



**LAW COMMISSION
OF INDIA**

ONE HUNDRED AND FORTY - SIXTH

REPORT

ON

SALE OF WOMEN AND CHILDREN

**PROPOSED SECTION 373 - A
INDIAN PENAL CODE
1993**

CONFIDENTIAL

K.N. SINGH
(Ex-Chief Justice of India)



CHAIRMAN
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GOVERNMENT OF INDIA
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Res. 3019465

D.O. No. 6(3) (19)/93-L.C. (LS)

February 26, 1993

Dear Prime Minister,

The social evil of sale of women and children has been growing in India during recent years. This evil is substantially confined to the poor sections of our society. All human beings especially women and children need special protection of law as they are particularly vulnerable to exploitation. The Law Commission has considered this subject *suo moto* having regard to the importance of the subject in the light of social justice to the poor. Though the Indian Penal Code contains certain provisions designed to deal with the disposal of persons below a certain age by way of sale or other mode of transfer, but those provisions are confined to cases where the transaction is entered into, for one of the purposes specified in those sections. But where such a purpose does not exist or is not proved at the trial, those provisions are not adequate to safeguard the interest of women and children.

The Law Commission has considered the matter in detail and I have great pleasure in forwarding herewith the 146th Report of the Law Commission of India on the subject of "Sale of Women and Children" with a proposal to add Section 373A to the Indian Penal Code to meet the social evil.

This is the third Report of 13th Law Commission.

With regards,

Yours sincerely

Sd/-

(K. N. Singh)

Hon'ble Shri P.V. Narasimha Rao,
Prime Minister and Minister for
Law, Justice & Company Affairs,
New Delhi.

Copy to :

Hon'ble Shri H. R. Bhardwaj,
Minister of State for Law, Justice and
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Shastri Bhawan,
New Delhi.

(K.N. Singh)

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CHAPTER I

Introduction

1.1 Genesis of the Report

The subject dealt with in this Report has been taken up by the Law Commission of India for consideration *suo moto*, having regard to the importance of the subject in the light of social justice.

1.2 The Social evil

The social evil of sale of women and children has been growing in India during recent years¹. While the Indian Penal Code contains a few provisions designed to deal with the disposal of persons below a certain age by way of sale or other mode of transfer, those provisions are confined to cases where the transaction is entered into, for one of the purposes specified in those sections. Where such a purpose does not exist or cannot be proved at the trial, these sections cannot be pressed into service. The Law Commission felt that the matter needed an examination, with a view to remedying any deficiency in the existing law that might be discovered as a result of such examination.

Truly speaking, no human being can be allowed to be treated as a chattel, in this twentieth century. Women and children, however, particularly need the protection of the law, because they are peculiarly vulnerable to exploitation.

The Constitution of India specifically declares "rights against exploitation" as a part of the fundamental rights guaranteed by the Constitution, see in particular Article 23. The right against exploitation has figured before the Supreme Court in several cases².

The right has been recognised and its provision for punishing its contravention laid down in several statutory provisions. Of course the fact that such prohibitions against specific practices were considered necessary does not mean that in legal theory those practices are regarded as valid. At the same time if the penal law is found to be defective in any respect it is obviously desirable that the position be looked into and such reforms as may be found necessary be considered.

Accordingly, the present Report devotes itself to an examination of the law relating to sale of women and children and transactions analogous thereto with a view to suggesting reforms, if needed.

1.3 Scheme of discussion

With the above object in view we proceed to examine in this Report the present legal position and the deficiency therein. Our concrete recommendation for amending the law will be made at the end of the Report.

CHAPTER 2

The Present Legal Position

2.1 Provisions in the Indian Penal Code : sections 372 and 373.

The provisions of the Indian Penal Code that come nearest to the subject under consideration in this Report are sections 372 and 373 of the Code¹. These sections prohibit the sale, letting out on hire or otherwise disposing of a child for the purpose specified in the sections, as also the converse conduct of purchasing, hiring or otherwise obtaining possession of a child for the specified purpose. The sections are concerned with the sale etc. of a person below the age of 18 years.

2.2 Limited scope

As these sections are confined to a transaction entered into for the specified purpose, their ambit is limited. Broadly speaking, the scope of the two sections is confined to sale or purchase, etc. for prostitution or illicit intercourse with any person or for any unlawful and immoral purpose. Explanation II to section 372 (which applies to section 373 also) defines "illicit intercourse" as meaning "sexual intercourse between persons not united by marriage or by any union or tie which, though not amounting to a marriage, is recognised by the personal law or custom of the community to which they belong or, where they belong to different communities, of both such communities, as constituting between them a quasi-marital relation."

2.3 Adoption Act

A provision occurring in the Hindu Adoptions and Maintenance Act, 1956 also may be referred to, at this stage, as a matter of interest. Section 17 of that Act prohibits the charging of consideration for giving a child in adoption under the Act². It is obvious that the section is confined to cases where the sale of the child takes place in connection with, or coupled with, adoption. It will have no utility and cannot be pressed into service, where the malpractice in question has no connection with adoption. A transaction having no connection with adoption sale for Rs. 12,000 reportedly went unpunished³.

2.4 Legal position in regard to Contract

It is perhaps needless to point out that the "sale" of a woman or child would not be regarded as a valid contractual transaction for the purposes of civil liability. In a Madhya Pradesh Case⁴, a woman was "sold" (though not in open market). The purchasers sued for refund of the consideration because the sale failed in its purpose. The plaintiff (a woman) had made an arrangement with the defendant to provide a *dangi* girl as a mistress for the plaintiff's son. The defendant sent a girl to the plaintiff's house, making the representation that the girl was a *dangi*. But the girl went back to her village after staying for only twenty days with the plaintiff's son. The plaintiff later discovered that the girl was a dancing girl. The plaintiff sued for refund of the money. The defendant raised the plea of unenforceability of the agreement. The trial court as well as the first appellate court decreed the suit. On second appeal the High Court set aside the decree, as the agreement violated Article 23 of the Constitution and the suit could not be countenanced.

It may also be mentioned that in another case decided by the same High Court⁵ the proposition that individuals cannot be treated as chattels, has been recognised.

2.5 The case for Amendment

We shall examine in detail in the next Chapter the question whether the provisions of the Penal Code are adequate to deal with the social evil with which this Report is concerned.

CHAPTER 3

Need for Amendment of the Law

3.1 Deficiency in the present section.

It appears to us that the present legal position, which has been summarised above, is seriously deficient in one important respect. It does not take care of cases where a sale *simpliciter* of a person takes place, where there is no object of using the person sold for a purpose not specified in sections 372-373 of the Indian Penal Code. In particular, these sections fail to attend to the situation of sale of a minor for marriage.

It is also worth mentioning that the section do not cover the case of sale or purchase of adult women. We are of the view that on both these points, the law should have a specific penal provision. Detailed reasons are set out in the next few paragraphs.

3.2 The Constitutional aspect.

The Constitution of India in Article 23, *inter alia*, prohibits the traffic in human beings and envisages that such conduct shall be an offence punishable by law. This is a fundamental right and obviously it is the intendment of the Constitution that the necessary legislation be found on the statute book. Of course, this does not mean that a new (post-Constitution) legislation should be enacted for the purpose.

Besides this, the broad objective of social justice underlying the Constitution and the specific provisions in the Part containing Directive Principles of State Policy, which direct that the State must prevent exploitation of women and children, envisage that conduct in the nature of exploitation be discouraged.

It is an imperative of the Constitution that—

- (i) the content of the existing statutes be studied, in order to consider how far they carry out the constitutional mandate, and
- (ii) in so far as the existing statute may be found to be inadequate, necessary amendment be made in the law.

It cannot be denied that the sale of women and children, whatever be the object of such sale, amounts to traffic in human beings or partakes of the character of such traffic. Even if it be argued that "traffic" contemplates a systematic course of conduct (i.e. a series of acts) and may not embrace an isolated act of sale, it should be emphasised that an isolated sale offends the spirit of Article 23, if not its letter.

3.3 Legislative competence.

In this context, it is pertinent to point out that where a particular social malpractice is found to contravene the provisions of Article 23 of the Constitution¹, then, by virtue of Article 35(a)(i) of the Constitution, Parliament is competent to enact a law on the subject. Further, under the Concurrent List, Entry 2, *inter alia*, legislation on Criminal Law (including matters dealt with in the Indian Penal Code at the commencement of the Constitution) is within the competence of Parliament.

3.4 The gravity of the offence.

Not much argument is needed to support the proposition that the sale of a human being (of any age or sex) is an anti-social act of the most heinous character whatever be the purpose. It tends to destroy all that mankind in its journeys through centuries of progress towards a civilized society, has sought to achieve. It inevitably creates a species of such human beings, thus violating all norms of civilized society.

The greatest harm is caused by such conduct to the individual so treated. He or she loses the most precious possession of a human being, namely respect for oneself, and a sense of identity and an awareness of one's dignity. No greater harm can be caused to an individual than the inflicting of a wound on his or her dignity, the maiming of his or her respect for oneself, the degradation of the soul. A society which tolerates such conduct not only harms itself by degrading its moral level, but is also guilty of injustice to the individual, and ultimately damages the social fabric.

3.5 Relevance of above arguments.

These arguments are not new. They have been present in the minds of most social reformers who have tried to initiate, intensify or consolidate improvements in social structure and practices. In some form or other, these propositions have been addressed in the course of history to so many generations of men and women in the past, and—though this may be regarded as unfortunate—it may be necessary also to address such arguments to generations to come in future. But these aspects have assumed a renewed significance in the present context. Since the existing law dealing with the sale of women and children is not all-embracing or comprehensive enough, it becomes necessary to amend it. And it is a truism that an amendment of the law—particularly, an amendment of the criminal (law in the shape of addition of a new offence—can be effective, only if the need for it is demonstrated by reasoning that carries its own convincing force on the moral level.

3.6 Magnitude and frequency of the Evil.

Of course, the mere fact that a certain social malpractice is found to prevail in a particular society does not necessarily mean that it is an appropriate case for the intervention of the law. There are limitations to the use of legal sanctions, particularly criminal sanctions. Not every departure from high moral norms can be dealt with by legal measures. The coercive machinery of the law may not be appropriate in many cases. Sometimes intervention of the law even where it is appropriate in principle, may not be effective in practice. Even apart from these difficulties, there is the question of economy in the use of criminal sanctions. But in the present case, these considerations can be said to be counter-balanced by the basic values constituting the underpinnings of the various propositions which we have set out in the earlier paragraphs of this Chapter. Moreover, the malpractice with which we are concerned causes serious harm to the individuals concerned and to society. Besides this, the amendment of the Penal Code which we are contemplating in this Report, will not, so far as we can see, impose an unduly heavy burden on the law enforcement machinery. It seeks to extend to a modest extent the principle of the existing penal provisions and is not likely to cause serious practical anomalies.

3.7 Some recent instances

At this stage, it appears to be proper to mention that the practice of sale of women and children, the evil effects of such a practice and the abhorrence that it deserves, are all amply demonstrated by several actual instances of such sales, reported recently². It is against this background that we proceed to examine the law.

3.8 Sections 372 and 373 of the Indian Penal Code.

The social evil of selling women and children is dealt with in the Penal Code, directly or indirectly, by several provisions. As stated above³, the provisions that come nearest to the point under consideration are sections 372 and 373, Indian Penal Code, which read as under :—

“372. Selling minor for purposes of prostitution, etc.

whoever sells, lets to hire, or otherwise disposes of any person under the age of eighteen years with intent that such person shall, at any age, be employed or used for the purposes of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will, at any age, be employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.

Explanation I.—When a female under the age of eighteen years is sold, let for hire, or otherwise disposed of to a prostitute or to any person who keeps or manages a brothel, the person so disposing of such female shall, until the contrary is proved, be presumed to have disposed of her with the intent that she shall be used for the purpose of prostitution.

Explanation II.—For the purposes of this section, “illicit intercourse” means sexual intercourse between persons not united by marriage or by any union or tie which, though not amounting to a marriage, is recognised by the personal law of custom of the community to which they belong or, where they belong to different communities, of both such communities, as constituting between them a quasi-marital relation.

“373. Buying minor for purposes of prostitution, etc.—Whoever buys, hires or otherwise obtains possession of any person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will, at any age be employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend ten years, and shall also be liable to fine.

Explanation I.—Any prostitute or any person keeping or managing a brothel, who buys, hires or otherwise obtains possession of a female under the age of eighteen years shall, until the contrary is proved, be presumed to have obtained possession of such female with the intent that he shall be used for the purpose of prostitution.

Explanation II.—“Illicit intercourse” has the same meaning as in Section 372.”

3.9 Limitations of sections 372-373, Indian Penal Code

Having quoted sections 372 and 373, Indian Penal Code, we would like to point out that (so far as it is relevant for the present purpose) the operation of these sections is subject to two important limitations.

- (a) In the first place, they are confined to sale (or purchase), letting on hire (or taking on hire) or other disposal (or acquisition on disposal) of a person under the age of 18 years. They do not cover the sale, etc. of adults.
- (b) Secondly, the sections are confined to transactions entered into for any of the purposes specified in the sections. Broadly speaking, these are—
 - (i) prostitution,
 - (ii) illicit intercourse with any person, or
 - (iii) any unlawful and immoral purpose.

Thus, sale of a person above the age of 18 years is not punished nor is any sale for a purpose not specified in the sections.

3.10 Need for Amendment

It is this limited scope of the two sections that gives rise to the need for amendment. There is, we believe, justification for extending the scope of the legal provisions so as to cover cases where a woman or a child is sold, whatever be the immediate or ultimate objective of the transaction and whether such objective be apparent or not. We have, in the opening paragraphs of this Chapter, set out some of the important considerations that should be borne in mind in approaching the subject. It is not necessary to repeat everything that has been said in those paragraphs. It is sufficient to state that the sale of a human being—particularly where the question is of an individual who needs special protection of the law—should be regarded, not only as a practice deserving condemnation by the law, but as conduct that should be visited with criminal penalties. The presence of an unlawful or immoral purpose may aggravate the criminality; but its absence does not take away the heinousness of the conduct. Such a transaction destroys the very humanness of the individual so sold, let on hire otherwise disposed of. Even from the point of view of the doer of the act, it is a demoralising act, because, if the law does not punish that doer, it may tend to generate and perpetuate in him an insidious abhorrence of human values and a disregard of the dignity of human beings. He tends to treat human beings as chattels to be used for accomplishing mercenary motives. The lacuna existing in the present law, therefore, needs to be removed.

3.11 Section 17, Hindu Adoptions Act.

We shall make our recommendation on the existing law in due course⁴. At this stage, we would like to make a reference to a provision of some interest contained in the Hindu Adoptions and Maintenance Act, 1956. Section 17 of this Act reads as under :—

“17. *Prohibition of certain payments.*—

- (1) No person shall receive or agree to receive any payment or other reward in consideration of the adoption of any person and no person shall make or give or agree to make or give to any other person any payment or reward, the receipt of which is prohibited by this section.
- (2) If any person contravenes the provisions of sub-section (1), he shall be punishable with imprisonment, which may extend to six months, or with fine, or with both.
- (3) No prosecution under this section shall be instituted without the previous sanction of the State Government or an officer authorised by the State Government in his behalf.

CHAPTER 4

Recommendation

4.1 Recommendation to insert section 373-A in the Indian Penal Code.

In the light of the discussion in the preceding Chapters, we recommend the insertion, after section 373 of the Indian Penal Code, of a new section on the following lines :—

“373-A *Selling woman or minor, etc.*

(1) Whoever, in a case not falling under section 372 or section 373⁹ or section 373¹⁰—

(a) sells, lets to hire or otherwise disposes of, for consideration, any person under the age of eighteen years, or any woman of any age, or

(b) buys, hires or otherwise obtains for consideration the possession of any such person or any woman, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

(2) The provisions of this section apply in relation to a person of unsound mind, as they apply in relation to a person under the age of eighteen years.”

Explanation : Nothing in this section shall apply in relation to the hiring of the services of any person.

~~4.2 Consequential change :~~)

On the insertion of the above section in the Indian Penal Code, a consequential amendment of the First Schedule to the Code of Criminal Procedure, 1973 will be needed. That Schedule deals with the categorisation of offences as bailable etc. It is suggested that the newly created offence should be —

(a) cognizable,

(b) non-bailable, and

(c) triable exclusively by the Court of Session.)

4.3 Persons of unsound mind

One minor point may be mentioned. A person of unsound mind may, at least theoretically, be subjected to the type of misconduct under consideration. Such cases may not be frequent in practice, but they should also be covered in the new section. Incidentally, the existing sections 372 and 373 of the Indian Penal Code¹ do not cover persons of unsound mind sold for the purpose of prostitution or illicit intercourse or unlawful or immoral purpose. The Commission is of the view that the aforesaid sections should be suitably amended to cover such persons also.

4.4 Proposed offence distinct from kidnapping

It should be pointed out that it may not be appropriate to link up the sale, etc. of the minor child (for a purpose not falling within sections 372 and 373 of the Indian Penal Code) with abduction. The offence of kidnapping or abduction is primarily one concerning violation of guardianship rights (in the case of kidnapping from unlawful guardianship under section 361) or infringement of the right to personal liberty by the use of force or fraud where the offence is that of kidnapping from India (section 360) or of abduction (section 362). The misconduct on the part of the parent or other guardian which is now under consideration, is more in the nature of abuse of guardianship and violation of the dignity of the child placed in guardianship. Of course, the offence may be committed even by a person who is not the guardian of the child, but even in that case, the offence is in the nature of violation of human dignity, leading to exploitation of the child in many cases.

4.5 Removal from custody

It may also not be quite appropriate to go to the extent of punishing any *mode or device* by which a child is removed from the lawful custody of the parent. Such a provision is bound to raise questions of some difficulty—for example, the question as to in what circumstances one parent may remove a child from the custody of the co-parent (when there is a discord between the two parents) and similar other issues. Courts have already been confronted with such controversies while dealing with cases under section 361 of the Indian Penal Code. Under that section, taking or enticing a minor (under 16 years

if a male, or under 18 years if a female) or any person of unsound mind, out of the keeping of the lawful guardian without the guardian's consent, commits the offence of kidnapping from lawful guardianship. There is an exception in regard to the act of any person who, *inter alia*, in good faith believes himself to be entitled to the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose. These complications will be avoided under the section as formulated above. On principles also, we are concerned here, not so much with the rights of the guardian or with personal liberty, as with the broader principle that a child ought not to be treated as a chattel.

We recommend accordingly.

Sd/-
(K.N. SINGH)
Chairman

Sd/-
(S. RANGANATHAN)
Member

Sd/-
(D.N. SANDANSHIV)
Member

Sd/-
(SARDAR ALI KHAN)
Member (Part-Time)

Sd/-
(P.M. BAKSHI)
Member (Part-Time)

Sd/-
(M. MARCUS)
Member (Part-Time)

(CH. PRABHAKARA RAO)
(Member-Secretary)

NEW DELHI *The 23rd February, 1993.*

FOOTNOTES

CHAPTER 1

1. See *Nihal Singh v. Ram Bai*, AIR 1987 M.P. 126.
2. *People's Union of Democratic Rights v. Union of Indian*, AIR 1982 SC 1473; *Sanjit Roy v. State of Rajasthan*, AIR 1983 SC 328; *Salal Hydroelectric Project v. State of J&K*, AIR 1984 SC 177; *Bandhua Mukti Morcha v. Union of India*, AIR 1984 802; and *Neeraja Chowdhury v. State of M.P.*, AIR 1984 SC 1099.

CHAPTER 2

1. See paragraph 3.8 *infra* for the text.
2. See paragraph 3.11 *infra*.
3. 'THE TRIBUNE,' 23 December 1992, page 3.
4. *Nihal Singh v. Ram Bai*, AIR 1987 M.P. 126, 127.
5. *Manohar Dalal v. State of M.P.*, AIR 1987 M.P. 132, 134.

CHAPTER 3

1. Cf. paragraph 2.4 *supra*.
2. See paragraph 2.2 and 2.4 *supra*. A two year old baby was reportedly sold by her uncle for Rs. 80,000. 'INDIAN EXPRESS,' 3 December 1992, Page 1.
3. December, 1992, page 1.
3. Paragraph 2.1, *supra*.
4. Chapter 4, *infra*.

CHAPTER 4

1. Paragraph 3.8, *supra*.