rights that, if enforced, might result in less child labour. For example, in *Mehta No. 2*, the Court grounds its order in the Constitution's prohibition of child labour in hazardous industries, as well as the directive principles aimed at securing a high standard of living and compulsory education for all Indians. On the other hand, these rights

cannot be used to stop widespread poverty, informal discrimination, or increase government resources to better effectively enforce the law. The rights-based approach does not only rely on domestic human rights instruments; it is possible to make links between international or regional human rights instruments and a development objective. Even then, India has failed to ratify key international labour instruments, including *Convention No. 138* and *Convention No. 182*. Though the Supreme Court of India has been more willing to apply international law in its decisions than other democracies, the rights in these conventions are of no effect if India does not ratify the treaties. The other problem with the rights-based approach is that it fails to account for how rights are to be enforced. Though it suggests that protecting fundamental freedoms and human rights are important to development, the rights-based approach does not discuss what policy tools governments and courts should employ to enforce those same rights.

Most importantly, India's government and its courts must stop considering child labour to be simply a problem associated with poverty. If India is to be successful in eradicating child labour of all types, it must target, both through legislation and social policy, the associated causes, including discrimination, gender-bias and a misunderstanding of the value of formal education. If India's politicians and bureaucrats ignore those problems, child labour will continue. And if child labour continues, India will be ignoring its commitments to human rights, children rights and the commitments it made to its people at Independence.

