

FOURTEEN YEARS AND COUNTING: REDEFINING CHILDHOOD (PERSPECTIVES ON CHILD LABOUR AND THE RIGHT TO EDUCATION)

*Subhadra Banda
Varshini Murali and
Vidya Narayanaswamy¹*

While poverty is the main cause of child labour, the role of the dismal public education system in aggravating the situation cannot be undermined.¹ In fact, deficiencies in the public education system cause children to drop out early and join the labour force.² The importance of the public education system needs to be stressed because it represents the only access the poor have to education.³ It is clear that a cause and effect relationship between poverty and low schooling levels exists if one looks at the school participation of poorer sections of the population.⁴ One of the main reasons for the high prevalence of child labour in these areas is the burden of debt, which forces families to send their children to work and low literacy rates among these families further compounds the problem.⁵

This paper discusses the imposition of an age bar which excludes the age groups of 0-6 and 14 -18 years from the guarantee of right to education provided by the Constitution under Article 21-A which was introduced by the Constitution (Eighty-sixth) Amendment Act, 2002. Often, rescued child labourers are of the twilight age of 12- 15, as a result of which they are excluded from the purview of the public education system, leading to the creation of another generation of educationally and economically deprived individuals, which further perpetuates the necessity for the existence of child labour. The authors argue that in order to effectively tackle child labour, the age-restrictive approach towards education must be replaced by one which is more inclusive, thereby enabling effective rehabilitation and empowering the victims of child labour. The article discusses the constitutional as well as judicial articulation of the right to education, the role of economic capacity of the state in determining the school leaving age and explores possible solutions

-
1. Shanta Sinha, *Emphasising Universal Principles towards Deepening of Democracy Actualising Children's Right to Education*. (June 18 2005- EPW Special Article).
 2. *Id.*
 3. *Id.*
 4. Gerard Oonk, *Elementary education in India*, India Committee in the Netherlands. 10 (1998)..
 5. *Too busy working to go to school available at http://www.unicef.org/india/child_protection_230.htm* (last visited 1st Dec. 2006).

that achieve the above-mentioned goal.

The scope of this article shall not, however, extend to issues of quality of education and the implementation of anti child labour legislation.

RIGHT TO EDUCATION – THE LEGAL FRAMEWORK

Despite the existence of the Directive Principle of State Policy that refers to free and compulsory education, its implementation, much like the other policy guidelines in Part IV of the Constitution, has been poor. Article 45 provided for a time frame of 10 years for the effective implementation of these goals. These goals were further reiterated in Article 51 as a fundamental duty. However, fifty eight years later it remains unimplemented. An examination of the Constituent Assembly Debates regarding Article 45 reveals that fourteen was set as the upper age limit for compulsory education in order to bring it in agreement with the minimum age for employment as laid down in Article 24.⁶ However, the minimum age of employment met with criticism on the ground that children are weak and unfit for employment at this age, and that this age was higher in other countries.⁷

The Supreme Court first read the right to education into Article 21 of the Constitution in *Mohini Jain v. Union of India*⁸. It was, however, limited to the age of 14 years in *JP Unnikrishnan v. State of Andhra Pradesh*⁹ where it was also held that the right to education under Article 21 drew its content from Article 45 of the Constitution.¹⁰

It was in the light of the Unnikrishnan judgment that the Constitution (Eighty-sixth) Amendment Act, 2002, introduced Article 21-A, which mandated the State to provide free and compulsory education to children between the ages of 6 and 14.¹¹ The reason for the incorporation of Article 21-A into Part III of the Constitution was to make explicit what is implicit in Article 21.¹²

6. CONSTITUENT ASSEMBLY DEBATES OFFICIAL REPORT (Ambedkar) 540 (4th rep. 2003).

7. CONSTITUENT ASSEMBLY DEBATES OFFICIAL REPORT (Shibban Lal Saksena) 814 (4th rep. 2003).

8. *Mohini Jain v. Union of India*, (1992) 3 SCC 666, (¶12) - “*The right to education flows directly from right to life. The right to life under Art. 21 and the dignity of an individual cannot be assured unless it is accompanied by the right to education. The State Government is under an obligation to make endeavour to provide educational facilities at all levels to its citizens.*”

9. *Unnikrishnan v. State of Andhra Pradesh*, (1993) 1 SCC 645, (¶145) - “*Right to education, understood in the context of Articles 45 and 41, means : (a) every child/ citizen of this country has a right to free education until he completes the age of fourteen years, and (b) after a child/citizen completes 14 years, his right to education is circumscribed by the limits of the economic capacity of the State and its development.*”

10. *Unnikrishnan v. State of Andhra Pradesh*, (1993) 1 SCC 645, ¶150.

11. Constitution Eighty-sixth Amendment Act, 2002, *Statement of Object and Reasons*, available at indiacode.nic.in/coiweb/fullact1.asp?tfnm=86.

12. REPORT OF THE 165TH LAW COMMISSION OF INDIA, 81(1997), “*The question is debatable whether it is at all necessary to amend the Constitution when there is an explicit recognition of the implicit right to education till the age fourteen years by the Supreme Court in Unnikrishnan.*”

Fourteen Years and Counting: Redefining Childhood

It is often argued that the right enshrined under Article 21-A is subject to availability of economic resources. The enforceability of a socio-economic rights means that the State must recognize and take steps by adopting legislative measures for the full realization of such rights to the maximum of the available resources of the State.¹³

In the celebrated opinion of YACOOB J in *Government of South Africa v. Grootboom*¹⁴ which dealt with the enforceability of socio economic rights, it was emphasized that the duty of the state to act in furtherance of a positive obligation is specifically subject to the availability of resources.¹⁵ However, the House of Lords has, on several occasions, has taken cognizance of the fact that once an authority determines a group of persons towards whom it owes a statutory duty, the excuse of economic incapacity would not be available to it¹⁶. Thus it is submitted that the right to education under Article 21-A is not subject to economic capacity of the State.¹⁷

It is also relevant to note that, positive rights, such as the one enshrined in Article 21-A, are enforceable.¹⁸ Legislative guidelines are necessary in order to detail the exact manner of achieving this lofty goal. One such attempt is the Right to Education Bill which makes it the responsibility of the State to ensure that children working in violation of the Child Labour (Prevention and Regulation) Act be withdrawn from labour and be re- instated in schools.¹⁹ It also calls for states to be proactive and ensure the removal of any impediment preventing a student from accessing education.²⁰ The UPA Government directed that the Bill be used as a model Bill leaving it to the discretion of the states whether they wish to adopt it. Only nineteen states and two union territories have laws that enforce the right to education. However, these laws place the onus of providing education on the parents, which is

13. 1 REPORT OF THE NATIONAL COMMISSION TO REVIEW THE WORKING OF THE CONSTITUTION 69 (2002).

14. 2001 (1) SA 36.

15. *Id.*, ¶ 46 - “The third defining aspect of the obligation to take the requisite measures is that the obligation does not require the state to do more than its available resources permit. This means that both the content of the obligation in relation to the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources. Section 26 does not expect more of the state than is achievable within its available resources.” Per Yacoob J.

16. *R v. Sefton Metropolitan Borough Council, ex parte Help the Aged*, [1997] 4 All E.R. 532, *R. v Wigan MBC Ex p. Tammadge*, (1997-98) 1 C.C.L. Rep. 581 (QBD), *R. (on the application of Hughes) v Liverpool City Council*, [2005] EWHC 428.

17. *Unnikrishnan v. State of Andhra Pradesh*, (1993) 1 SCC 645, ¶ 145, “Right to education, understood in the context of Articles 45 and 41, means : (a) every child/ citizen of this country has a right to free education until he completes the age of fourteen years, and (b) after a child/citizen completes 14 years, his right to education is circumscribed by the limits of the economic capacity of the State and its development.”

18. Jeanne M. Woods. *Justiciable Social Rights as A Critique of the Liberal Paradigm*. 38 TEX. INT'L L.J. 763 (; Helen Hershkoff. *Foreword: Positive Rights and the Evolution of State Constitutions*. 33 Rutgers L.J. 799.

19. Jayati Ghosh. *Stolen Childhood*. Frontline. November 17, 2006 available at <http://www.frontlineonnet.com/fl2322/stories/20061117005300400.htm> (last visited Mar. 7, 2008).

20. National Advisory Council, *The Right to Education and Challenges Beyond available* at nac.nic.in/concept%20papers/educationfeb18.pdf, (last visited Mar. 7, 2008)

contrary to the spirit of the 86th Amendment, which makes it the responsibility of the state to ensure the same.²¹ The lack of a legal framework to ensure these rights is destructive to the very nature of a fundamental right provided under Article 21A of the Constitution.²²

In order to understand the constitutional framework in its entirety, it is necessary to carry out a comparative analysis of the Directive Principle embodied Article 45 and the 86th amendment. The former merely places an upper limit of 14 years with respect to availing the right to education. This implies that the State should also undertake the responsibility of preschool education for all children.²³ However the amendment is more exclusionary in its approach and introduces an age bracket of 6 -14 years in identifying the beneficiaries of this right. Ironically, the Statement of Objects and Reasons of the 86th Amendment further illustrates this disparity between the Directive Principle and Fundamental Right.²⁴

Such numerical demarcations are created to absolve the government of responsibility towards a section of children whose numbers are reckoned in crores; and were earlier a section that was identified by the constitution makers as deserving of the right.²⁵ The constitutional amendment does not take cognizance of the fact that the period from zero to six years is crucial. One could also argue that it is during this time that the child's mental faculties are at an important stage of development during that time, and thus the inclusion of this age group becomes crucial.²⁶

With specific regard to reinstating child labourers into the schooling system, it is relevant to bear in mind that such children may have dropped out of school for a good number of years, enough to make them feel alien in a regular school environment. Hence, it is important that these children, instead of being introduced

21. *Ibid.*

22. National Advisory Council, *The Right to Education and Challenges Beyond* available at nac.nic.in./concept%20papers/educationfeb18.pdf, (last visited Mar. 7,2008).

23. M.V.Foundation, *Implementation of the Right to Education Some Considerations*, available at www.mvfindia.in/campaigns/Children's%20Right%20to%20Education/Article_on_Right_to_Education (last visited Mar. 7,2008)

24. Constitution Eighty-sixth Amendment Act, 2002, *Statement of Object and Reasons* - The Supreme Court in its judgment in Unni Krishnan J.P. vs. State of Andhra Pradesh, A. I. R, 1993 SC 2178, has held that children of this country have a fundamental right to free education until they complete the age of *fourteen years*. The Common Minimum Programme of the United Front Government resolves to make right to free and compulsory elementary education a fundamental right and to enforce it through suitable statutory measures. The Committee of Education Ministers which was set up to examine the implications of the aforesaid resolution have recommended that the Constitution be amended to make the Right to Free and Compulsory Education from *six to fourteen years* of age as a fundamental right and to make a fundamental duty of parents to provide opportunities for education to their children of this age group.

25. *Id.*

26. Vijayashri Sripati and Arun K. Thiruvengadam, *Constitutional Amendment Making the Right to Education a Fundamental Right*, 2 INT'L J. CONST. L. 148, 148 (2004)

Fourteen Years and Counting: Redefining Childhood

into regular schools directly, are sensitized to the schooling system through bridge courses provided at National Child Labour Project (NCLP) schools and other such special schools. While children below the age of nine are directly introduced to regular schools, it is mandatory for the older children to undergo the bridge course before they are ready to return to the regular schools. It has been noticed that schools are ill equipped to deal with children who are 9+ and have never been to school.²⁷ The child is therefore at risk of dropping out and re-joining the labour force. Children who are 12+ and willing to join Residential Bridge Courses are discouraged from doing so on account of the fact that they are “too old to be in school”.²⁸ It has been documented that “above a certain threshold in respect of hours of work, which varies according to age and type of activity, a child’s learning capacity can be impaired”.²⁹ American researchers have documented data that establishes that the academic performance of young persons between twelve and seventeen years old is adversely affected if they work even fifteen hours a week.³⁰

This delimitation of the upper age limit to avail the right to education has been an issue that has evoked much debate, leading to the constitution of a committee by the National Commission for Child Rights (NCCPCR) to re-examine the limit.³¹

The Chairman of the Commission has expressed the view that there is a need for a universal definition of a child, which will apply across the board for purposes such as conferment of right to education, prevention of child labour, etc.

ARTICULATION OF THE RIGHT TO EDUCATION IN INTERNATIONAL LAW

In order to better understand the right to education, it is necessary to situate this discourse within the international framework of child rights. Article 1 of the Child Rights Convention defines a child as “every human being below the age of eighteen years, unless under the law applicable to the child, majority is attained earlier”³² The ICESCR³³ while failing to prescribe an age limit, states that primary education

27. Shantha Sinha, *Getting Children Into School :Flexibility is the key available at <http://www.mvfindia.in/documents/articles/GETTING%20CHILDREN%20INTO%20SCHOOL.pdf>* (last visited Mar. 7, 2008).

28. *Id.*

29. Katherine Cox, *The Inevitability of Nimble Fingers? Law, Development, and Child Labor*, 32 VAND. J. TRANSNAT’L L. 115 (1999).

30. International Labour Conference, *Combating the Most Intolerable Forms of Child Labour: A Global Challenge 5, ILO (Amsterdam Child Labour Conference) (1997)* available at <http://www.ilo.org/public/english/comp/child/standards/resolution/amsterdam.htm> (last visited Mar 7 2007)

31. Sonia Sarkar, *Panel to decide upper age limit of childhood*, THE TIMES OF INDIA, 14 Jan 2008, available at http://timesofindia.indiatimes.com/India/Panel_to_decide_upper_age_limit_of_childhood/articleshow/2697661.cms (last visited Mar. 7, 2008)

32. Convention on the Rights of the Child, 20 Nov. 1989, Art. 1 1577 U.N.T.S. 3

should be compulsory for all. It also states that secondary education should be made available and accessible to all in a progressive manner. Looking at regional instruments, the African Charter on the Rights and Welfare defines a child to mean every human being below the age of 18 years.³⁴ The Charter mandates that the right to education should be made free and compulsory with respect to basic education and provides for the progressive realization of right to free secondary education.³⁵ However, the ILO permits flexibility in upper age limit with respect to right to education, allowing countries which are not educationally and economically developed to set the minimum age at fourteen.³⁶ Several of these international instruments demarcate obligations of states by segregating primary from secondary

-
33. Convention on the Rights of the Child, 20 Nov. 1989, Art. 13 1577 U.N.T.S. 3;- General comment on its implementation
1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.
 2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:
 - (a) Primary education shall be compulsory and available free to all;
 - (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
 - (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
 - (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;
 - (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.
34. African [Banjul] Charter on Human and Peoples' Rights, October 21, 1986, Art. 2, 21 I.L.M. 58, Definition of a Child - "*For tile purposes of this Charter. a child means every human being below the age of 18 years.*"
35. African [Banjul] Charter on Human and Peoples' Rights, October 21, 1986, Art. 3, 21 I.L.M. 58, - States Parties to the present Charter shall take all appropriate measures with a view to achieving the full realization of this right and shall in particular:
 - (a) provide free and compulsory basic education;
 - (b) encourage the development of secondary education in its different forms and to progressively make it free and accessible to all;
 - (c) make the higher education accessible to all on the basis of capacity and ability by every appropriate means;
 - (d) take measures to encourage regular attendance at schools and the reduction of drop-out rates;
 - (e) take special measures in respect of female, gifted and disadvantaged children, to ensure equal access to education for all sections of the community.
36. International Labour Organization (ILO), *Minimum Age Convention, C138*, 26 June 1973. C138, Art. 4. - "*Notwithstanding the provisions of paragraph 3 of this Article, a Member whose economy and educational facilities are insufficiently developed may, after consultation with the organisations of employers and workers concerned, where such exist, initially specify a minimum age of 14 years.*"

education. According to a standard laid down by UNESCO, the former usually begins at ages five, six or seven and lasts for four to six years (the mode of the OECD countries being six years).³⁷ Thus it is evident that the age bar of 14 is not a demarcation between secondary and primary education. The debates of the Constituent assembly reveal that such demarcation was rejected and thought to be “inappropriate”³⁸. The inconsistency manifests itself on two levels – 1) conflicting age limits in international instruments and 2) conflict between age limits in domestic legislations and international instruments. Such inconsistencies act as an impediment in the implementation of anti-child labour legislations and education benefits.

Several countries have set their age limit for access to ‘free education’ to eighteen. For instance, in Flanders, the constitutional principle of access to free education, applies only till the age of eighteen, which happens to be the age of end of compulsory education. In Ireland, compulsory education applies till the age of sixteen, and ‘free further education’ is funded until the age of twenty one, if he/she wishes to continue studying during that period. In Netherlands, the end of compulsory full time schooling is set to sixteen, even after which, support is lent in the form of an ‘education contribution’ for all those who wish to pursue their education.³⁹ The South African Constitution grants every person the right to basic education. The South African Schools Act, 1996 provides for compulsory education, for all children between the ages seven and fifteen, the school leaving age being fifteen. South Africa maintains its minimum age of employment at fifteen. However, the provisions under the Basic Conditions of Employment Act, 1996 strengthen the prohibition of child labour, and protect children in employment between fifteen and eighteen years of age.⁴⁰ Israel recently increased its ‘school leaving age’ from sixteen to eighteen.⁴¹ An overview of various such nations and states, many of which have lately made changes to their age of compulsory education, increasing it to either seventeen or eighteen, only goes to show the growing importance of a higher secondary education.

37. International Standard Classification of Education, November 1997, available at http://www.unesco.org/education/information/nfsunesco/doc/iscled_1997.htm—“The core at this level consists of education provided for children, the customary or legal age of entrance being not younger than five years or older than seven years. This level covers in principle six years of full-time schooling.”

38. CONSTITUENT ASSEMBLY DEBATES OFFICIAL REPORT (Ambedkar) 540 (4th rep. 2003).

39. IDES NICAISE, THE RIGHT TO LEARN – EDUCATIONAL STRATEGIES FOR THE SOCIALLY EXCLUDED YOUTH IN EUROPE 84 (2000).

40. *At What Age..are school-children employed, married and taken to court?*, available at http://www.right-to-education.org/content/age/south_africa.html (last visited March 7, 2008).

41. Or Kashti and Shahar Ilan, *Knesset raises school dropout age to 18*, HAARETZ, July 19, 2007, available at <http://www.haaretz.com/hasen/spages/883341.html> (last visited March 4, 2008).

CONCLUSION

Although India's public expenditure has witnessed a steady rise, and its official literacy rate has increased to 65.38%, till date, only 4.11 % of its GDP is spent on education. Right to education is a means to an end- an end to the cyclic deprivation of generations denying them means to realise their fullest potential. It is necessary to understand that there is no substitute to the implementation of this right.

It is submitted that the 86th amendment is exclusionary in its language as it is indifferent to the constitutional intent and purpose it was conceptualised to achieve. Children, rescued from the rut of child labour, cannot be made victims of such deprivation, and be excluded from 'free education' due to no fault of theirs. To compensate the victims of child labour for their loss, one needs to adopt a holistic, individualistic approach. It is conceded that the economic capacity of the State plays an important role with respect to providing educational benefits for those falling in the age group of 14-18.⁴² However, each child labourer needs to be examined individually, in order to adequately compensate the child with enough and more educational opportunities ensuring that he is not forced to return to the work force where he will only face further exploitation. In sum, it is a bill of exclusion rather than inclusion, a complete denial of rights.⁴³ The Directive Principle embodied in Article 41 of the Constitution makes it the duty of the state, within the limits of its economic capacity and development, to make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want. A recent amendment sought to be introduced envisages that the right to education should be available to *all* citizens, although the duty of the state is still subject to its economic capacity and development.⁴⁴ Fifty eight years after the Constitution has come into force, a Directive Principle essential for the realization of the constitutional goal of the elimination of child labour has attained semi - fundamental right status. An accelerated process, defying such precedent of legislative lethargy, is necessary to realize this fundamental right in its entirety.

In light of our economic set up, and incapability to grant every child a 'free education' till the age of eighteen, lifting the maximum age limit will pose to be a problem.

42. Unnikrishnan v. State of Andhra Pradesh, (1993) 1 SCC 645, (¶145) - "*Right to education, understood in the context of Articles 45 and 41, means : (a) every child/ citizen of this country has a right to free education until he completes the age of fourteen years, and (b) after a child/citizen completes 14 years, his right to education is circumscribed by the limits of the economic capacity of the State and its development.*"

43. Jayati Ghosh. *Education Bill - A Critique*. THE HINDU, August 17, 2006, available at <http://www.frontlineonnet.com/fl2322/stories/20061117005300400.htm> (last visited February 24, 2008).

44. *The Constitution (Amendment) Bill, 2007*, available at http://164.100.24.208/ls/Bills/16_2007.pdf (last visited Mar 7, 2008)

Fourteen Years and Counting: Redefining Childhood

However, education upto Standard Eight or Nine is simply inadequate to fight this vicious circle of poverty and deprivation, and to discourage them from re-entering the workforce. Also, non-access to secondary education prevents these children from realising their full potential. What could be done, perhaps, is to expand the curriculum of these NCLP schools to include vocational and technical training, thereby providing even those children falling outside the upper age limit of fourteen with an opportunity to learn. Private participation in the arena of education and rehabilitation is necessary to tackle the issue of child labour. In a developing nation such as ours, where the resources of the State are limited, private participation will supplement the State's efforts in this direction.

Dependency on child labour recycles poverty and hopelessness by turning today's generation of child labourers into tomorrow's sick, unemployed, uneducated and unproductive adults. Empowerment by education lies at heart of a movement-the eradication of systemic, institutionalised deprivation that manifests itself in child labour.