

JUSTICE FOR CHILDREN: WITH SPECIAL REFERENCE TO EDUCATION

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I. INTRODUCTION

This essay attempts to bring into focus certain aspects of childhood that have remained unacknowledged over the history of modern institutions of justice in India, mainly on account of a lack of academic scholarship and the resultant absence of a sustained discourse. This inadequacy is reflected in most of the legal cases fought on matters pertaining to children in different spheres of social, cultural and economic life. The poverty of discourse is also reflected in the verdicts these cases received. A similar poverty can be observed in the history of legislation about childhood, in crucial spheres like child-marriage, use of children as labour force, and sexual abuse and trafficking. In a key domain related to childhood, namely, education, a long struggle to legislate is now a matter of documented history which spans a full century preceding the drafting and promulgation of the Right to Education ('RTE') law,¹ about a decade ago. Within this short period however, this comprehensive law has begun to show its diminution, both in conceptual terms and in the provisions required to implement it. The analysis presented in this essay focuses on this particular right of Indian children, in the context of socio-historical conditions and the state of schooling as an institution.

The essay is divided into three parts. The first part discusses the specific meaning that the term 'right' acquires in the context of the various kinds of adverse situations that children face in a collective sense. The second part focuses on the right to education that has been turned into a law in India. The problems it has been facing are looked at in the light of some of its provisions. The third part turns towards the concept of a civil society that is often mentioned as a means whereby the right to education can be brought under judicial custody. This discussion is followed by the conclusion.

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¹ Right to Education Act 2009.

II. SOCIAL ORIGINS OF MISFORTUNES SUFFERED BY CHILDREN

Before considering the problems that children's access to the rights granted to them might encounter, we need to make distinctions among the various social origins of injustice relevant to childhood. In a broad sense, all forms of human distress are experienced within a social context. A framework so wide may not serve much purpose in our present context. Nor do we want to dwell into the sources of children's distress that manifest within the family, for example, in marital discord. Judicial attention has been available in such cases. Another source of children's distress that is reasonably well covered by the legal system is that of criminal activity, such as kidnapping for various purposes. We are interested in looking at the sources of distress that are embedded in the organised functioning of society and in its relations with the state apparatus. At what point does a child face the situations listed below is a crucial issue for any attempt to apply a code of justice. This is because the loss of a right is not a general idea in the case of children. A right lost in infancy may not be recoverable at all, whereas the loss of the same right during adolescence may prove, to a certain extent at least, redressable by means of legal action. Much depends on the specific right under reference and the circumstances that led to its loss. This is why the following classification may help. The categories used in this classification look mutually exclusive; to think like that will be a delusion. Adverse circumstances are usually complex and the effects they bring on the sufferers, especially children, are intertwined with pre-existing or contingent circumstances of a different nature. For example, the education of a child which is repeatedly interrupted by monsoon floods is also likely to be affected by the pre-existing problems of acute poverty of the parents and malnutrition.

Let us, therefore, view the following list of social origins of misfortunes suffered during childhood with the assumption that these categories will be highly interactive and therefore, overlapping.

Firstly, the economic structure of society and the economic relations among different strata constitute the first major source of injustice suffered during childhood. The distinction between structure and relations is important. Economic 'structure' depends on the policies formulated and followed by the state; and economic 'relations' are those between people located in different layers of income and means of livelihood. Certain forms of livelihood, such as handicrafts, generate modest or subsistence-level incomes, and these livelihoods may involve children. However, 'child labour' as a category of the active labour force is usually the outcome of the state's policies shaping the structure of the economy. Exploitative conditions in which children are forced to work in certain forms of employment need to be separated from the involvement of children in handicrafts that provide the community and families with a basic income. Of course, it is not easy or always possible to distinguish family-based participation of children in work from

the employment of children in organized work, but the distinction is necessary to appreciate the precise social origins of injustice that children might suffer in a society like ours.

Cultural sources of injustice suffered during childhood are hard to detect, discuss and address mainly because the injustice is enmeshed in established norms. As an aspect of culture, India's caste system is much too omnipresent and complex to allow a straightforward analysis of how it affects childhood. However, many studies have established how caste prejudice and discrimination, directly as well as indirectly, shape the educational destinies of children belonging to the lower rungs of the caste hierarchy, especially the Scheduled Castes. Prejudice towards tribal people is a similar case in point. The limited resources made available for tribal education compound the discrimination suffered by the children of several designated tribal groups. Gender issues are yet another major instance of injustice suffered in childhood on account of the prejudice and discriminatory practices embedded in culture. When these prejudices are part of child rearing practices, they enter 'primary socialisation'.² This concept applies to all forms of prejudice mentioned above. A child's experience during infancy gets imprinted on the mind in ways that do not easily allow engagement or reflection during the later years. Caste, class and gender prejudices prevailing in the cultural ethos of society are internalised by the child's unquestioning mind, making them 'normalized'. Of these, the prejudices pertaining to gender are the deepest and least tractable, and therefore extremely difficult to address later on. The prejudicial view of 'girlhood' entrenched in the education system compounds the problem³ constituting an additional route for culture to influence childhood adversely.⁴

Thirdly, adverse historical circumstances form a peculiarly difficult terrain of injustice for people born or growing up in the midst of these circumstances. The partition of India and Pakistan is a prime example. The study carried out by Vijayalakshmy (2004) demonstrates how the partition affected the lives of millions of children. Her study also shows how judicial intervention made a difference to the lives of many children whose encounter with the horror of partition could have otherwise been regarded simply as a misfortune. In the situation that has prevailed in Kashmir for a long time now, children have suffered what commonly passes as tragic misfortune. While many civil society groups have tried to help Kashmiri children who have suffered due to the historical circumstances they were growing up under, the role of the state, in general and that of the judiciary in particular, has been woefully limited. As other examples of historical origins of children's suffering, we can consider the socio-political turmoil faced by tribal societies in Chhattisgarh, Jharkhand and certain parts of the North-East.

² Peter Berger and Thomas Luckman, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge*, 1966.

³ Krishna Kumar, *Politics of Education in Colonial India*, 1st edn 2014.

⁴ Leela Dubey, *Anthropological explorations in Gender: Intersecting Fields*, Sage Publications 2001.

Moreover, State-led development projects often lead to large-scale displacement of entire village communities to new locations. Such movement or forced migration disrupts childhood in ways that are seldom captured by documentation. Children's rights in basic spheres such as health and education are affected. Depending on the age at which a child experiences the disruption, its impact requires specific assessment of compensatory treatment or partial reversibility. In the considerable literature that now exists about displacement sociology (such as in the case of the building of Sardar Sarovar dam on the Narmada), consideration of children's rights is conspicuously absent. Monetary or land compensation by the state also does not directly address the issues that mass displacement causes in the lives of children.

This classification and brief discussion of the social origins of injustice suffered during childhood implies a distinct sense in which the term 'right' might be applicable to children. The following section probes the specific semantic implications of the term 'rights' when it is used with reference to children.

A. CHILDREN AND THE CONCEPT OF RIGHTS

Any judicial system that aims at serving children must take into account certain basic parameters from which the idea of childhood acquires its meaning. Nature draws some of these parameters, while others arise from social living. The recognition of both kinds of parameters, however, varies across countries and cultures. This is because the idea of childhood has unfolded in the course of a history which is far from being universal.⁵ It is wrong to assume that the nature-related aspects of childhood are a matter of consensus. This mistake is frequently made when, for example, Indians quote liberal philosophers like Rousseau and Mill as authorities on childhood in order to justify an argument under consideration in a dispute. Authorities they are, and therefore they warrant universal recognition and admissibility, but they do not offer us a sufficient basis for conceptualising childhood in our specific circumstances. The same can be said of more recent psychological constructions of childhood. They have their value, but the social context in which they are to be applied cannot be ignored.

Many problems that children face in our country arise either from the social conditions or from the state's response to these conditions. Justice to children requires an understanding of the wider context in which real children are born and spend their childhood. Neither philosophy nor science—in this case, psychology—is free of a social context which shapes perceptions and the circulation of ideas in a social universe. What is good for a child who is currently an infant can well be a matter of dispute between a European and an African society, and even between two European nations. Laws that are applied to decide

⁵ Philippe Aries, *Centuries of Childhood: A Social History of Family Life*, 1960.

harmful domestic conditions and the legal recourse of an infant differ from country to country. The extent to which the state depends on the family to look after babies without interfering in the child-rearing practices being applied has no universality. Indeed, the state's regard for the family as the sole locus of the child's early life differs quite radically across nation-states. The point is that the conceptions of childhood are rooted so deeply in social histories that age-related or sex-related views claiming nature as their reference point lack universal validity. Infancy, early childhood and puberty are undoubtedly natural stages of childhood, but societies view the expected contents of these stages differently. Similarly, ideas about the appropriate age at which children's participation in income-generating work or preparation for a vocation may be considered acceptable may radically differ across nations and within them. For the institutional arms of justice to reach out to a child in distress may not, therefore, be a simple matter of interpreting universal rights of childhood.

Notwithstanding the above, the UN Convention of Child Rights ('UN Convention')⁶ marks a significant advancement for any attempt to improve children's access to justice. Our ability to use this Convention for grasping the rights-related problems children face will greatly benefit from examining the meaning of a right for children. Being a child and having a right are propositions that call for some explanation. If someone has a right, it assumes that the person has the capacity, at least in a notional sense, to assert it. The very idea of a right carries a certain amount of power—to assert it if the need to do so arises in case of denial or violation. Under ideal circumstances, in a social structure where all individuals and institutional structures are aware of everyone's rights, the need to assert it may not arise as awareness will prove sufficient to avoid violation or denial of a right. However, if a violation does occur, the person who needs to assert it must have the capacity to do so. This is where a special problem arises for consideration of children as recipient of rights. As a phase of human life, childhood has certain limitations as far as intellectual and social capacities are concerned. Small children cannot be expected to know and appreciate that they have certain rights. Nor can they be expected to assert it if one of their rights is being denied, violated or fulfilled in a distorted manner. Being a child implies being powerless and dependent on others for one's basic and other needs for a substantial part of childhood. This natural order of things makes the award of rights to children a special case.

This point can be elaborated by reminding ourselves that, as beneficiaries or holders of human and civic rights, children belong to a special category of their own, i.e., their case is different from certain adult beneficiaries of rights who do not have the capacity to assert or protect their rights. In a general sense, having a

⁶ UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations.

right does not necessarily imply the awareness of having it. Circumstances prevent many men and women from knowing that they have rights. These circumstances include illiteracy or lack of education, extreme poverty, regional isolation, and so on. On account of one or more, or a combination, of such circumstances, many adults may not be aware that they have certain human or civic rights. Seemingly, this position may be similar to that of children, except for one crucial difference. Whereas an adult person has, in theory, the potential to be made aware in a reasonable period of time that he or she has a right, a child, by virtue of being a child, has rather limited potential during a substantial and crucial part of childhood to appreciate and understand that he or she has certain rights. A similar distinction can be drawn on the matter of compensation or redressal. In the case of adult sufferers of right violation, restorative judicial intervention has value. In the case of a child sufferer, even a quick intervention—and that is quite rare—cannot adequately compensate for the portion of childhood already spent in a right-injured condition.

In summary, as a stage of life, childhood impairs children's access to the rights they are entitled to. This paradox implies that an external agency is necessary for enabling children to avail their rights. An enlightened family and community can facilitate children's access to their own rights. If this happens, we can treat such a family or community as a manifestation of a civil society. The term, 'civil society' tends to be used as a synonym for non-government organizations (NGOs) these days. But it is meant to point towards something amorphous: a spirit in society to manage its own affairs in an awakened manner. This is why a family or community that provides for children in a manner that fulfills the criteria for well-being presented by the UN Convention of their rights will qualify to be called an arm of a civil society. However, if such an arm does not function, the only agency left to ensure children's access to their rights is the state. Its policies, capacity and commitment to follow these policies are crucial for fulfillment of children's rights.

This discussion takes us to the need to ponder on the structure of the state. If the judiciary is a part of the state apparatus, its role in the context of children needs to be compared with that of the legislative and the executive branches. These branches are directly responsible for making and implementing laws, policies and decisions, including the decision to make adequate financial provision for and supervision of institutions put in place for looking after children's rights. If the judicial apparatus treats itself merely and mainly in its conventional role of dispensing justice when approached, it is likely to fall short of ensuring children's access to their rights in a society where the idea of a secure childhood has not been fully formed and the legislative and executive arms of the state feel under no pressure to provide protection for children's rights. When the human and civic rights of people are taken into account, the specific problems of infants and children are seldom examined and assessed in any substantial sense. They are treated

as a part of family and community although the challenges they pose from the perspective of rights are quite distinct.

One might assume that offering justice to children in the case of violation of their various rights will always face a problem in one way or another. The problem has many dimensions and layers. To begin with, we can distinguish between the issues that arise from the fact that childhood is a stage of human life, and, on the other hand, issues that have their origins in the coexistence of children and adults in the socially constituted world. In both these dimensions we can aspire for clarity by identifying the layers. In the idea of childhood as a stage of human life, we need to separate infancy from pre-puberty and the latter from pre-adult adolescence or early youth. We also need to treat gender as a separator between children in all these stages. In the second dimension, we can recognise economic layers or strata as being relevant to child-adult co-existence and the fact of children's dependence on adults. In Indian society, economic layers intersect with caste and other forms of background descriptors. There is a third dimension too, that requires historical and comparative awareness of the remarkably distinct lives and social destinies that rural and urban children have in different societies, depending on their trajectories in the current and ongoing encounter with modernity.

These distinctions should help us to locate the problem of dispensing justice for children that arises when children are treated as a composite category. Laws concerning childhood refer to 'the child', suggesting a fundamental uniformity in the experience of childhood in all its natural stages and across its social variations indicated above. Even the law on child marriage does not distinguish between boys and girls. Early marriage having a sharply different meaning for the two sexes deserves no lengthy debate. The numerous cases brought to the attention of the N.V. Joshi Committee which drafted the Sarada Act in the early 20th century present eloquent and tragic testimony to the point that the suffering a child bride endures is not comparable to what a child groom may experience. Many of the submissions made to the Committee carry elaborate medical records of girls who suffered the consequences of pregnancy in their early puberty.⁷ Despite this testimony, the use of the term 'child' was preferred in the title of the original Act and in its subsequent amended versions. Under the sections on definitions, these versions distinguish between boys and girls, stipulating different minimum permissible ages at the time of marriage. This Act is at the same time rational and also irrational. It is rational because it attempts to separate pre-adult humans on the basis of their sex in order to stipulate distinct age borders for eligibility to get married. The irrationality lies in conflating the distinct experience of marriage pertaining to the two sexes. If a legal ban on 'child' marriage is meant to offer

⁷ Elanor Rathbone, *Child Marriage : the Indian Minotaur : An Object-lesson from the Past to the Future*, 1934.

justice to children, the purpose cannot be achieved if the law threatens the violators of the ban with consequences that do not distinguish brides from grooms. The injustice that girls who face marriage at an early age face is radically different and sharper than what boys in similar circumstances might face. These observations are not necessarily relevant or sufficient, nor are they intended, to illuminate the reasons why the law banning child marriage has not proved effective despite having gone through revisions.

Now that we have examined why the concept of rights carries a specific meaning in the case of children, we can proceed to a discussion of the right to elementary education granted to India's children through an amendment to the Indian Constitution.

III. THE 'RIGHT TO EDUCATION' ('RTE')

Let us now turn our attention to the peculiarities of education as a major child right. These peculiarities arise from the nature of education and from the distinction between the conceptual and systemic meanings of education. Education is now so strongly associated in the public mind with childhood that no one distinguishes education as a concept from education as a system. This distinction helps us to make sense of the dual role that education plays in children's lives. It not only serves them during childhood but also prepares them for later, adult life. This preparatory aspect of education makes it a highly complex social process which modern societies manage with the help of the state's apparatus. The nature of the preparatory aspect of education is related to a society's own structure as well as to the vision embedded in its state. Contradictions between education as an idea and its systemic character arise from the historical conditions reflecting the interaction between the social structure and the state.

This initial discussion can now be broadened and applied to the general context of children's rights, including the right to education which has been granted quite recently to Indian children. As indicated earlier, a basic problem resides in the term 'child' itself. As a word in the English language, the 'child' carried a certain inheritance rooted in British and European culture and history. Its use in an Indian context lacks a parallel socio-historical support. Language is one reflection of this. The words used to refer to a child in Hindi and other Indian languages, including Sanskrit, help us to appreciate the problem. For referring to a child in Hindi, for instance, one must use either 'ladka' or 'ladki' ('baalak' or 'baalika') – these being gendered terms unlike the term 'child.'. The composite term 'baal' can only be used in a hyphenated phrase such as 'baal-vidhava' (child widow) or 'baal adhikaar' (child rights). Gender-related debates are, thus, integral to someone being regarded as a child, given that gender is so major a factor in shaping the experience of childhood.

The RTE conceived and promulgated in the first decade of the 21st century attempts to impart a legal identity to all of India's children, both present and future. This is undoubtedly a historic break for India, from its own record of procrastination over the legislation of a legally binding role of the state in children's lives. The earliest attempt of a limited right to education was made in 1911.⁸ The making of the Constitution in mid-20th century might have provided an opportunity to give children's education a place in the framework of fundamental rights, but that did not happen. What did happen throws light on the limitations of the state itself, and, in turn, on the narrow space available for modern ideas about childhood. Article 45, which constituted a 'directive' principle of state policy, made an unimpressive, slow journey through nearly four decades towards enabling children of six to fourteen years an experience of learning at a school. It is this promise that the recent RTE has pushed into the list of fundamental rights, as part of Article 21, which had originally focused on the right to life. Its extension to education owes to an imaginative interpretation of life itself by the highest court when it noticed that the right to life carried substance only if life itself was worthwhile. That is where education came in, as a childhood experience that adds worth to life. The years taken by parliament to move from this historic verdict i.e. *Society for Un-aided Private Schools vs. Union of India* (2012)⁹ to the enactment of a Constitutional amendment and later an enabling law for that amendment to take effect do not carry any dramatic political development that might explain why RTE finally got promulgated. There is no trace of its becoming an election promise. Why it happened is, therefore, far from clear, and one can harbour the doubt that the counterfactual scenario of India carrying on without an RTE could well have been real.

Now that RTE has become a fundamental and justiciable right, it can be placed among the various rights endowed on children by global consent. On account of the peculiarities arising out of the nature of childhood, as discussed earlier, all these rights are essentially notional because the recipient of these rights, namely children, cannot on their own protect themselves or arouse any palpable systemic pressure for their enforcement. As a passing stage of human life, childhood does not permit any tangible struggle or collective effort to be mooted to make the so-called rights of children real. They can only be viewed as conscience raisers, and their capacity to perform this role depends on the larger conditions prevailing in a society or nation. It is hardly surprising that RTE has met with considerable difficulties in the first decade of its promulgation. These challenges and difficulties will be discussed in the following part.

⁸ Krishna Kumar, *Politics of Education in Colonial India*, 1st edn 2014.

⁹ Krishna Kumar, *Smaller Citizens: Writings on the Making of Indian Citizens*, 2021.

A. CHALLENGES AND DIFFICULTIES

Apart from the expected problems of coordination between Central and State-level structures of governance and finance, RTE has faced both legal challenges and legislative revisions. A strong legal challenge came up just two years after RTE's promulgation. It was against Section 12(1)(c) which provides 25 per cent reservation for children from economically weaker sections of society in fee charging private schools. In its verdict on this case, the Supreme Court upheld the RTE's provision for 25 per cent reservation as being constitutionally valid. Despite the Court's endorsement and appreciation of RTE's vision of social inclusion, the implementation of its reservation policy continues to face numerous problems in different States. Although it is true that a decade is barely sufficient for the full-scale implementation of a social policy law in a country as diverse and stratified as India, the slow and difficult progress of Section 12(1)(c) reveals the deep challenges it presents to the system of education.¹⁰ It is worth examining these challenges briefly from the perspective of 'quality'.¹¹

For most part, the problems and opposition faced by RTE's provision for a quota in private schools for the poor arise from a serious but popular misconception. It is believed that a socially homogeneous classroom is more productive than a mixed one. This belief has gained strength from its uninterrupted and unchallenged dominance in private schools for a long time. Managing authorities and teachers of private schools are so used to having an income-wise homogenous population that they cannot see the necessity and potential benefits of the presence of the poorer strata of society in the classrooms. RTE's enforcement of such a presence is perceived by many private schools as an imposition by the state and as an infringement of their autonomy. Those who have accepted it regard it mainly as a leveler or a bridge across a class divide. This perception is not wrong, but it is rather limited as it misses the value of Section 12(1)(c) as a positive step towards improving the quality of teaching and learning.

Children's learning is not merely an outcome of the teachers' effort. The ethos of the classroom and the social composition of the cohort make a difference to the quality of learning. Many decades of policy progress and research in non-selective comprehensive schools in several educationally advanced countries of the world have established the importance of socio-economic and cultural diversity in the classroom as a key factor of high quality in education. In classrooms that are socially and culturally diverse, children have access to a wider and richer pool of peer inputs. The teacher also benefits from this wider pool in the attempt she is required to make in order to link various topics of the syllabus with children's own life experiences and to enhance participation. Being a child-centred

¹⁰ Education For All - The Quality Imperative, UNESCO, 2005.

¹¹ Krishna Kumar, *Quality of Education at the Beginning of the 21st Century: Lessons from India*, 2004.

teacher implies an inclusive and imaginative kind of pedagogic planning on the part of the teacher. This is why RTE's provision for ensuring a substantial presence of children from economically weaker sections of society is a step towards making Indian classrooms more child-centric even as the experience of school life lays the foundations of a cohesive and inclusive socio-cultural ethos in society.

The RTE recognises the fundamental constitutional values of equality and justice, and provides a clear strategy to operationalise them in terms of specific procedures to be followed in shaping school life. These are laid out specifically in Chapter V of the RTE Act although there are aspects scaffolding them in other chapters as well. Section 29 of Chapter V stipulates eight norms under which a child's elementary education shall be carried out and completed. These norms include non-discriminatory pedagogy, shifting from a pass-fail system of examination to continuous and comprehensive assessment, and a ban on corporal punishment. These norms are sufficiently indicative of the quality of educational experience at schools to which RTE entitles every child between the ages of 6 and 14. Section 29 clearly aligns the curriculum, pedagogy and evaluation to constitutional values, leaving no room for confusion about what is meant by a 'child friendly and child-centred' policy ethos in the classroom. It includes freedom from fear, anxiety and trauma, and it requires the teacher to use activities that promote all-round development and the spirit of discovery while focusing on the child's potential. Evaluation is also to be made less mechanical and more oriented towards an assessment procedure that contributes to the child's growth. This was further reinforced in Section 30 of the original RTE Act, banning annual Board examinations. (This Section has now been amended). As for the freedom from fear and anxiety, Section 17 (Chapter IV) of RTE attempts to ensure it by prohibiting physical punishment and mental harassment. This prohibition acknowledges the prevalence of corporal punishment in schools at all levels as demonstrated by a major survey carried out by the National Commission for the Protection of Child Rights.¹²

Taken as a whole, the overall structure and provisions of RTE convey a strong signal that school life and ethos in schools will meet high standards of institutional awareness of constitutional values and children's needs. As a social policy law, RTE clarifies the policy goal it is meant to reach, and it also conveys an awareness of the kind of obstacles it might encounter in implementation. Thus, it goes into issues like teachers' salaries, qualifications and conditions of employment, and the quality of school infrastructure. It also enunciates different levels of authority and grievance redressal mechanisms that will ensure sound management and monitoring of implementation. The well-articulated goals and provisions of the RTE Act provide ample indicators that might help the legal-judicial system to intervene wherever children's right to education as enunciated in this

¹² NCPCR, *Eliminating Corporal Punishment in Schools* (New Delhi: NCPCR) 2011.

Act is infringed upon. However, the key question is how children can be made to access judicial intervention when, as this essay argued earlier, they lack both the agency and the capacity to recognise when their rights are ignored or violated. Even though the RTE Act provides for quasi-judicial systems for protecting its own provisions from distortion, the functioning of these quasi-judicial structures itself may require judicial intervention. A case in point is the role assigned to the NCPCR in the RTE Act. While the role itself is extremely significant and the responsibility it involves is major, the actual institutional apparatus of NCPCR has remained skeletal over the years and its capacity to perform its role has been woefully poor, given its own institutional skimpiness. There is a serious contradiction between the role and the expectations in this case, and this contradiction will require the attention of the courts in the coming years. Already during the pandemic years, the provisions of the RTE Act have proved to be too weak to stand up to policy neglect. As the RTE Act enters its second decade, its future has already started to look bleak, and the educational policy document released in 2020 offers little reassurance that a social policy law as major as the RTE Act will continue to remain pivotal in the state's role as a custodian of children's right to education. However, the judicial intervention required for effective implementation of RTE is itself fraught with problems, as is discussed in the following section.

IV. THE PROBLEM OF JUDICIAL INTERVENTION

As an institution, the judiciary faces a considerable problem in fulfilling its role as a justice-giver to children. Those who plead on a child's behalf can be broadly divided into two categories: those representing the state and those who represent the civil society. The former is dealt with in the first part of this section, and the latter is discussed in the second part; while together highlighting that as potential seekers of justice for children, both state and civil society have severe limitations.

A. STATE

The state is constrained by itself, so to say, as it recognises a child as an object of protection rather than as an active seeker of means to participate in the state's functioning. The child is only a citizen in the making, not an active citizen yet. The child's citizenship rights are mediated by adults, most commonly by parents or legal guardians. When it comes to accessing the judicial arm of the state, the child comes into the picture as a valid entity when an adult, such as one of the parents, approaches the courts, as happens in cases of marital discord. If parents fail in their natural functions or roles, for example, in feeding the child well or looking after the child during sickness, the state may itself be responsible in cases where the parents have no wherewithal to look after the child's needs. Poverty, unemployment, displacement, accidents and numerous other

circumstances indicated in the first part of this essay, can place parents in situations where the state is implicated in their inability to fulfil their role as parents. The child who suffers in such cases can hardly expect justice unless the judiciary can exercise some palpable pressure on the state to admit its culpability. This may be proven to have arisen from bad or poorly conceived policies, but certain structural issues are also involved.

Since independence, the state has covered its culpability, in the matter of failure to ensure that parental poverty does not hamper children's education, by pointing towards its financial capacities. Historically, the Indian state has tended to save the funds it could have spent on children's education for using them elsewhere. The budget allocations estimated by experts to be necessary for educating children have not materialised. After the promulgation of RTE, it seemed that a break was reached in this matter. The central government assumed the responsibility to provide additional funds to the states for ensuring compliance of RTE norms. However, this happy situation did not last long, and within a decade of RTE being enforced, central funding specified for RTE started to dry up. Once again, we are back to the question of the state's capacity for looking after children.

The judiciary has all along accepted this argument. It did not consider itself to be in a position to interrogate the state's policies, including financial outlays. Such a move would be regarded as strange, and many might regard even a mild interrogation as a judicial overreach or an instance of activism. The possibility of such labeling, however, cannot overshadow the argument we are pursuing in the context of justice for children. No financial provision for children can ignore the fundamental economic necessity of borrowing from the future, so to say, simply because children cannot become productive enough in a short time to make the state's investment in their needs viable. Fiscal balancing can only be practiced in this matter by referring to distant time horizons. If the judiciary is to offer justice to those who are children at present, it can hardly do so without interrogating the state's economic policies that directly affect children. Their access to justice is an aspect of governance, therefore the judicial desire to enable children to experience justice cannot be fulfilled if there is no questioning possible of the executive's decisions and financial allocations that concern children.

The present distribution of powers of the legislative, the executive and the judicial arms of the state is based on the assumption that the state's role with reference to children will be mediated by the family and the community. This assumption is becoming increasingly untenable on account of pervasive turmoil in the family and the community. The turmoil is a consequence of changes in the external realities that shape childhood and institutions that serve it, particularly the school. The external socio-economic realities in which schools function have also been changing in many regions under the stress of factors like the crisis of

the environment, social conflict, economic migration from rural to urban areas, and mass displacement caused by development projects. The prolonged crisis caused by the Corona pandemic has added yet another major factor in this list.

The new social ethos surrounding children is marked by the rise of a post-welfare state which enables national and global corporate entities to access children directly with the help of digital communication devices. This kind of unmediated access to children of all ages presents a sharp contrast to the state's own dependence on the family for reaching out to children, judicial institutions being no exception. Responding to this unprecedented situation does not necessarily mean widening the state's access to childhood, but it does mean that a deep review of all protective mechanisms and laws concerning children is required. Judicial understanding of childhood in India is based on liberal European philosophers who had assumed that the state would provide a protective cover for children. This edifice of liberalism has implied that state institutions would treat the family as a legitimate buffer whose capacities to look after the young would receive the state's support. The current world order under which children are growing up has torn apart the protective cover that liberal philosophy had assumed and assisted in conceptualising. The liberal edifice has been replaced by the neo-liberal assertion that the market is superior to the executive for fulfilling most of the welfare functions of the state. Justice for children and protection of their rights demand radical revisiting of all concepts and means by which state institutions were supposed to make childhood a special stage of life.

In the specific sphere of child rights, the state's financial provisions for institutions like the NCPCR, juvenile homes and orphanages need to be taken into account. The NCPCR carries the responsibility of supervising the implementation of children's rights. For fulfilling this role, the NCPCR needs a considerable institutional apparatus spread across the country. The apparatus it has is skeletal and similar to the new institutional design favoured by the post-welfare or neo-liberal state. Although new, its institutional capacity is as poor as that of juvenile homes and orphanages.

B. CIVIL SOCIETY

The judiciary often seems to depend on civil society representatives for serving children who are facing distress. The term 'civil society' denotes several accepted meanings which revolve around the idea that human collectivity has a conscience. This idea has gone through several mutations in the evolution of the usage of the phrase 'civil society.'

Originally meant to convey the social sphere outside the state's domain of power, the term 'civil society' has greatly diminished over the recent decades and it now refers to non-government organisations or NGOs. The idea of civil society

presents an unacknowledged difficulty when we associate the idea with the ideological ethos in which civil society emerges and expresses itself. From the point of view of childhood, the ideological ethos have great significance because they shape the chances children might have of developing their own minds when they receive education at an institution. Given that all institutions comprising a system of education function in the ethos created by the ideas available at the time, any ideological formation—based on a fixed¹³ set of ideas being pushed by political forces—poses a major issue for the learning that children will receive at the institutions where they are enrolled. An ideology can be flexible or frozen, depending on its own origins and the social conditions under which it has matured. A frozen ideology is unlikely to allow the education system to encourage children to think freely. The common and erroneous perception that children are like empty vessels helps a frozen ideology to view and treat children as targets of the bunch of thoughts comprising the ideology. If the targeting is done at an early age, the effects can be quite marked and constricting. From the child's perspective, this would be a negation of his or her right to education inasmuch as education is a process of learning to think for oneself. Reaching out to such a child should constitute a duty of the institutions of justice. How exactly they might be of help to children in this case, let alone a vast number of children targeted by a powerful ideology, is a subject deserving deeper acknowledgement and further analysis in jurisprudence. In the context of the ideological ethos indicated here, the term 'civil society' can hardly be regarded as an expression of collective conscience.

It is unfortunate that civil society in the Indian context is now increasingly regarded as a synonym for NGOs. They seem to match the concept of civil society as a voice propelled by society's own conscience and organisational capacity, as distinct from the state's role and diverse functions. In India's past, especially the recent past associated with the freedom struggle, civil society found expression as voluntary groupings and organisations of scale. They were different from the present-day NGOs in that the latter provide paid regular employment and are dependent on funds acquired from the government or overseas donors. Significant shrinkage of employment opportunities for educated youth has led to a great increase in the number of NGOs in the recent decades. Some of them work for children in rural areas and urban slums. Their capacity to serve the poorer strata of rural and urban society varies; so does their perspective on children's educational and other rights. On the issue of child labour, for instance, there are sharply divided perspectives among NGOs committed to children. Some believe that compulsory education can wean all children away from work, whereas others focus on improving the conditions under which children of the poor work.¹⁴ This is just one example to indicate that civil society cannot be treated as a coherent or

¹³ Karl Mannheim, *Ideology and Utopia*, 1991.

¹⁴ Vijayalakshmi Balakrishnan, *Growing Up and Away: Narratives of Indian Childhoods Memory, History, Identity*, 2011.

organised voice in the context of children's rights. Within the field of education too, NGOs have strong differences that deserve to be called ideological.

V. CONCLUSION

To conclude, the right to elementary education that children in India now possess in a technical sense is far from becoming a social reality. Even though the RTE now has the status of a formally enacted law, The case of this right is no different from several other rights that children have been endowed upon by the UN Convention. The problems it faces are rooted in the conceptual issues that the application of the idea of rights to children presents. As discussed quite elaborately in the first part of this paper, the key difficulty of this application resides in the fact that children are by nature devoid of the capacity to protect their own rights. Their dependence on the state and the conscience of society creates the need to take into account the historical conditions in which we find ourselves today. The paper has examined these conditions, and on the basis of this examination it has argued that judicial intervention is inescapable if the RTE is to be saved from irrelevance. The experience of laws promulgated to prevent child marriage and child labour also proves that justice for children in different spheres is hard to dispense under the present understanding and conditions. A radical review of the structure of the arrangements that define the inter-relations between the three arms of the state, namely the legislature, the executive and the judiciary, is necessary to break the prevailing historical stalemate on fulfillment of the right to education and other rights of children.