



LEGAL ASPECTS OF CHILD LABOUR IN INDIA

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This paper is intended to study the forms of child labour in India in light of the existing laws governing child labour and suggest patches to effectively curb the social stigma. The major law for child labour in India is the Child Labour (Prohibition & Regulation) Act, 1986 which was later amended in 2016 through Child Labour Amendment (Prohibition & Regulation) Act, 2016. While this law deals directly with child labour, other laws like The Right to Education Act 2009 have indirect bearing on the issue. This paper focuses on the Child Labour Act, 1986 and its 2016 amendment in detail.

INTRODUCTION

Child labour as a social evil is a relatively recent construct. In the pre-industrial era, working was considered to be an integral part of a child's development whereas idleness was considered to be a vice (Davidson, 1939). The devilish dogma of child labour gained momentum only after the industrial revolution when the labour markets saw an unprecedented demand of skilled labour and an excess supply of unskilled labour in the form of immigrant workers and child labourers. Technological change thus distorted the equilibrium of the labour market which eventually led to reduction in child labourers across the world, and especially in the US (Osterman, 1979). The Britain reacted to this distortion by implementing The 1883 Factory Act which effectively prevented the child labours of the country from working in dangerous work conditions (Nardinelli, 1980). This begs the question that why some economies were first to move against child labour while others were late, and the rest are still struggling to escape its clutches. Doepke & Zilibotti (2005) argue that child labour laws in the early America or Britain were not passed for the sake of social reform but for their implications on labour reforms. Post industrial revolution, when the demand of unskilled labour had started to fall, the restriction of children from the labour market was expected to increase the wage of the unskilled labours who were largely foreign immigrants. The acceptance of these laws obviously depended on the share of child's income in the total household income. Where the percentage was low, it was easily accepted but where it was high, child labour prevailed. This is also the case for developing countries who are struggling with the problem of child labour today- in most of the cases, the children work to contribute towards the household income, not to provide for their parent or guardian. (Basu & Van, 1998). With this rationale, it is important to look at the current status of child labour in India. According to the 2011 census, number of children in the age group of 5 to 14 years in India is 259.6 million of which 10.1million (3.9%) are involved in labour, either as mainstream workers or marginal workers.

The incidence of child labour has declined by 2.6million between 2001 and 2011 and this decline has been more in the rural areas. In fact, the urban India has seen an increase in the incidence of child labour (Internaitonal Labour Organization, 2017). In 2001, 11.4million children worked in rural areas whereas 1.3million worked in urban areas. The same in 2011 changed to 8.1million and 2.0million respectively. 32.9% children are involved in agricultural labours while 26.0% are cultivators and 5.2% are involved in household works. The rest are engaged in activities other than the three listed above. Agricultural child labourers are more popular in the rural areas whereas the urban areas have the highest demand for child labourers in activities other than these three, (Internaitonal Labour Organization, 2017).

The Concept of Child Labour in India

The concept of child labour is highly complex and contentious in India. Classification of work done by children as child labour is subject to age, place of employment, payment, exploitation, deprivation, and denial of holistic development to the child. In this regard, it is surprising to note that India's national law, Child Labour (Prohibition and Regulation) Act of 1986 does not define the term 'child labour'. The first aspect is concerned with age. This law defines 'child' as a young person below 14 years of age. But even the term 'child' has been defined differently in different Indian laws. For instance, in Indian Penal Code 1860, and enactment of colonial government, section 82 defines a child as someone below seven years, that is, any deviant behaviour or unexpected/ unusual action of a child below 7 years is not considered a crime. Our constitution (Article 45, 39, 24) itself defines a child as someone below 14 years of age. Similarly, the census of India, Apprentice Act 1961, Beedi and Cigar Workers Act, 1966, Motor/ Vehicle Workers Act 1961 define a child as one below 14 years. However, in most of the United Nations Conventions, especially the Convention on Child Rights (1989) as well as International Labour Organization Conventions (15th and 16th of 1921) define child as a young person below 18 years of age. Interestingly, India consented and signed the Convention on Child Rights (1989) on 12th November 1992. Thus, there is a contradiction between the international law and the national law as far as the age/ definition of child (hence child labour) is concerned. As one is considered adult at the age of 18 years, all persons below 18 years of age should be included in the definition of child. Second issue relates to the place of employment, i.e. whether a child employed in the family works maybe considered a child labour or outside employment is a necessary condition for being a child labour. The answer to this question will depend on how we look at the issue- narrowly or comprehensively. In a narrow sense, one may think that children working in the family agriculture tasks, petty business works (shop keeping), small artisan works (carpentry, pottery, blacksmithy etc.), or services should not be considered as child labour because it is their 'own task' or 'family task' and not 'others' task'. Here the cultural identity of 'we' versus 'they' immediately arises- our family, our works and our needs versus their family, their works and their needs. But the question that may arise here is, whether these family tasks are full time or part time. If these tasks are full time, i.e. if the child has to work for equal number of hours as his parents and other adults in the household, then certainly it comes under the definition of child labour. Thus, a child engaged in family works full time is certainly a child labourer. On the other hand, if a child merely performs family tasks part time and his family takes care of his schooling and other requirements, he may not be branded as a child labourer. Third aspect is paid versus unpaid work of the child. That is, whether paid work is a precondition of child labour or even unpaid work of a child would come under the definition of child labour. For instance, consider the following cases: first a child is engaged by an employer for grazing of his cattle or at tea-shop and is given food (one or both ends) or clothes or both, but no payment or wages in the form of grains etc. Second, a child works for an employer without any payment or food for the advance or debt taken by his family from the latter. Third, a child is given raw materials, like tendu leaves for beedi making, wool for carpet making or yarn for weaving of clothes etc., by an outside employer through a middle man to work at a farmer's house itself on piece-rate basis. Fourth, a child works as a domestic help in the house of an official and is given food and clothes in return as well as some rupees on a monthly basis. All these four categories of work by children come under child labour because the child works under certain compulsions and conditions of employment with or without any returns. Fourth aspect is the exploitation. The question is whether every type of child labour is exploitative. In this regard, we are reminded of the 1979 report of Gurupadaswamy Committee constituted by the

Government of India which distinguished between 'child labour' and 'child labour exploitation'. According to this report, child labour takes the form of child labour exploitation if the following conditions are attached with it (Sharma, 2006, p. 221)-

- a. The child has to work beyond his capacity
- b. The child's work hours interfere with his education, entertainment and leisure
- c. The child's wages are not in accordance with work
- d. The concerned occupation or production process is hazardous to his health and safety.

This committee was against the child labour exploitation but not against the child labour per se. However, such distinction is difficult to make because the social reality usually takes shades of grey rather than black and white. For instance, the employer may show payment of full wages to child labourers at par with adult labourers on paper. He may also show far less number of work hours than actual work hours so that on paper the child gets ample time to attend the school while working for the employer. Or, the employer may easily show adequate protection and safety measures without actually implementing them or the nature of work itself maybe hazardous. Fifth, there is a deprivation aspect to child labour as well. In practice, many children work as 'unseen hands' (unpaid and unacknowledged). A large number of children are denied their rights to childhood in all its connotations- the freedom to play, to learn and to develop to their fullest potential- and as such must be classified as child workers, whether or not they are recognized as child labours (Ramchandran, 2002). This broad definition is more agreeable because this encompasses all the deprived children, working full time or part time, inside family or outside, and even those who are neither working nor studying in schools, whom D. P. Chaudhary calls 'nowhere children' (Chaudhary, 1996). He clarifies that many children were enrolled in schools but later dropped out due to family compulsion or incapacity of the schools to retain them. The proportion of boys from the poorest households who dropped out is 396 per thousand compared to 94 per thousand among boys from richer households. Thus, in this view, the problem of dropouts in rural schools may be attributed mainly to the poor quality education and supply side problems. Similarly, the probe report also found that because of the poor quality of education imparted in government schools the enrolled children from poor families are dropping out and thus immediately joining the group of child labours or become potential child labour (Probe Team, 1999). Finally, Santa Sinha and her M. V. Foundation who are engaged in the eradication of the child labour since 1992, take the most comprehensive definition encompassing denial of child's full development and rightly propound five postulates about child labour which are as follows (Sharma, 2006, p. 264):

- i) Every child not going to school is a child labourer
- ii) Whether a child gets wages or not, works at his family or under others, works in hazardous conditions or non-hazardous conditions, works on daily basis or piece-rate, he works as a child labourer
- iii) To eradicate child labour from India, the only way is to remove child labour system in rural areas
- iv) Every work is harmful to child because it affects his development
- v) Different logics like family's difficulties, poverty, child's earning as additional income to family, family's disinterestedness in sending child to school, school being boring to children, and education being unhelpful in providing employment are against the holistic development of the

child.

The last definition is a bottom-up definition, hence it encompasses both actual and potential child labours on the one hand, and on the other hand, tends to actually go beyond the realm of academics and attempts to eradicate the problem of child labour at its root. To this end, she and her organization are involved in identifying the child labours, motivating them, involving the community, engaging them in 'bridge courses' and finally enrolling them in formal mainstream schools.

Legal Framework for Child Labour in India

A Historical Perspective Even in colonial India during the 1920s, the issue of child labour was raised both officially and unofficially. For instance, in 1929 the Royal Commission on Labour in India was established and it submitted its report in 1931 in which the pathetic status of child labourers was described in terms of working for long periods (10-20 hours), prevalence of near slavery conditions, bondage and forced labour, corporal punishment for petty mistakes, pledging of children by their parents to employers, nexus of moneylenders, landholders and factory owners in multiple exploitation of child labours, no food, no interval, no weekly holidays, and no leisure (Sharma, 2006). The Karachi session of Indian National Congress saw a resolution being passed for the protection of the labourers, including child labourers which specifically mentioned that the children of school-going age should not be employed in hazardous occupations like factories and mines. Consequently, labour subcommittee of the Indian National Congress included the following points in its report submitted in 1940 (Mishra, 2000):

1. Work and life conditions (including work hours) could be regulated;
2. Correlating with the education system, minimum age of employment should be slowly raised to 15 years;
3. Work hours should be limited to 9 in a day and 48 in a week;
4. Such a method of wage fixation should be used so that the labourer may get living wage and minimum wage.

Needless to mention here that the political guru of Mahatma Gandhi, Gopal Krishna Gokhale, in the capacity of the president of the INC, had appealed in early 20th century to the British government for free and compulsory education of all the children so that they may not be deprived of the golden opportunity of getting knowledge and may not suffer as child labourers. However, the British government had already made a law- Factories Act (1881) - wherein it was provided that the children below 7 years could not work in factories. Further, children were not allowed to work in two factories and/ or to work for more than 9 hours. For the first time this law provided four days leave in a month but it was applicable only in factories employing 100 or more labourers (Sharma, 2006). This law has narrowly defined the children as those below 7 years of very tender age whereas most of the child labourers start working after the age of 7 years. To be fair, in the light of the recommendations of the Royal Commission on Labour in India (1931), the British government made the first significant law in favour of child labour in 1933 known as Children (Pledging of Labour) Act 1933. This law clearly declared the pledging of child labourers by their parents to employers through written bonds by taking some advances from the latter as illegal. It defined young persons below 15 years as child labourers. Later, another law known as Children Employment Act 1938 was made by the British Government which fixed 14 years as the minimum age for employment in carriage of passengers at railways and handling of luggage at port, beedi making, carpet weaving, cement manufacturing, cloth printing,

dyeing and weaving, making of matchboxes, cutting of mica and tanning works. Their age certificate was made compulsory in such employments but unfortunately the term 'child labour' was not defined in this act; rather it allowed the children above 14 years but below 17 years to work in prohibited category of works/ industrial processes/ occupations. After independence, a central law known as Children's Employment (Amendment) Act 1951 prohibited the children of 15 to 17 years to work at night at railway station and ports. Secondly, it made mandatory for the employers to maintain register regarding the young persons below 17 years employed by them. Again in 1978, Children's Employment (Amendment) Act 1978 was enacted by the Government of India whereby children below 15 years of age were prohibited to pick up coal and clean cinders in railway complexes, work in construction works, catering establishment and work near railway lines or between two railway lines. But this law too was not comprehensive. 3.2 A Modern Perspective The Government of India legislated a major law in 1986 towards prevention of child labour in India known as Child Labour (Prohibition and Regulation) Act, 1986. It has defined child as a young person of 14 years of age but the definition of the term 'child labour' was missing. Its salient features are as follows (Sharma, 2006):

- a. Maximum work hours cannot exceed 6
- b. Half an hour rest in between six hours
- c. Children are not allowed to work from 7pm to 8am
- d. Prohibition to take work for more than 3 hours at a stretch
- e. One weekly holiday
- f. To maintain a register for children employed and in case of any dispute regarding age, a certificate to be issued by a competent medical officer
- g. The competent Government (central or state) to make rules regarding sanitation, healthcare, and facilities for labourers
- h. In case of violation of the provisions of the act, the employers of the child labourers will be punished with a minimum of three month imprisonment, and a maximum of one year imprisonment or a minimum INR10,000 fine and a maximum 20,000 fine or both for the first time offenders. For a second time offense, the punishment increases to minimum 6 months and maximum 2 years imprisonment.
- i. The Act as amended till now prohibits the employment of children below fourteen years of age in thirteen occupations and fifty seven industrial processes as given below:

Part A: Prohibited Occupations

- a. Transportation of passengers or goods by railway/ ports
- b. Picking up cinders, cleaning of ashes, or building works in railway complexes
- c. Work in catering establishment at a railway station including moving from one platform to other and/ or working in a moving train
- d. Railway construction work or a work near or between railway lines
- e. Work within a port
- f. Sale of explosives and fireworks
- g. Slaughterhouse
- h. Automobile workshop and garage
- i. Mining workshop

- j. Handling of toxic, inflammable and explosive materials
- k. Handloom and power loom
- l. Mines and coal mines
- m. Units of plastic works and workshop of fire-glasses

Part B:

Processes Beedi making, carpet weaving, cement manufacturing, printing, dyeing and weaving of clothes, making of match boxes, explosives and fireworks, cutting and breaking of mica, soap making, tanning, cleaning of wool, building and manufacturing industry, granite processing and plashing, making of slate pencils, agate products, toxic materials and metals, lead, manganese, chromium, benzene, pesticides and asbestos, lac, work defined as dangerous processes in Factories Act, soldering and electronic industry, incense sticks making, cashew processing, automobile repair and maintenance, brick and tiles making, cotton processing etc., detergents, weaving workshops, gem polishing, handling of chromo-mite and manganese ores, jute textiles and coir making, limekilns, lock making, lead manufacturing processes, cement pipes and other works, glass works, dyeing/ painting, manufacturing and handling of pesticides/ insecticides, toxic and rusting materials, coal and briquette making, manufacturing of sports items with synthetics, chemicals and leather, fibre glass and plastic processing and moulding, oil pressing and refining, paper making, clay pot making, brass works, agricultural processes, with the use of tractor, thresher, harvester and fodder cutting machine, saw mill processes, hiding and related works, stone crushing, tobacco works, tyre making and re-trading etc., chicken works, pot making and polishing, crushing and polishing of metals, slate making from mines, diamond cutting and polishing, rag-picking and scavenging, powder making from black lead, and all processes related to keeping silkworms. However, the Child Labour (Prohibition & Regulation) Act does have the following lacunae:

- a. Under section 2(x), the definition of ‘workshop’ does not include those complexes given under section 67 of Factories Act 1948. Therefore, the employers take undue benefit of this loophole.
- b. Under section 2(5), there is a scope that an employer may employ his family children even in hazardous works. Consequently, some employers who run their economic activities in their residences employ child labourers but claim that they are their family members. Actually the employment of Children Act 1938 was stronger than the existing act in this regard as that law provided that only family children could be employed and did away with hiring children from outside.
- c. This act is not applicable to government schools and government aided/ recognized schools; thus many private schools engage child labours in taking the undue advantage of this provision.
- d. Under section 2(x), the term ‘industrial processes’ is mentioned which is not as comprehensive as ‘any production process’ since the latter also includes non-industrial production processes.
- e. Under section 7, it should be added that the children cannot be employed at piece-rate so that the employer is bound to pay the minimum wages to the child labourers like adult labourers.
- f. As is currently provided under the act, simply regulating certain works/ processes is not sufficient because any work due to which the child labourers are deprived of their education, play and childhood, becomes hazardous for them.

- g. Regarding the medical certification of age, it is quite probable that given the prevalent corruption, the medical officer will act as per the whims of the rich employers. Instead there should be a provision that the onus for age-proof should be on the employer, that too, before the employment of the children. Age certificate produced must have been issued by the registrar of birth and deaths or schools.
- h. Under this act, there is no provision for imposing tax on the employers for creation of National Child Labour Welfare Fund so that it may be utilised for children working in regulated activities.
- i. The biggest failure of this act is that it is not applicable to informal activities wherein ninety percent of child labour is engaged.
- j. Under this act, the term 'child labour' has not been defined; the act only defines a child as a young person below 14 years. Further, as per the ILO Conventions and the UN Convention of 1989, CRC as well as some national laws (Motor Vehicle Act, Merchant Shipping Act etc.), this age should be raised up to 18 years because a person becomes adult only after the age of 18 and one may get at least 10-12 years of schooling till that age.
- k. Under the act, the definition of 'place of work' is very narrow. It should include agricultural activities, fishery activities, afforestation, process of domestic production, microenterprises operated by family members and the likes.
- l. The employment of children act 1938 had made it compulsory for the employer to inform the labour/ factory inspector before starting any industry of prohibited process for children. Unfortunately, the Child Labour Act 1986 does not have such provision. Hence, the employers take undue advantage of this loophole.
- m. The Act should have the provision to publicise all the hazardous occupations and production processes for children so that common people may be aware of these and take appropriate action in case of violation.
- n. The penal provision should be made together and both the fine and imprisonment should be enhanced to INR50,000 and two years for the first offense and its double for subsequent offenses.
- o. In addition to labour/ factory inspectors, the recognized trade unions and accredited journalists/ NGOs should also be allowed to check whether child labourers work in an enterprise or not. They should then report the matter to the concerned labour/factory inspectors or superior officials. The above act was amended to Child and Adolescent Labour (Prohibition and Regulation) Act, 1986 on July 29, 2016.

This act broadened the scope of the act by including both children (those under the age of fourteen) and adolescent (those between the ages of 14 and 18). The act prohibits all kinds of labour for children under the age of fourteen except family run activities and artistic ventures, provided the education of the child is not hampered. This is an improvement as the original act prohibited working only in certain activities like carpet weaving, beedi making, mines etc. Further, adolescents are also prohibited from working in hazardous occupations- mining, inflammable materials and hazardous processes under the Factories Act. The Act makes child labour a cognizable offence i.e. employing child labourers is punishable by law under the amended act. The punishment includes imprisonment for 6 months to two years or penalty between INR20,000 and INR50,000 or both for the first time offenders. A repeat offender will attract an imprisonment of 1 to 3 years. If the repeat offender is the child's parent, he will have to pay a fine of INR10,000 only. The amendment has reduced the list of

hazardous occupations from 83 to 3 (mining, inflammable materials and hazardous processes as described under the Factories Act) and also has provisions for periodic inspections which may be carried out by the District Magistrates if the Government of India deems so (Ministry of Law and Justice, 2016). The amendment has both positive and negative aspects. This amendment aligns India with ILO's convention numbers 138 and 182. The former deals with the minimum working age of any child should not be less than 15 years, with the possible exception of developing countries. The latter requires that no children be working in any form of hazardous occupations and that the worst forms of child labour be eradicated altogether. The act has also increased the punishment for child labour employers and has a more flexible provision of regulation. The act mandates that all children under the age of 14 be provided with education. However, certain flaws exist even in the amended act. The provision that children under the age of 14 can work in family enterprises after school hours (and during vacations) can lead to child labour in unregulated activities. Furthermore, families encompass not only parents but also their siblings which may lead to child exploitation. It may even be difficult to establish if the child is working for the family or as part of the family which is employed by a third party. This generates scope for existence of child labour, especially in the caste determined jobs. The worse part of the amendment perhaps is the reduction of number of hazardous occupations which is reduced from 83 to 3 and omits activities related to batteries, automobiles etc. again paving the way for convenient existence of adolescent labour. The act does not clarify this position for family businesses as well like bangle industries which can employ children under the age of 14 if run by their family but are extremely harmful for their health.

3.3 Constitutional Provision The part III of Indian constitution provides the fundamental rights to the citizens and therein Article 24 clearly provides that any child below 14 years of age would not be employed in a factory or a mines or other hazardous employment. This provision is mandatory and therefore any aggrieved person may move to High/ Supreme Court for its implementation in case of any violation. However, here too, the term 'hazardous' has not been defined, hence its undue advantage is taken by the employers. On the other hand, Part IV of the Constitution, Directive Principles of State Policy, also has some provisions in this regard. For instance, under Article 39 (E), the State has to ensure that children's tender age is not misused and any Indian citizen should not work under compulsion in such tasks/ occupations which are against his age or strength. Similarly Article 39 (F) provides that State should provide such facilities and opportunities so that the children may develop with freedom, dignity and in a healthy way and their childhood and adulthood does not suffer physically and morally. Further, Article 45 clearly states that the State shall endeavour to provide free and compulsory education to all children below 14 years within 10 years from the date of enforcement of the constitution. Our constitution came into effect on 26 January 1950 and by 26 January 1960 all children should have started to receive free and compulsory education, which did not happen and over a quarter of our population is still illiterate with the literacy rate being just 74%. Despite the existence of Article 45 since 1950, there were hardly any laws, rules or regulations and the Right to Education Act under Article 21A was legislated only in 2009, although it is yet to be effectively implemented in the country. However, one must not forget the landmark judgement of the Indian Supreme Court in *K. P. Unnikrishnan Versus Union of India* where the provision of free and compulsory education under Article 45 was declared a fundamental right way back in 1993. Moreover, under Article 47 of Indian Constitution, the State should take steps, as its primary duty, to provide nutrition, raise the standard of living and improve the public health of citizens. Though Directive Principles are not mandatory, but discretionary, yet with the increasing literacy, mass awareness and public pressure, the State is bound to pay heed to these principles in the course of time.

CONCLUSION

The above analysis of the laws directly related to child labour shows that despite the amendment, the act has glaring loopholes which allow child labour to flourish within the ambit of the act and thus should be modified further in the interest of children in general and child labour in particular. The current status of the act points more towards alignment and ratification of ILO conventions than towards complete child labour abolishment. Given that child labour is largely confined to unregulated sectors of the economy, mere regulations can take the society only so far. Child labour needs to be seen in the broadest sense as any kind of deprivation or denial for full development of the child and the law should strive to remove such instances. Legislation, however progressive it may be, is not sufficient for purging child labour. Along with full and regular enforcement of labour laws, it is urgently required that labour officials, prosecution and judicial officials should be sensitized towards child labourers' woes perhaps through genuine mass awareness drive by NGOs and citizens for bringing all child labourers to school.

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