



JOURNAL OF THE INDIAN LAW INSTITUTE

VOLUME 50

APRIL-JUNE 2008

NUMBER 2

**CHILD LABOUR – PROHIBITION v. ABOLITION:
UNTANGLING THE CONSTITUTIONAL TANGLE**

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I Introduction

CHILDREN ARE universally recognized as the most important asset of any nation. The future of the nation depends directly on how they are brought up and cared for. This is why the Universal Declaration of Human Rights adopted way back in 1948 had proclaimed that childhood was entitled to special care and assistance. The UN Convention on the Rights of the Child adopted in 1989 proclaims in article 6 that every child has the inherent right to life and that the state parties shall ensure to the maximum extent possible the survival and development of the child. Again, in article 32 the convention mandates the states parties to recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

The Government of India has ratified the convention in December 1992, with the solitary rider in relation to article 32 : While fully subscribing to the objectives and purposes 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 cooperation, 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 age for admission to each and every area of employment in India - the Government of India undertakes to take measures to progressively implement the provision of Article 32,

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particularly paragraphs 2 (a) in accordance with its national legislation and relevant international instruments to which it is a State Party.

Also, a peek at our constitutional provisions, especially, articles 24, 39 (e) and (f) would reveal that there is much in common between the legal and moral mandates enshrined therein and the framework of norms, principles and guidelines embodied in the UN Convention on the Rights of the Child. Similarities apart, the fact remains that in countries afflicted with chronic poverty and pervasive privation, the rights of the child (poor child) are incessantly marginalized, if not altogether relegated to the oblivion. This is exactly what has happened in our country and the result is there for every one to see. With the many competing demands on the country's resources, the government has not been able to give to the children their due towards their growth and development. Resultantly, there is widespread employment of children, both open and disguised, for survival of self and, often their families, in environments and professions, which are most detrimental to their health and growth. Poverty, unemployment or underemployment of parent, precarious incomes, low living standards, and insufficient opportunities for education and training leave no choice to such children other than toiling under conditions not conducive to their health.

The government has not been able to do much to remedy the situation, despite the commitment made by it while ratifying the UN Convention for reasons beyond its control. The result is that India has the dubious distinction of having the largest contingent of child labour and as a concomitant, the maximum number of juvenile illiterates in the world.¹ Whether they are sweating in the heat of stone quarries, working in the fields 12 to 16 hours a day, picking rags in city streets, or hidden away as domestic servants, these children endure miserable and difficult lives. They earn little and are abused much. They struggle to make enough to eat and perhaps to help feed their families as well. They do not go to school; more than half of them will never learn the barest skills of literacy. Many of them may have been working since the age of four or five, and by the time they reach adulthood they may be irrevocably sick or deformed — they will certainly be exhausted, old men and women by the age of forty, likely to be dead by fifty.²

Most or all of these children are working under some form of compulsion, whether from their parents, from the expectations attached to their caste, or from simple economic necessity, or to ward off starvation.

1. See, Joe Arimpoor, "Profile of the Child Worker" 44 *Social Action* 59 (1994). Also see Alec Fyfe, *Child Labour Policy and the Role of Education in India* 2 (Mimeo, 1994).

2. Human Rights Watch, *The Small Hands of Slavery* 1 (1996).



II Child labour - Historical perspective

Child labour is not a new phenomenon. It existed in some form or other in the past, it is there in the present, and it will continue to be there in future as well, given the ground realities of our country and the legal system that we have in place.³ The origin of child work can be traced back to the early stages of the evolution of societies, in which the process of learning by working (child work) was considered as part and parcel of the social and economic upliftment. It was also probably a part of the survival process.

There are references to slavery, domestic service, and master servant relationship in literature, particularly Buddhist literature, which unmistakably point towards the presence of children toiling as slaves and servants at the mercy of their masters. In the medieval period also both Hindu and Muslim affluence was characterized by the use of children as personal servants, often working as helpers and apprentices to the adults.⁴

III Conceptualizing child labour

The complex nature of the concept of ‘child labour’ as it involves differing interpretations of ‘child’ and ‘labour’ and further ‘work’ and ‘labour’, makes it difficult to have a consensually validated definition of ‘child labour’ both in the national and international context. Some agencies, organizations and countries, however, use the terms child labour and child work interchangeably. The worldwide concern with child labour has resulted in two major international conventions on children, which set age limits for childhood and entry into work.⁵ The Indian Constitution also has set the age limit for children.⁶ However, it is to be noted that perceptions of childhood differ in different countries and societies. In many societies childhood does not end when a child attains a certain age, but entrance into adulthood is a gradual process, or is based on criteria other than age. Thus, the two main approaches to defining child labour are : (i) any labour force

3. According to official (Planning Commission) figures, over 260 million people (26 per cent of our population) still live below the country’s poverty line. Seventy five per cent of these are dwelling in rural areas. (See, Planning Commission, Government of India, *Tenth Plan, Poverty Alleviation in Rural Areas* 2002). The child labour law that we have, viz., Child Labour (Prohibition and Regulation) Act, 1986 prohibits child labour only in specified occupations and processes within its legislatively prescribed parameters and does not proscribe child labour *per se* from all employments.

4. See, Leela Dube, “The Economic Roles of Children in India : Some Methodological Issues” in Gery Rodgers and Guy Standing (eds.), *Child Work, Poverty and Underdevelopment* 76 (1981).

5. ILO, Minimum Age Convention, 1973 (No. 138, art. 3); and UN Convention on the Rights of the Child, 1989, Arts. 1 and 32.

6. See, Art. 24.



activity by children below a stipulated minimum age; and (ii) any work - economic or not - that is injurious to the health, safety and development of children. Based on the above, some authors have defined child labour focusing on different patterns of children's activities⁷ and some others on the negative effects of work on children.⁸

ILO defines child labour as "children prematurely leading adult lives, working long hours for low wages under conditions damaging to their health and to their physical and mental development, sometimes separated from their families; frequently deprived of meaningful educational and training opportunities that could open up for them a better future."⁹

"When the business of wage earning or of participation in self or family support conflicts directly or indirectly with the business of growth and education, the result is child labour. The function of work in childhood is primarily developmental and not economic. Children's work, then, as a social good, is the direct, antithesis of child labour as a social evil."¹⁰

Elements of child labour

According to a study undertaken by Anker and Melkas, child labour involves one or more of the following elements : (i) work by very young children; (ii) long hours of work on a regular full-time basis; (iii) hazardous working conditions (physically and mentally); (iv) no or insufficient access, attendance or progress in school; (v) abusive treatment by the employer; and (vi) work in slave-like arrangements (bonded labour).¹¹

The Committee on Child Labour, after an in-depth study of the problem of child labour in the country came to the finding that "child labour involves the use of labour at its point of lowest productivity, hence it is an inefficient utilization of labour power. Child labour represents pre-mature expenditure rather than saving." It concluded: "the argument that employment of children increases the earnings of the family and keeps children away from mischief is misleading. It glosses over the fact that child labour stunts their physical growth, hampers their intellectual development and by forcing them into the army of unskilled labourers or blind alley jobs condemns them to low wages all their lives...child labour is economically unsound, psychologically

7. See, Gerry Rodgers and Guy Standing (Eds), *Child Work, Poverty and Underdevelopment* (ILO, 1981).

8. Jo Boyden, *The Relationship between Education and Child Work* (Innocenti Occasional Papers, Child Rights Series, No. 8, 1995); and Alec Fyfe, *Child Labour : A Guide to Project Design* (ILO Child Labour Collection, 1993).

9. Francis Blanchard, *Child Labour* 3-4 (ILO, 1983).

10. *Encyclopaedia of Social Sciences* 413.

11. Anker and Melkas, *Economic Incentives for Children and Families to Eliminate Child Labour* 32 (ILO, 1996).



disastrous and physically as well as morally dangerous and harmful.”¹²

Views of 2nd National Commission on Labour

The report “Women and Child Labour” of the study group commissioned by the Second National Commission on Labour has identified certain employments as child labour: children working unacceptably long hours a day; children working in narrow trenches in mines where adults cannot crawl; children working in the carpet industry and elsewhere and who are bonded; children who are severely punished and tortured if they attempt to escape; child who replaces his father as bonded worker: in Sivakasi for example, ‘the child in the womb is pledged to the factory’; children working in home based industries in abominable conditions; and children working in unhygienic, crowded conditions and who are victims of occupation related diseases — becoming old and unproductive citizens at a time when most other people are just beginning to participate in a full life.¹³ Since more and more paid work is shifted to home-based work and the distinction between work in the home and work outside has become blurred, the study group has opined that “all forms of work are bad for children, and any form of distinction between one form of work or another done by children is completely arbitrary.”¹⁴

Magnitude of child labour

International scenario

Reliable statistics on child labour are rare and, when available, often incomplete. Because child labour is illegal below a certain age in almost every country, national government surveys often do not collect information on working children below 15 years old.

According to the latest available statistics of the United Nations Children’s Educational Fund (UNICEF) an estimated 246 million children are engaged in child labour all over the world. Of these, almost 70 per cent (171 million) work in hazardous occupations, such as working in mines, chemical factories, in agricultural fields (approximately 70 per cent) with constant contact with pesticides or with dangerous machinery. Moreover, millions of girls work as domestic helpers and also unpaid household help and are especially vulnerable to exploitation and abuse. Millions of others

12. See the *Report of the Committee on Child Labour 10* (Government of India, Gurupadaswamy Committee Report, 1979).

13. See *Report of the Study Group 167-68* (Second National Commission on Labour, 2001).

14. *Ibid.*



work under horrific circumstances; they may be trafficked (1.2 million), forced into debt bondage or other forms of slavery (5.7 million), into prostitution and pornography (1.8 million), into participating in armed conflict (0.3 million), or other illicit activities (0.6 million).¹⁵

Regional estimates indicate that : Asian and Pacific regions harbour the largest number of child workers in the 5 to 14 age group, 127.3 million in total (19 percent of the children work in the region). Sub-Saharan Africa has an estimated 48 million child workers. Almost one child out of three (29 percent) below the age of 15 works. Latin America and the Caribbean have approximately 17.4 million child workers (16 percent of children work in the region). 13.4 million children work in the Middle East and North Africa, which constitutes 15 percent of the total children. Approximately 2.5 million and 2.4 million children are working in industrialized and transition economies, respectively.¹⁶

Indian scenario

There are varying estimates of the magnitude of child labour in India due to differing concepts, methods of estimation and identifying the sources of data, among others.¹⁷ To these can be added the vast unorganized, informal and unregulated sector of the economy and corresponding labour market. For example, it is in the informal sectors that child labour mostly operates without being adequately represented in the official labour statistics, including the census.

Based on the number of non-school going children and families living in destitution, Campaign Against Child Labour estimates that there are between 70 to 80 million child labourers in the country.¹⁸ A survey of child labour throughout the country ordered by the Supreme Court was completed during 1997, and it documented the existence of some 126,665 wage-earning child labourers. When this figure was challenged as patently low, the states conducted a second survey, in which an additional 428,305 child

15. See, UNICEF, *Child Labour Today* (2005).

16. *Ibid.*

17. The information on children working in informal sectors, or attending schools, who might also be working is difficult to procure. The collection of reliable data regarding child labour is limited also by the fact that, officially the work undertaken by children in domestic and informal sectors are excluded from worker's category, as it is difficult to assess the productive value of such labour. Thus, official child labour figures are always at such variance with statistics quoted by non-governmental agencies. Two main sources of most authentic data on child labour are Census of India and National Sample Survey Organization (NSSO) reports. NSSO 55th Round in 1999-2000 and Census 2001 present age-wise workers, which is one of the most authentic source of data for working out the magnitude of child labour.

18. CACL, "An Alternative Report on the Status of Child Labour in India" (Submission to the UNCRC, Sept.-Oct., 1999).



labourers in hazardous industries were found. However, even the combined total of the two surveys understates the true dimension of the problem.¹⁹

As per the Census of India, there were 10.75 million child labour in the age group 5 to 14 years in 1971; 13.64 million in 1981; 11.28 million in 1991 and 12.66 million in 2001. Out of these 12.66 million, about 5.77 million children were classified as ‘main workers’ and the rest 6.88 million children were as ‘marginal workers’.²⁰ Most of the working children are engaged in agricultural activities as wage laborers or cultivators. Manufacturing, processing, servicing and repairs in the household industries engaged 3 per cent of child workers, while 3 per cent were engaged in factory work and the other 15 per cent were engaged in service sector, mostly as domestic workers, and in small trade activities.²¹

Working children are usually classified in terms of work situations in (a) domestic work; (b) non-domestic and non-monetary work; (c) bonded labour work; (d) wage work in hazardous and non-hazardous occupations; and (e) commercial sexual exploitation work.²² Each work situation has deep rooted consequences on their human rights, healthcare and future economic production processes.

According to UNICEF’s, *The State of the World’s Children 2006* about 14 per cent of the children (5 to 14 years) of the total children in the age group were engaged in child labour activities in 2004, with the percentages for boys and girls almost same at 14 per cent and 15 per cent, respectively.²³

IV Causes of child labour

Causes of child labour are not one but many. It is both a cause and

19. US Dept. of State, *Country Reports on Human Rights Practices 1999* (25.2.2000).

20. Main workers are those workers who are found engaged for production activities for more than six months (more than 183 days in a year), while marginal workers are those workers who work for less than six months in a year.

21. There is a possibility that some of the child factory workers are not recorded and the number is under-estimated, since the law prohibits the employment of children in factories.

22. The categories used are those devised by Gerry Rodgers and Guy Standing, *Child Work, Poverty and Underdevelopment* (ILO, 1981).

23. There are wide conventional differences on child labour as described by various national and international organizations. For e.g., UNICEF and ILO consider a child as one in the age group of 5 to 14, whereas, the World Bank and UNDP define a child as one in the age group of 10 to 14 years. Due to this definitional differences of various organizations with respect to child labour, the data are not strictly comparable. However, they give some idea of the long term-trends. Moreover, as the child labour is mainly employed only unorganized sector, data are based on different surveys, which further reduce the comparability among them.



consequence of poverty, displacement, illiteracy and adult unemployment. Extreme forms of poverty play a crucial role in fostering and perpetuating child labour. Studies after studies have confirmed this fact.²⁴ Child labour, definitely, is not a problem that confronts the rich. It's a malady which only the poor are afflicted with. The biggest problem with poverty is that it is not contagious. Had it been contagious, it would have been contained.

Economic compulsion and exploitation of poverty

Over 260 million people in the country still live below the poverty line. In the country side, the distribution of land is most iniquitous. Nearly one-third of the metropolitan population lives in slums and improvised tenements. In these circumstances, the child is compelled to shed sweat of his brow to keep the wolf away from the door. In some families when disease or other forms of disability upset the delicate balance of family budget, there may not be any alternative but to send the child to work.²⁵ The income accruing from child labour may be small but it plays a crucial role in saving the family to keep their body and soul together. In studies done by the National Labour Institute in the lock industries of Aligarh, Bangle industries of Firozabad, gem polishing industries of Jaipur, slate industry of Markapur, etc., it has been found that in most of the cases the children's contribution to family income is 20-30 per cent.²⁶ Economic compulsions may sometimes even compel the poor parents to collude with the employer and put the child under risks of inhuman exploitation.²⁷

Poverty and child labour thus, always beget each other and tend to reinforce themselves in families and communities.²⁸

A US report has noted that while poverty may be one very important contributing factor for child labour some other factors are also equally important, viz., economic self interest - factory owners who overwork, underpay, and otherwise take advantage of vulnerable child workers; public

24. R. Kanbargi, (Ed). *Child Labour in the Indian Subcontinent : Dimensions and Implications* 53 (1991); Neera Burra, *Born to Work : Child Labour in India* 37 (1995); K.K. Khatu, *et al*, *Working Children in India* 33 (1983); etc.

25. Helen R. Sekhar and Noor Mohammad, *Unlocking the Childhood of Every Aligarh Child* 13 (2002).

26. V.V. Giri National Labour Institute, *Hard Labour at a Tender Age* 20, 36, 57, 78 (2002). Also see, S. Usha and D.R. Devi, "Causes and Earnings of Child Labour in Beedi and Agarbathi Industries" 40 *The Journal of Labour Economics* 849 (1997); M. Swaminathan, "Economic Growth and the Persistence of Child labour : Evidence from an Indian City" 26 *World Development* 1513 (1998).

27. Ravi S. Srivastava and Nikhil Raj, *Knots that Tie up Children in Mirzapur* 102 (2002).

28. G.K. Lieten, "Child Labour and Poverty : The Poverty of Analysis", 45 *The Indian Journal of Labour Economics* 457 (2002).



indifference — politicians, media, non-governmental organizations, and other opinion makers who collectively treat child labour as a non-issue; public policy — inadequate resources devoted to primary education and export promotion policies that support firms and industries without regard to their impact on child labour; government inadequacies — labour inspectorates that lack authority, expertise, numbers and accountability; government corruption — government officials who not only condone but in many cases personally benefit from child labour; and societal prejudice — majority groups, which consider child labour among less privileged groups part of the natural order.²⁹

Although all the above factors do contribute towards child labour, they are in no way exhaustive. Among the other factors contributing to child labour are rapid population growth, adult unemployment, bad working conditions, lack of minimum wages, exploitation of workers, low standard of living, low quality of education, lack of legal provisions and enforcement, low capacity of institutions, gender discrimination, conceptual thinking about childhood, etc. It is a combination of these factors which compel children to work under exploitative or hazardous conditions.

Pull and push factors

Other studies on the issue of child labour have also tried to explain the reasons for the spread and prevalence of child labour more or less on the same lines.³⁰ According to these there are various socio-economic and cultural factors that force children into work and these factors can be broadly classified into two : Supply (push factor); and Demand (pull factor). The supply side factors refer to the conditions under which families are engaging children in work. Demand side factors refer to the preference of employers for employing children.

V Consequences of child labour

Child labour is a concrete manifestation of the violations of the rights of children, especially the right to education and development. Working at a young age has many adverse and direct consequences:

- children are deprived of their right to education;
- children are deprived of their right to play, leisure and healthy growth;

29. See, US Dept. of State, Country Reports on Human Rights Practices 1999 (25.2.2000).

30. Dr. MCR HRD Institute of Andhra Pradesh and ILO-IPEC-Andhra Pradesh Project on Child Labour, *Core Training Manual on Child Labour* 50 (2003).



- children are deprived of their free mental, physical, psychological and spiritual growth owing to hazardous nature of their work and over work that is not compatible with their age;
- children are deprived of their childhood itself;
- child labour creates and perpetuates poverty;
- it condemns the child to a life of unskilled, badly paid work; and
- ultimately leads to child labour with each generation of poor children undercutting wages.

In rural areas, it has been seen, that farmers store seed grains for sowing in the next season. But owing to starvation and poverty sometimes these seed grains are also consumed, affecting the well being of their future. Children are like today's seeds for tomorrow's healthy societies. Child labour amounts to consuming the seed grains resulting in gloomy future.³¹

Child labour is as much the cause as also consequence of adult unemployment and under-employment. It at once supplements and depresses the family income. It is not only a subsidy to industry but also a direct inducement to the payment of low wages to adult workers. Child labour involves the use of labour at its point of lowest productivity, hence it is an inefficient utilization of labour power. It represents premature expenditure rather than saving.³²

“Long hours of work, late hours of night employment, continuous standing, sitting or use of single set of muscles, emphasis on the finer neuro-muscular coordination's with attendant nervous strain, indoor confinement in noisy factories and dusty trades, carrying heavy loads under the arm or lifting heavy weights, pressure of speed in the performance of simple mechanical acts, contact with industrial poisons, exposure to inclement weather”,³³ all take their toll on the health of children and make them unhealthy adults.

As was summed up by the government committee on child labour, it can now authoritatively be stated that child labour deprives children of their educational opportunities, minimizes their chances for vocational training, stunts their physical growth, hampers their intellectual development and by forcing them into the army of unskilled labourers or blind alley jobs, condemns them to low wages all their lives. Therefore, child labour is economically unsound, psychologically disastrous and physically as well as morally dangerous and harmful.³⁴

31. ILO, *Core Training Manual on Child Labour* 217 (2002).

32. Government of India, *Report of the Committee on Child Labour* 9 (1979).

33. See, 3 *Encyclopaedia of Social Sciences* 421.

34. *Child Labour Committee Report*, *supra* note 32 at 10.



VI Child labour and education

Child labour and illiteracy go hand in hand as one tends to breed the other. Numerous studies have examined the impact of education on the incidence of child labour. Most of the child labour are either illiterate or partially literate. The parents of child labour are also more often than not, illiterate. No study has ever found a child labour coming from an educated family.³⁵

Myron Weiner, a strong advocate of compulsory education for children to combat child labour in India, maintains that without the iron frame of legislation to compel at least few years of elementary education, millions of Indian parents will never send their children to school, employers will never release their grip on a nimble fingered, easy to handle and cheap source of labour and India will continue to head the international illiteracy league well into the coming century.³⁶

Kerala example

Child labour and mass illiteracy are undoubtedly huge blots on the nation's record, and the importance of education in curbing child labour cannot be underestimated. By taking the example of the State of Kerala, this statement can be corroborated. Child labour is almost non-existent in Kerala and the literacy rate is almost touching cent per cent. Historical and political factors explain this success.

Historically, the Christian missionaries who started arriving in the state since 1498, built churches (*palli* in Malayalam) and along with it schools (*pallikoodam*) and enrolled children, regardless of caste, religion or their parents' income. Over the years, the number of schools kept rising, even if they did not cover the needs of the whole population.

Kerala's government financed schools also proved to be increasingly successful since independence. Enrolment is free and free school meals encourage poor families to send their children. The minimum wage, which is higher than elsewhere in India, allows parents to survive without their children having to go out to work. Anyone who has not enrolled his son or

35. For example, one may usefully refer to studies by Parveen Nangia, *Childwork in India: A Preliminary Analysis* (1981); A.N. Singh, *Child Labour in India - Socio-Economic Perspectives* (1990); G.P. Mishra and P.N. Pande, *A Study on Child Labour in Glass Industry of Ferozabad* (1992); Sudhir Kumar, "Child Labour in Education" in Bhagwan Prasad Singh and Shukla Monhanty (Eds), *Children at Work : Problems and Policy Options* (1993); and Rajeev Sharma, *Child Labour in the Glass Bangle Industry of Firozabad* (Ph.D thesis, *Mimeo*, 1996).

36. Myron Weiner, *The Child and the State in India* 107 (1991).



daughter in school comes under pressure from the other inhabitants of the village. Even primary teachers before the beginning of the school session go about looking for children to be enrolled, may not be with the sole motive of imparting education, but definitely to save their employment, since a drop in the prescribed number of students for a division would result in a division cut!

Thus, it can be seen that a whole range of factors have contributed to Kerala's success story in the field of education and resultantly, the almost eradication of child labour from the state. "Almost", because the exodus of workers from the state to the Gulf countries, has in turn, produced a shortage of unskilled labour within the state. This demand is filled in part by the arrival of inhabitants from the neighbouring state of Tamil Nadu where education has not spread so much and the minimum wages are low. The migrant families thus use their children to fill the vacuum. Therefore, whatever child labour is there in the state, is mostly migrant child labour and not of the local inhabitants.³⁷

If India is to succeed in the fight against child labour, it needs to urgently do something in the lines of what Kerala has done without having to look to other countries as was acknowledged by Myron Weiner.³⁸

VII Major sectors of child employment

The major sectors (illustrative and not exhaustive) where children are employed/working in large numbers are agriculture, beedi industry, brassware manufacturing, carpet making, domestic service, fireworks and matches, gemstones, glass, leather, locks, silk and stone quarries, etc.

An analysis of these major sectors of child employment would reveal that children working in these sectors are among the most exploited lot. These various forms of exploitation and abuse — excessive hours of work, low remuneration, exposure to unhealthy and unsafe working conditions, long and sometimes permanent separation from families, physical abuse and cruelty — are to be found in almost all the sectors. These, when coupled with other kinds of deprivations like denial of their right to play, to learn, to enjoy a normal childhood, lack of health care facilities, adequate nutrition, welfare services, insurance and social security benefits, make the life of child labour most miserable. The effects of all these, together or separately, on the physical and mental development of the child labour leave far-reaching and often irreversible consequences on the lives of these unfortunate ones,

37. Samuel Grumiau, "Child Labour : Kerala's Recipe" 17 *Workers Online* (11.6.1999).

38. *Supra* note 36 at 175-76.



reducing them to dependent and subservient workforce all through their life.³⁹

VIII Child labour and the constitutional framework

The Constitution of India, it may be said, is solicitous of the children's well being, development and their rights. In that, when it speaks about children it speaks about *all* children of the country, irrespective of birth, faith, caste, creed or sex. However, unfortunately a distinction exists from the very birth between the children of the rich and the children of the poor and child labour obviously belong exclusively to this latter class. If the policy makers of this country had followed the hallowed position the framers of our Constitution had envisaged for children, child labour would not have been such an insurmountable problem today. The energy and resources that we are expending on child labour today could very well have been used to improve the school curriculum, to improve children's health, welfare and development.

There are a number of constitutional provisions which speak about children and their welfare. Starting with the Preamble itself, the Constitution of India promises to secure to all citizens (including children) of India "Justice, social, economic and political; liberty of thought, expression, belief, faith and worship." It further provides for "equality of status and of equal opportunity"⁴⁰ and assures dignity to the individual;⁴¹ enables the state to make special provisions for children;⁴² directs the state to provide free and compulsory education to all children of the age of 6-14 years;⁴³ prohibits trafficking of human beings and forced labour;⁴⁴ prohibits employment of children below the age of 14 years in factories, mines or any other hazardous occupations;⁴⁵ enjoins the state to secure a social order for the promotion of welfare of the people;⁴⁶ directs the state to ensure that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that the childhood and youth are protected against exploitation and against moral and material abandonment;⁴⁷ states that the state shall endeavour to provide

39. See also, *Report of the Director General, International Labour Conference, 69th session* (1983).

40. See, Constitution of India, Art. 14.

41. *Id.*, Art. 21.

42. Art. 15(3).

43. *Id.*, Art. 21 A.

44. *Id.*, Art. 23.

45. *Id.*, Art. 24.

46. *Id.* Art. 38.

47. *Id.*, Art. 39 (e) and (f)



early childhood care and education for all children until they complete the age of six years.⁴⁸

Constitutional provisions apart, the National Policy for Children adopted by the Government of India in 1974 states that “the nation’s children are a supremely important asset. Their nurture and solicitude are our responsibility. Children’s programme should find a prominent part in our national plans for the development of human resources, so that our children grow up to become robust citizens, physically fit, mentally alert and morally healthy, endowed with the skills and motivations needed by society. Equal opportunities for development to all children during the period of growth should be our aim, for this would serve our larger purpose of reducing inequality and ensuring social justice.”

In the face of this kind of constitutional provisions envisaging welfare and development of children and the commitment envisioned in the national policy for children, the question of children toiling under hazardous and exploitative conditions do not arise at all. However, this isn’t the reality we know of. There are millions of children toiling under inhuman and subhuman conditions in our country. There is no doubt that in countries afflicted with chronic poverty and pervasive privation, rights of children, especially poor children, are intolerable and incessantly marginalized, if not altogether relegated to oblivion. Over the years, this is precisely what has happened in our country in spite of the best intentions of the founding fathers of our Constitution. What equality of opportunity can there be between the children who go to the best of schools and those who go to the worst of places to work? The mandate of especially articles 23 and 24 is, more often than not, observed in its breach and the aspirations articulated in articles 39 and 45 are given a go by. The result of all these is there for every one to see. India has the largest contingent of child labour and illiterates in the world.⁴⁹

The incidence of poverty is often used as an alibi for children not going to school, having been diverted to do child labour.⁵⁰ The distinction that is made between children of the rich and powerful and the children of the poor and indigent — the latter as hands and the former as minds - that is, children who must be taught to work and children who must be taught to learn, the acquisition of manual skills as distinct from cognitive skills, contributing its share to the malady of child labour.⁵¹

48. *Id.*, Art. 45.

49. See, The Government of India, *Report of the Task Force on Child Labour* 5 (1989, *Mimeo*).

50. Krishna Iyer, “Jurisprudence of Juvenile Justice” in The Indian Law Institute, *Shaping the Future by Law : Children, Environment and Human Health* 28 at 34 (1997).

51. *Supra* note 36 at 6.



IX Constitutional perspective of child labour

Prohibition/regulation v. Abolition of child labour

Now the important questions: Does the Constitution prohibit or permit child labour? What is the actual interpretation of the constitutional provisions in this respect? There are two dominant views regarding these questions. One view arguing that child labour is completely outlawed by the Constitution and as such it should be abolished by the enactment of an appropriate law; and the other view opining that what the Constitution prohibits is only employment of children in factories and mines and other hazardous industries and not all kinds of employments.⁵² This view, therefore, advocates prohibition of child labour in hazardous industries and regulation of child labour in other employments where they are permitted. Implicit in this view is the notion that poor children have no choice other than to work, but at the same time the state, as *parens patriae*, should see to it that they are prevented from hazardous employments. It may be noted that neither the Constitution nor the Child Labour (Prohibition and Regulation) Act, 1986 defines the word ‘hazardous’. For the legitimation of their respective views both groups draw support and sustenance from the same Constitution. Both the views have protagonists and antagonists, both within the government as well as outside.

Adherents of prohibition/regulation of child labour

Those who argue that the Constitution does not ban child labour *per se* but prohibits only those employments which are hazardous to children and in the rest of the employments which are non-hazardous children can be lawfully employed at regulatory conditions place reliance mainly on article 24 of the Constitution⁵³ and the Child Labour (Prohibition and Regulation) Act, 1986.⁵⁴ Since the word ‘hazardous’ is not defined in the Constitution, they argue, its meaning should be limited to only physical hazard. Therefore, any employment which is physically hazardous for children, they should be prohibited from being employed but in all other employments which are

52. Assefa Bequele, *Towards a Strategy of Combating Child Labour in Very Poor Countries* 3 (ILO, 1990).

53. Art. 24 of the Constitution lays down that no child below the age of 14 years shall be employed to work in any factory or mine or engaged in any other hazardous employment.

54. The Act prohibits in part III children below 14 years from being employed in certain occupations and processes as given in the Schedule, but in part IV regulates the employment of children in other occupations and processes without laying down a minimum age for employment.



physically not hazardous, their employment should only be regulated. It is to be noted that the rationale behind incorporating the schedule in the Child Labour (Prohibition and Regulation) Act, 1986 prohibiting children from being employed in specified occupations and processes which are considered to be physically hazardous and making provision in the Act for regulating their employment in other activities not specified therein is based on the above argument. It may be submitted that the above position has been arrived at by a literal interpretation of the wordings of article 24 of the Constitution.

This position allowing children to be employed in occupations and processes other than those mentioned in the schedule, is based on the assumption that children of the poor parents have no choice other than being employed to augment the family income. Therefore, child labour is a 'harsh reality' an 'economic necessity' of the poor parents and something that cannot be done away with and has to be accepted as such. Howsoever meager their earnings may be, the children do contribute their share to the family's budget and help the family to keep the wolf out of the door.

This view, thus, grants the parents the right to the earnings of their children and makes them an economic asset to their parents rather than an economic liability. It may be submitted that this kind of acceptance of child labour as a harsh reality, an economic necessity, an economic asset of the parents, etc. does not look at child as child but only as poor child who need to work if he has to survive. It is unfortunate to think that the only way in the circumstances is to improve the working conditions of children by regulating their hours of work and wages paid and providing them non-formal supplementary education at work places or elsewhere, rather than remove them from the work force. By not insisting on compulsory primary education for these children (the present system of education is so useless for the poor since it does not prepare the child for future employment) and advocating 'amelioration' of the working conditions of the child rather than 'abolition' of their employment itself, this view could be described as status-quoist and non-developmental.

Needless to say, the government is the staunchest supporter of this view. This view is also shared by the International Labour Organization. The recent Convention on the Abolition of the Worst Forms of Child Labour⁵⁵ is an admission by the international body that even if child labour cannot be abolished in the near future, attempts should be made to eradicate its worst manifestations immediately. The enactment of the Child Labour (Prohibition and Regulation) Act, 1986 by India is an enunciation of this fact.

55. ILO Convention No. 182.



This way of thinking is nothing new as regards children being employed. The First National Commission on Labour which was set up under the chairmanship of P.B. Gajendragadkar J to study and review the conditions of labour since 1947, in its comprehensive report, though expressed its concern about child labour and considered it as a serious economic problem, did not suggest complete elimination of child labour. All that it recommended was that “by fixing limited hours of employment for children, their education and employment should be combined.”⁵⁶

This seems to be the position in India even today.⁵⁷ The Official Working Group on Employment of Children, which was set up by the Government of India to consider the 1973 ILO Convention, recommended that the convention might, for the present, be regarded as a norm to be progressively achieved. It opined that it was neither feasible nor desirable to totally abolish child labour at the present stage of the country’s economic development when millions of families below the poverty line had to deploy the children in the labour market. A total ban on child labour, it observed, would impose unbearable suffering on them.

At the inaugural address delivered by the then Union Minister for Labour K.V. Raghunatha Reddy in 1975 at a national seminar on employment of children in India organized by the National Institute of Public Cooperation and Child Development, New Delhi, he observed that “I need hardly emphasize that poverty is the main factor which is responsible for child labour in India. The main reason for engagement of child labour is that it is very cheap and is also readily available...”⁵⁸ Quoting the observations of Indira Gandhi, the then Prime Minister of India, he stated further : “In our country, it will be impossible to prevent such employment for quite some time because of economic conditions. It is better, therefore, to assure them healthy conditions of work and to protect them from any exploitation and hazardous occupation rather than prevent their employment.”⁵⁹

“Child labour” according to an elected representative of the people, “is no longer a medium of economic exploitation; it is necessitated by economic compulsions of the parents and in many cases that of the child himself. They work because they must, for their own survival and that of their families. Therefore, any attempt through legislation will not be successful...”⁶⁰

56. See the *Report of the First National Commission on Labour* 387 (1969).

57. It is interesting to note that India is yet to ratify the ILO Convention No. 138 which prescribes Minimum Age for Children in Employment till date.

58. See, the Proceeding of the National Seminar on Employment of Children in India, Inaugural Address at 11 (*Mimeo*).

59. *Id.* at 15.

60. See *Lok Sabha Debates*, Seventh Session, (8th Lok Sabha), Vol. XXIII, No. 22, col. 329, 331 (Dec. 3, 1986).



At the valedictory address delivered by Arvind Netam, the then Deputy Union Minister for Social Welfare, Government of India at the above mentioned seminar, he observed : “It is true that there can be no two opinions about child labour being an undesirable practice but looking to our present day economic situation, it is going to remain an unavoidable evil with us quite a long time. Therefore, under the circumstances, we cannot but have to live with the problem. If we are not in a position to abolish the problem in *toto* we must aim at minimizing the impact on the growth and personality development of the child and save him from its disastrous consequences.”⁶¹

Based on the same poverty argument the Harbans Singh Commission⁶² did not recommend for an immediate ban on the employment of child labour in the match industries of Sivakasi. “A ban on child labour”, according to him, “is likely to create more problems than it will solve. It will upset their industries which are the major source of income in the area not only for the children but also for the adults. A total ban on the employment of children in these factories will surely...create acute economic hardship for the families of the children employed in the industries. Until alternative sources of employment for children have become available the only

61. *Id.* at 247. Elaborating further, he stated: “Working children invariably come from families who occupy the lowest rung of the socio-economic ladder. These families have to deploy their children in gainful occupations as a last resort in their struggle for survival. Children from such families not only have to slave to supplement the family income but in many instances, they are sole breadwinners to support their chronically ill or incapacitated parents. Those sections of population because of their social disabilities suffer from an aspirational vacuum. Having been subjected to oppression and exploitation for centuries, they are left with little motivation to enhance their status and self-image. They do not even realize the importance of education which is the most effective instrument of self improvement and social change. Child education, in their case is not an attractive proposition because it not only deprives them of an additional income but also puts on them an economic burden which they cannot bear. Child labour is, therefore, likely to last with such groups as long as they are bogged down in their degrading poverty.” *Id.* at 248-49.

62. Harbans Singh Commission was appointed as an aftermath of the hue and cry raised in 1976 when a bus transporting children who were employed in the match industries of Sivakasi turned over and fatally injured them. The one man commission was appointed by the state government of Tamil Nadu to conduct an “in-depth study covering all the aspects of the problems of child labour in various factories and industries in Ramanathapuram District.” He was required to report on : “(i) measures for eradication of the unfair labour practice of employment of children; (ii) providing them with suitable alternative employment and/or rehabilitation; (iii) possibility of providing for their working at home with a facility to attend schools at least in one shift; and (iv) reduction of the rigours of employment of children who have completed 14 years of age.” As can be seen, the terms of reference did not mention about suggesting ways and means of eradicating/abolishing child labour.



consequence of denial of opportunity for employment to children... will be a loss of income and consequent distress to their parents.”⁶³ He also agreed with Thirumathi Jayalakshmi, the then Member of Parliament from Sivakasi, who said that “though there is considerable exploitation of child labour it should not be abolished straight away. It is an economic problem and should be tackled accordingly without causing hardship to the families of the child labourers and also without upsetting the industries which have created employment.”⁶⁴ He, however, recommended a gradual substitution of child labour in match industries by adult labour. “Considering the large number of families depending on children working in match industries and the difficult economic situation in Ramanathapuram District, it will be advisable to allow a ...period of, say, 8 to 10 years for the change over.”⁶⁵

The National Committee on Child Labour under the chairmanship of M.S. Gurupadaswamy set up as a sequel to the decision of the United Nations declaring 1979 as the International Year of the Child was requested to look into the causes leading to and the problems arising out of employment of children. The terms of reference did not mention about eradication or banning of child labour. The government, after viewing with “concern the widespread existence of child labour in the country both in the organized and unorganized sectors”⁶⁶ requested the committee to (a) examine the existing laws, their adequacy and implementation, and suggest corrective action to be taken to improve implementation and to remedy defects; (b) examine the dimensions of child labour, the occupations in which children are employed etc., and suggest new area where laws abolishing/regulating the employment of children can be introduced; and (c) suggest welfare measures, training and other facilities which would be introduced to benefit children in employment.⁶⁷ As can be seen, there was no reference to suggest ways and means of abolishing/prohibiting child labour in all employments.

The inaugural speech delivered by the then Union Law Minister itself set the tone for the committee’s work. It was observed by the minister: “The problem of child labour is one that has been engaging the attention of

63. See, Report of Thiru Harbans Singh, IAS, Member, Board of Revenue, “Problems of Child Labour in Various Factories and Industries in Ramanathapuram District” in *Documentation of Law Relating to Employment of Children* appendix XI, at 139 (1986).

64. *Id.* at 137.

65. *Id.* at 139. Instead of acting on this recommendation, what the government has done is to legalize the employment of children in match industries by the implementation of the National Child Labour Policy in the match industries of Sivakasi!

66. See the Government of India, *Report of the Committee on Child Labour* 55 (1979).

67. *Ibid.*



our social workers, trade unions, other social reformers and the government for many decades in our country...Children are engaged in domestic services, in hotels, in restaurants and canteens, in way side shops, as workers, hawkers, helpers in service stations and as repair shop workers and shoe shine boys; sometime they work in construction industry...In the semi-organized sector we see that the children are employed particularly in the beedi making industry, in mica, in shellac, in match manufacturing, glass manufacturing, handloom weaving, leather tanning and carpet weaving..."⁶⁸

It was further observed: "The reasons are fairly well known. The extreme poverty of our people, lack of opportunities for gainful employment, the inadequacy and the intermittent nature of incomes, the low standard of living, especially in the rural areas; all these make it possible for families and parents to think in terms of supplementing their income by utilizing the labour power of children....There is a tendency for children not to go to school, or drop out and premature exposure to hazards, exposure to hazardous conditions as far as health is concerned, and the resultant stultification of the growth of the personality of the child. It leads to gradual erosion of the potentiality for economic output. It leads to low levels of employability which again is a factor that militates against the full utilization of manpower... If society has to pay such a tremendous cost — a current cost and future cost — for maintaining this utilization of child labour why do not we legislate forthwith to prohibit all forms of child labour....It is not that this is not a desirable objective, it is not that this is not an objective towards which we have to go and go rapidly, but we have to think of two sets of problems related with a proposal for an immediate legal ban on the employment of child labour. One set of problems can be described as economic problems. Flowing from the problems of poverty, the fact remains whether an immediate prohibition of the employment of child labour will not lead to the closing of some channels of supplementing incomes for extremely poor families who live below the poverty line....Another set of problems can be described as administrative problems, because you may pass a law in your wisdom, but the law has to be implemented. What is a law's worth if it is to remain imprisoned in the statute book. Social reform has to be practical. Social reforms also include the formulation of tangible steps which can take us to our objective."⁶⁹

Thus, after so much of agonizing about the ills of child labour, the minister never wanted the committee to look into the possibility of abolishing child labour, apart from suggesting that it is a desirable thing to do, again the poverty argument dominating the entire discourse.

68. *Id.* at 57-58.

69. *Ibid.*



The committee, after extensive research and field study came to the conclusion that child labour is economically unsound, psychologically disastrous and physically as well as morally dangerous and harmful. It also did not accept the legitimacy of child labour on the basis of the argument that employment of children increased the earnings of the family and kept children away from mischief. The committee stated unequivocally that child labour deprived children of educational opportunities, minimized their chances for vocational training, stunted their physical growth, hampered their intellectual development and condemned them to low wages all their lives by forcing them into the army of unskilled labourers of blind alley jobs.⁷⁰

Among the many recommendations of the committee it recommended that the minimum age should be prescribed for entering *any employment*. It, accordingly, recommended that the minimum age for entry into *any employment* should be 15 years and that existing laws which prescribe an age lower than this should be suitably amended.⁷¹ The committee also recommended that concerted steps be taken within five years to achieve the objective of providing minimum educational qualification, say eighth standard or equivalent, (the age prescribed in the Constitution for completing compulsory primary education) for entry into any regulated employment.⁷²

The government, on the other hand, was of the opinion that the time was not ripe for accepting this recommendation on minimum age for employment. As for the recommendation on the minimum educational qualification, the government felt that the objectives of providing education for all the children was *desirable*. However, it might *not be practicable* to achieve this objective within five years and that it might not also be desirable to prescribe such qualification for all employments.

“Banning child labour was not feasible due to the prevailing socio-economic constraints and exigencies”, was the official position of the government as enunciated by the then Union Minister of Planning.⁷³ In the *Annual Report of 1983-84* the Ministry of Labour officially stated that the government had accepted child labour as a “harsh reality” and that it was neither “feasible nor opportune” to prevent children from working in the present stage of economic development.”⁷⁴

The Seventh Five Year Plan 1985-1990 approved by the National Development Council, also stated that since it was not feasible to eradicate child labour, the government should try to make the conditions of working

70. *Id.* at 60.

71. *Id.* at 59.

72. *Ibid.*

73. See, *The Decan Herald* (17.7.1983).

74. See, the Government of India, Ministry of Labour, *Annual Report 1983-84*.



children more acceptable. The plan proposed a greater role for the voluntary agencies in providing child workers with health care, nutrition and education. The abolition of child labour, it said, could only be achieved when there was sufficient improvement in the conditions of the families whose children are compelled to work.⁷⁵

Speaking in the *Rajya Sabha* on 3rd May 1984, the then Labour and Rehabilitation Minister reaffirmed the government's commitment to end exploitation of child labour but stressed that the whole question was inexorably linked with the socio-economic conditions in the country. Apart from legal measures, the economic conditions of the people must be improved to tackle this problem effectively because it was sheer economic compulsions which impelled the parents to send their children to undergo labour.⁷⁶

The above views got the legislative *imprimatur* when Parliament enacted the Child Labour (Prohibition and Regulation) Act, 1986. At one stroke the Act legalized the employment of children and therein lies the tragedy that has befallen millions and millions of indigent children. By not laying down a minimum age of employment the Act gave legal legitimacy to all kinds of employments of children outside the few prohibited occupations and processes. The paternalistic approach of the state in allowing children of the poor to work is evident from the speech of the Minister of Labour in the *Lok Sabha* while concluding the debate on the Child Labour (Prohibition and Regulation) Bill, 1986.

He observed: We cannot take this problem (of child labour) lightly. The fact that there are 17 million children working in our country means that it is something very grave. Therefore, we must try to understand why they are working....In most of the cases, among these children, it is an economic necessity. I do not think everybody understands what is meant by poverty. Those who are talking against this Bill, would not have talked so, had they undergone poverty. We know what is poverty in this country. We know what starvation means in this world....Do you think that I am not disappointed (in bringing this Bill)? It would have been my wish if child labour could have been abolished with a stroke of pen. If I come to this House and say that the child labour is hereby abolished and the whole House welcomes it with claps, do you mean that the child labour would be over in this country? It will not be. Therefore, we have given a lot of thought to this. There were three ways open to us. One, let it remain as it is; two, let us abolish it, ban it, but as I said, Is it possible? When it is not

75. This position unfortunately continues to be the same, despite the government's amending the Constitution to make education a fundamental right of every child.

76. See, *The Hindustan Times* (New Delhi, 3 May 1984).



possible, when we cannot abolish it, and at the same time, we cannot just let the things happen as now, we thought, something must be done. Keeping the whole situation in view, we thought, wherever possible, we should ban it and wherever it is not possible, we should regulate it. Article 24 of the Constitution prohibits employment of children below the age of 14 years in mines, in factories and in other hazardous occupations. It does not ban everywhere, otherwise the framers of the Constitution would not have mentioned specifically these three things. Therefore, according to the provisions of article 24 ... we have come here to ban the employment of children below the age of 14 years in those areas which are contemplated under article 24....But in the other areas, non-mining, non-industry, and non-hazardous areas, we thought that under the present circumstances, the best way for us is to regulate it, and then we should come forward with some welfare measures.... I must take the House into confidence that we really thought over this and we decided to deal with the problem of child labour in three ways. First, we should ban it, where it can be banned, and where it cannot be banned, we should regulate it, and then rehabilitate them and draw up a welfare programme for their education, health and nutrition.⁷⁷

What all these mean is that the government will leave opportunities open. This continues to be the stand of the government even today.

The Second National Commission on Labour has also not recommended complete ban on the employment of children altogether. It has only stressed on providing universal education as a means to tackle the problem of child labour. The Commission has, therefore, recommended the repealing of the extant Child Labour (Prohibition and Regulation) Act, 1986 with a new model Act which it has suggested, viz, Child Labour (Prohibition and Rehabilitation) Act, “to prohibit the employment of children in all employments and to regulate employment of children where permitted....”⁷⁸

By adding few more occupations and processes in the list of prohibited ones⁷⁹ and increasing the number of child labour projects under the National Child Labour Policy,⁸⁰ the government thinks that it is doing its part to contain child labour, with no intention to ban it, at least in the near future.

77. See, *Lok Sabha Debates* (English Version) Eighth Series, Vol. XXIII, No. 26, cols. 172-73 (Dec. 9, 1986).

78. See, *The Report of the Second National Commission on Labour* 1067 (2002). No action, has however, been taken by the government on this recommendation of the Commission.

79. By a Government of India Notification on the advice of the Technical Advisory Committee, child labour in service sector, including domestic child labour has been prohibited since Oct. 10, 2006.

80. Under this policy the government has now 250 projects in 21 states.



Proponents of abolition of child labour

Those who argue for abolition of child labour consider that the various provisions of the Constitution and the concept of child labour do not go together. According to this view, the Constitution is solicitous of the well being and development of children and child labour is antithetical to the welfare notions of children. It is argued that anything that affects the physical, mental or moral growth of children needs to be held as hazardous.

The word 'hazard' is defined as the capacity or the potential of an object, substance or condition to produce a particular type of adverse effect to a person or group of persons. Hazards are generally classified into four types : physical, chemical; biological and ergonomics. Physical hazards include noise, heat, light, radiation, vibration, dust and general housekeeping conditions. Chemical hazards are mist, fumes smoke, liquid and solid materials, gas vapour and dust particulates. Biological hazards are insects, bacteria, viruses, rodents, mite, parasites and other organisms. Ergonomics hazards are those pertaining to body positions in undertaking different tasks and using tools or equipment, monotony and boredom, repetitive movements, organizational or administrative issues, and psycho-social dimensions. In addition, safety concerns such as accidents, injuries, falls and slips may also be considered a separate classification of hazards. Such hazards may be further categorized according to the elements of occupational health, namely, the worker, the task, the work environment and the tool or equipment, for easier delineation of control measure or preventive programmes.⁸¹

This description of hazard does not take into account the other hazards which children are prey to, viz., mental, social, spiritual and psychological hazards. It can, therefore be said that if the child is denied his right to education, it is a hazard; if he is denied opportunity to develop as a full human being, it is a hazard; if it affects the physical health or mental growth, it is a hazard; if it impedes the child's spiritual, moral or social development, it is a hazard. This would mean any work, which goes against the interests of the child, is a hazard.

The word 'hazardous' in article 24 of the Constitution has to be given an expanded interpretation and has to be assigned the meaning, which the founding fathers of our Constitution intended it to be given. Therefore, the word 'hazardous' in the above mentioned article has to be read in relation to the child and not in relation to an adult. The article specifically deals with employments which are hazardous to a child. What may not be hazardous to an adult may be hazardous to a child because of his tender age. So the

81. See, *Survey on Working Children*, "Philippines national Survey on Working Children" 5-6. Available at globalmarch.org/virtuallibrary/inter-law/gen/ns-philip.htm.



word hazardous is a relative term and is to be used depending on persons and circumstances. Some jobs may be hazardous *per se* both for adults and children alike; but some jobs, though may not be hazardous *per se*, may be hazardous to children because of its nature.

An activity will have to be understood as hazardous for a child, (a) if there is an inherent risk involved with a particular kind of occupation, e.g., danger of accident, danger due to poisonous gasses, electricity, chemicals, explosives, danger of acquiring any occupational disease; (b) if there is a possibility that the particular occupation might hamper child's physical and mental growth, e.g., working in carpet, glass, diamond cutting industry, etc.; (c) if there is any psychological or moral danger to the child where the child may be tortured physically, mentally or may be used for immoral purposes by the employer, e.g., domestic employment; (d) if it is forced employment, e.g., bonded child labour.⁸²

Therefore, what one needs to look at is whether the hazard is intrinsic to the nature of the work itself; whether they arise from the working environment and conditions of work; or whether they are simply unsuitable for children. Whatever be the nature of the hazard, the children are prohibited from such employment.

To fully understand the nature of hazard in relation to child labour, article 24 has to be interpreted in the context of the directive principles of state policy providing free and compulsory education,⁸³ prohibiting citizens to work at jobs unsuited to their age or strength by virtue of their economic circumstances.

According to Upendra Baxi, the Constitution adopts a *fundamentalist* strategy of outlawing child labour; the state agents adopt in contrast, the incrementally reformist position.⁸⁴ The enactment of the Child Labour (Prohibition and Regulation) Act, 1986 was, according to him, an instance where the reformists won the day by stressing the tenacity of child labour in the economic matrix of India, by characterizing it as a 'necessary evil' and by arguing that illegalization of child labour will require unprecedented state intervention which may, after all, not ameliorate but rather aggravate the misery of India's children.

Identifying three provisions of the Constitution, viz., articles 24, 45 and 39(e) and (f) as enunciating the constitutional conception of the child in India, he states that a 'fundamentalist' reading of these provisions would show that the Constitution outlaws child labour.

82. Neera Burra, "Child Labour in India : Poverty, Exploitation and Vested Interest" 36 *Social Action* 253-54.

83. Before Art. 45 was amended by the Constitution (Eighty-Sixth Amendment) Act, 2002.

84. See, *Mainstream*, vol. XXXI, No. 44 at 18 (1993).



Firstly, article 24, which is a fundamental right against exploitation, requires that “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.” A fundamentalist reading of these words emphasizes that this article prohibits employment of children in hazardous employment and argues that all employment is *per se*, in itself, hazardous because to put a child to work is to confiscate his childhood. But the constitutional intent was to protect and promote childhood.⁸⁵

Secondly, this intent is abundantly clarified by article 45 which as a directive principle of state policy, fundamental in the governance of the country, requires the state to endeavor within the first decade of its Independence, to provide “free and compulsory education for all children until they complete the age of fourteen years.” Education was to be *free* and compulsory; the state stood summoned to overcome the argument or resources and culture. And such education was not possible with exploitation of children by putting them to work. Article 45 exemplifies the notion of employment of children as being by its very nature hazardous.⁸⁶

Thirdly, the directive principles embodied in articles 39(e) and (f) reinforce the fundamentalist reading when they obligate the state to ensure that :

- the health and strength of workers, men and women and the tender age of children are not abused;
- citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;
- children are given opportunities and facilities to develop in a healthy manner and in conditions of dignity and freedom;
- childhood and youth are protected against exploitation and against moral and material abandonment,

when read with article 24, he emphasizes, these principles suggest in an uncontestable way that employment of children stands outlawed by the Constitution. Even if some pragmatic grounds may see the reformist position justified, the Constitution forbids recourse to these.⁸⁷

Therefore, the Constitution seems to be crystal clear: any attempt to put children to work which flies in the face of the constitutional conception of child are unconstitutional. Article 21 which is a fundamental right to life makes it absolutely clear that life means more than physical survival⁸⁸

85. *Ibid.*

86. *Ibid.*

87. *Id.* at 19.

88. *Francis Coralie v. Union Territory*, AIR 1981 SC 746.



and if children being put to employment enjoy no more than bare physical survival, there would be a denial of the right to life as expansively interpreted by the court.⁸⁹

Therefore, any discussion on child labour which raises the question whether child labour below 14 should be permitted or not is at the outset unconstitutional and a perfidious sin against the Constitution itself.

“We have something that is unconstitutional but not something that is completely illegal. Things may be unconstitutional without being illegal. Therefore, what we need is a law that will make illegal what is on all accounts unconstitutional. We need a law not to regulate child labour. We need a law to make it systematic, wide ranging criminal offence to employ children contrary to the constitutional conception below the age of 14 years. As long as article 39 remains, there is no possibility of legitimating and legalizing child labour below the age of 14. Here we have the classic example of the lawlessness of government which refuses to be bound by the very constitutional processes from which it derives legitimacy to govern the people of India.”⁹⁰

“Although, article 24 of the Constitution states that no child below the age of 14 shall work in mines, factories and hazardous occupations”, Chandrachud CJI states, “this does not give the legislature a charter to put children to work in other occupations. Article 24 has to be studied in a particular context and it is the interpretation of this article in the light of the directive principles of state policy which is crucial.”⁹¹

In this context it may be mentioned that our Constitution aims at bringing out a synthesis between fundamental right and the directive principles of state policy, by giving to the former pride of place and to the latter a place of permanence. Together, not individually, they form the core of the Constitution. Together, not individually, they constitute its true conscience.⁹² Therefore, although a citizen cannot enforce the directive principles contained in part IV of the Constitution, they are, however, fundamental in the governance of the country.

“A serious attempt is going to be made”, stated D.A. Desai J at a seminar on child labour, “of violating not only the mandate but the spirit of the Constitution...it is time to voice a strong disapproval of this laboured attempt to labour something which is impermissible under the

89. *Bandhua Mukti Morcha v. Union of India*, AIR 1984 SC 802.

90. See, Jose Verghese, *Law relating to the Employment of Children in India* 40, 41 (1989).

91. These views were expressed by the former Chief Justice of India in a panel discussion of child labour on the All India Radio on 24.11.1984.

92. *Sheela Barse v. Secretary, Children Aid Society*, AIR 1987 SC 656.



Constitution.”⁹³ Referring to the government’s attempt to regularize child labour, he stated that the argument has been :”If we cannot stop child labour, it is necessitus, as Krishna Iyer J put it, then we shall regulate it. Then why not regulate everything — every deviance from statutory law for the purpose of granting some socio-economic justice, some social benefits, something to bring a little cheer to their sunken eyes and crying lips...if utilitarianism is the sole guiding consideration, then what is the use of Part IV of the Constitution?”⁹⁴

Article 23 of Constitution and child labour

In the celebrated case of *People’s Union for Democratic Rights v. Union of India*⁹⁵ (popularly known as the *Asiad* case) P.N. Bhagwati J equating child labour with forced labour under article 23⁹⁶ observed that it was against the tenets of the Constitution.

According to the judge, “what article 23 prohibits is ‘forced labour’, that is, labour or service which a person is ‘forced’ to provide and ‘force’ which would make such a labour or service ‘forced labour’ may arise in several ways. It may be physical force, which may compel a person to provide labour or service to another or it may be ‘force’ exerted through a legal provision such as a provision for imprisonment or fine in case the employee fails to provide labour or service or it may even be compulsion arising from hunger and poverty, want and destitution. Any factor which deprives a person of a choice of alternatives and compels him to adopt one particular course of action, may properly be regarded as ‘force’ and if labour or service is compelled as a result of such ‘force’ it would be forced labour. There is no reason why the word ‘forced’ should be read in a narrow and restricted manner so as to be confined only to physical or legal force particularly when the national charter, its fundamental document has promised to build a new socialist republic where there will be socio-economic justice for all and every one shall have the right to adequate means of livelihood.”⁹⁷

93. Observations of D.A. Desai J in his inaugural address at a seminar on Child labour held at the Indian Social Institute, quoted in Jose Verghese, *supra* note 90 at 41.

94. *Ibid.*

95. AIR 1982 SC 1473.

96. Art. 23 provides: “Traffic in human beings and *beggar* and other similar forms of forced labour are prohibited and any contravention this provision shall be an offence punishable in accordance with law.”

97. *Supra* note 95 at 1482. This is especially true of children who are forced to work for sustenance of self and their families and children who are under an obligation to work being bonded.



“Child labour is the enemy of child education,” proclaims Krishna Iyer J. “The right to life, which includes the right to education and development, interdicts child labour which not only risks life and opportunity for growth but also denies those freedoms and facilities sans which a child is condemned to midgetry, moronism and penury of creativity.”⁹⁸

To him democracy without education is hypocrisy without limitation. Likewise, life unlettered is human span halted at simian stage. The right to education up to age 14 is free and compulsory and is to be read with the right to life, article 45 being a facet of article 21 in the egalitarian context of the preamble and the spirit of articles 15(3) and 39 (e) and (f).⁹⁹ He finds a vested interest for the leaders to keep the masses uneducated. Quoting Henry Peter, “Education makes people easy to lead but difficult to drive; easy to govern, but impossible to enslave”, he states that “the incidence of poverty is often used as an alibi for children not going to school, having been diverted to child labour. Thus, we have child illiteracy and child labour, mutually interacting, which makes a mockery of the promise (in the Preamble) of the Republic that justice, social, economic and political is the title of the young and old.”¹⁰⁰

Criticizing the Ministry of Labour for harshly accepting child labour as a ‘harsh reality’, taking the view that abolition of child labour is not an economic feasibility, a stand which is a blatant disregard of the Constitution, he apportions the blame to treasury benches and opposition parties alike. The culpability of the establishment is aggravated, he states, by the fact that far from withdrawing children from labour, provision for training of children to labour better is being organized.¹⁰¹

The Child Labour (Prohibition and Regulation) Act, 1986, the judge felt is really a confession that government does not intend to wipe out the torture of child labour but will only introduce a benignant component in

98. See, Krishna Iyer J, *supra* note 50 at 30 .

99. *Ibid.*

100. *Ibid.*

101. *Id.* at 32. The Handloom and Handicrafts Exports Corporation, a government body has set up training centers to train children between ages 7 to 14 to weave carpets. This job is declared hazardous and forbidden by law since the woolen fibers are dangerous for child’s lungs, eyes and skin. These children at different ages after undergoing training for 8 hours a day for one year enter into carpet industry for employment. Way back in 1985 the Ministry of Labour, Government of India had worked out a Rs. 45 crore scheme to ‘help’ the children working in the match factories of Sivakasi and in the carpet factories of Mirzapur-Bhadohi belt under the National Child Labour Programme. Under this scheme children below the age of 14 years are being recruited to the carpet training centers and match factories to further increase the number of child workers. The child workers are also being given looms under IRDB to promote self employment of children.



the malignant operation.¹⁰² According to him, there are many sins committed by the state, which cannot be forgiven, but those, which relate to the welfare of children, deserve condign public censure because the child is the first charge on the state's resources. Because children are voiceless, they are neglected with impunity by those in power who will be held guilty by the future.¹⁰³

Reading the provisions in articles 21, 38, 39(e) and (f) 41 and 45 of the Constitution together in the landmark case of *Mohini Jain v. Union of India*¹⁰⁴ Kuldip Singh J observes that the constitutional mandate of child education is an integral part of right to life. He observes further that although education is not a guaranteed fundamental right¹⁰⁵ reading the above mentioned provisions cumulatively it becomes clear that the framers of the Constitution made it obligatory for the state to provide education for its citizens.

The dignity of man, the judge has held, is inviolable. It is the duty of the state to respect and protect the same. It is primarily the education, which brings forth the dignity of man. The framers of the Constitution were aware that more than seventy per cent of the people, to whom they were giving the Constitution of India, were illiterate. They were also hopeful that within a period of ten years illiteracy would be wiped out from the country. It was with that hope that articles 41 and 45 were brought in chapter of the Constitution.¹⁰⁶

“Although a citizen cannot enforce the directive principles contained in chapter IV of the Constitution, but these were not intended to be mere pious declarations”, the judge declared. “The directive principles which are fundamental in the governance of the country cannot be isolated from the fundamental rights guaranteed under part III. These principles have to be read into the fundamental rights. Both are supplementary to each other. Without making “right to education” under article 41 a reality the fundamental rights under chapter III shall remain beyond the reach of large majority which is illiterate.”¹⁰⁷

Thus, the judge was, in fact, stating the obvious. Unless education is made compulsory and every child is made to attend school, child labour will continue against the mandate of the Constitution.

102. *Id.* at 33.

103. *Id.* at 34.

104. AIR 1993 SC 1858.

105. This was before the Constitution was amended by adding Art. 21A making primary education a fundamental right.

106. *Supra* note 104 at 1861.

107. *Id.* at 1862.



X Conclusion

It may be observed that prohibition of child labour in certain occupations, and regulating their working conditions, relying on the wordings of article 24 of the Constitution, though may be the only *practical approach* to the problem in the circumstances, may not be the correct approach. In any case the Constitution does not empower the state to legitimize the employment of children just for the reason that they are poor children, and by reason of their poverty, have to work to sustain themselves and their families. Therefore, the very concept of hazardous and non-hazardous employment itself needs to be looked at anew. What is considered as non-hazardous employment today may become hazardous employment tomorrow. The fact that many additions had to be made in the schedule to the Child Labour Act shows that the concept of hazardous/non hazardous is relative. In fact, any employment whether hazardous or non-hazardous which deprives the children of their childhood is to be prohibited as that seems to be the constitutional spirit and intent. Provisions in the Constitution cannot be read in isolation to justify the employment of children on practical considerations. Pragmatism, as far as child labour is concerned, is not in the welfare of the toiling millions of children. What is required in their case is giving them their childhood by providing them with proper educational facilities and welfare measures for growing up in a healthy environment.

Now that the Constitution has been amended under the pressure of the judgment of the apex court in *Unnikrishnan v. State of Andhra Pradesh*¹⁰⁸ which held education to be a fundamental right of children aged 6-14 years by inserting article 21 A for that purpose, it is imperative that the concept of child labour is revisited. Definitely, child labour and education cannot go together. The reason being that a child cannot be at two places at the same time — in the school and at the work place. If education is to be imparted meaningfully, it ought to be the formal education and not the non-formal education, which is touted as the replacement for the poor children — earning while learning. The state cannot abdicate its responsibility of imparting meaningful education to the children of this country, especially the children of the downtrodden from where the child labour comes. After all, children have the first charge of the resources of the nation. The burden of responsibility to educate its young citizens, who are the future of the nation, should be on the government and this burden should not be shifted to the parents of the poor children who are already burdened. If only the state owns up its responsibility can it be said that the state is serious to end the menace of child labour, albeit in a phased manner. If the path to progressive elimination of child labour is to be traversed, there has to be a

108. (1993) 4 SCC 111.



law enacted to back up the effort. More so now when the state is duty bound to impart education to the children from six to 14 years of age, education having been given the status of a fundamental right. No law on working children short of abolition of child labour would be in the interest and welfare of the children, their parents and the nation at large. The country owes it them.

The goals set out in article 39(e) and (f), viz., to safeguard the children of tender age from entering into jobs which are unsuited to their age and strength forced by economic necessity; and to protect childhood and youth against exploitation to secure facilities for the healthy development of children, are impossible to be achieved without adhering to the commandment of article 21A. If the state is to fulfil its obligation to provide free and compulsory education to all children, it cannot permit the employment of children in any employment, whether hazardous or non-hazardous. As observed by B.R. Ambedkar, the *rightful place of a child below 14 years is in schools and playgrounds and not in dingy factories and workshops*. The operationalization of informal education and the principle of 'learn while you earn' to the tender age children is, to say the least, against the letter and spirit of the Constitution which when it talks about children talks about *all* children, irrespective of sex, caste, creed, status or religion.

As Krishna Iyer J has put succinctly: child labour is the enemy of child education. The right to life, which includes the right to education and development, interdicts child labour which not only risks life and opportunity of growth but also denies those freedoms and facilities sans which a child is condemned to midgetry, moronism and penury of creativity.

Employers employ children not for altruistic or charitable considerations, but to minimize labour cost and to maximize their profits. Some element of exploitation is inherent in such a relationship. Therefore, the only way to protect the children from exploitation is to prohibit child labour. How long can the country which is wedded to the ideals of socialism, social justice, economic justice, distributive justice, equality and equal opportunities continue to burden the young shoulders of its children by legitimating their labour and abdicating its avowed constitutional mandate? Do we still need their toil to bring in foreign exchange?

It may be argued that law alone will not eliminate child labour and it will continue to exist. While this argument may be true, it is equally true that it will facilitate in bringing down the number of child labour. Having a law prohibiting child labour in all forms is better than not having a law at all for the fear of non-implementation. If social awareness is created among the employers and the parents of child labour about the ill effects of children being employed so young and if adequate care is taken to provide proper schools, teachers, teaching aids, mid-day meals, free books and uniforms,



with a proper implementing machinery, conscious of its duties, there is no reason why a law banning child labour cannot be enforced. It is nobody's case that it can be done overnight. It will definitely take time and creation of the required infrastructure and the political will. The problem definitely is gigantic, deep rooted and socio-economic. The solution should also therefore match the requirements.

It cannot be denied that the whole problem with most of our social legislations has been lack of proper enforcement. But for that the law is not to be blamed; the blame should fairly and squarely lie with the implementing authorities. It may be true that Child Marriage Restraint Act may not have put a stop to child marriages in the country but it has definitely gone a long way in curbing the evil practice. Likewise, the Dowry Prohibition Act has not eliminated the practice of taking and giving dowry. But the Act has provided relief to a number of people as and when the need arose.

Therefore, to say that even if we have a law banning child labour, the evil of child labour will continue unabated, as it is impossible to implement the law, is no justification for not enacting a law for the purpose. The recent government decision to ban child labour from hospitality sector, including the domestic sector, is a law in the right direction. However, proper rehabilitation measures need to be put in place to see that the children rendered unemployed by the ban are not forced to seek refuge in the streets, thus becoming easy preys in the hands of unscrupulous anti-social elements. Remedy should not become a bigger malady. Providing them with proper education in the place of their rehabilitation will ensure that they are properly rehabilitated.

Unfortunately, in the matter of child labour what we generally end up doing is window-dressing with no serious efforts being made to enforce and implement the law, again on practical considerations and vested interests. Child Labour Act was passed way back in 1986 but the enforcement is lacking. Constitution was amended in 2002 to make education a fundamental right of every child between ages of 6-14 but no serious effort was made to make education compulsory or child labour illegal. Even those states and union territories, which have enacted compulsory education laws have not made it compulsory for the children to attend school. Regarding the latest ban of the employment of children as domestic servants and in wayside restaurants, etc. the story seems to be the same. In Delhi, the government was required to open 40 new transition education centers for rescued child labourers before the ban was to become operational. But according to a latest report in the press¹⁰⁹ not even a single new center has been opened

109. Nidhi Sharma, "At ground zero, ban on paper" *The Times of India*, New Delhi (26.12. 2006).



so far and the labour department has been unable to rescue a single child from the roadside restaurants or houses since the notification banning such employment came into force. If this be the case, there is no point in bringing in a law just for announcing to the world that we care about our poor children. There needs to be proper correlation between what is intended to be done and what is actually being done. Therefore, half-hearted measures are of no use if any perceptible dent is to be made in the fortress of child labour in our country.