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Indrasish Majumder & Jhanvi Pakanati

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MANUFACTURED ORPHANS: A Call for Recognition of Illegal Adoption as Child Trafficking

Indrasish Majumder & Jhanvi Pakanati***

[Abstract: *The adoption industry is a massive, money-driven market in which orphans are 'manufactured.'* Almost 90% of the estimated 143 million children in orphanages worldwide are not orphans at all. The illegal labelling of a child as 'abandoned' or 'surrendered' in the eyes of the state is widely used to produce orphans. While Section 81 of the Juvenile Justice Act criminalises offering or receiving children outside of the procedures outlined in the Act, the criminal act is still not construed as child trafficking under the Indian Penal Code. Unfortunately, despite the Law Commission of India's strong recommendation in its 146th Report to broaden the scope of legal provisions to include cases where a woman or a child is sold, regardless of the immediate or ultimate goal of the transaction and whether such a goal is obvious or not, nothing substantial has been done by the state in this regard. This paper takes a child rights approach and establishes the need for expanding the scope of the trafficking clause in the Indian Penal Code to include cases in which a woman or a child is sold, regardless of the immediate or ultimate goal of the transaction and regardless of whether such a goal is readily apparent or not.]

I

Introduction

The term "manufactured orphans" was initially introduced in the Undercover Asia programme broadcast on Channel News Asia. In essence, the term pertains to children who are orphaned as a result of illegitimate methods yet are deemed legally adoptable through the adoption industry.¹ One of the most prevalent adulterous practices in the production of orphans for illicit adoptions involves the systematic abduction of infants,

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¹ *Undercover Asia, S4E5: Manufactured Orphans*, CHANNEL NEWS ASIA (May 18, 2017), available at: <https://www.channelnewsasia.com/watch/undercover-asia/manufactured-orphans-1584686/> (last visited May 10, 2023).

the use of improper inducements for consent (such as coercion, bribery, or misrepresentation), and the pursuit of improper financial gain (such as payment for the children or the payment of bribes to intermediaries involved in the adoption process).² The tactics encompassed in this phenomenon pertain to the circumvention of regulations and the falsification of official documentation, including but not limited to birth and medical certificates, maternal credentials, DNA test outcomes, and counterfeit records of relinquishment or desertion.³ The adoption industry, which is primarily driven by profit, is responsible for the creation of orphans.⁴ According to recent estimates, a significant proportion of the approximately 143 million children residing in orphanages globally—nearly 90%—do not meet the criteria for orphanhood.⁵ The case of Anupama Chandran serves as a recent and notable example of artificially created orphans. In this particular instance, the petitioner's parents deliberately concealed their child's identity and relinquished custody to a facility overseen by the Child Welfare Committee, effectively rendering the child parentless. The infant was then "legally free for adoption," according to the Child Welfare Committee, and was given up for adoption in defiance of the Juvenile Justice Act. In addition, the Missionaries of Charity, an organisation founded by Mother Teresa in Ranchi, was subject to investigation in 2018 due to allegations of involvement in a "baby-selling racket." This came to light when a nun associated with the shelter confessed to selling four infants.⁶

As per the Indian Penal Code, the offence of "trafficking" is deemed to be applicable solely upon substantiation of the fact that the illicit adoption was executed to facilitate sexual exploitation.⁷ Similarly, the Immoral Traffic (Prevention) Act also deals only with

² Nigel Cantwell, *The sale of children and illegal adoptions*, DEFENCE FOR CHILDREN (November, 2017), available at: <https://defenceforchildren.nl/media/1945/the-sale-of-children-and-illegal-adoption.pdf> (last visited May 10, 2023).

³ Sumithra Prasanna, *Lies, Greed, and Heartbreak: How Orphans Are 'Made' for the Adoption Industry*, CHANNEL NEWS ASIA (10 June, 2017), available at: <https://www.channelnewsasia.com/cna-insider/lies-greed-and-heartbreak-how-orphans-are-made-adoption-industry-1011031> (last visited May 10, 2023).

⁴ *Undercover Asia*, *supra* note 1.

⁵ *Kerala Baby Adoption Row: Congress Calls It Deliberate 'Human Trafficking'*, NDTV PRESS TRUST OF INDIA (24 Nov., 2021), available at: <https://www.ndtv.com/kerala-news/kerala-baby-adoption-row-congress-calls-it-deliberate-human-trafficking-2622840> (last visited May 11, 2023).

⁶ *Baby-Selling Racket in Ranchi: Missionaries of Charity Say Action is Being Taken to Ascertain Truth*, FIRST POST (12 Jul., 2018), available at: <https://www.firstpost.com/india/baby-selling-racket-in-ranchi-missionaries-of-charity-says-action-being-taken-to-ascertain-truth-4727381.html> (last visited May 11, 2023).

⁷ The Indian Penal Code, 1860.

the trafficking of minors for prostitution.⁸ There is absolutely no mention of trafficking for the purpose of illegal adoptions in these laws.

This paper analyses the present laws on illegal adoptions and argues that the transactional element—the buying and selling of a minor—deserves equal weight in the legal definition of human trafficking.

First, this paper examines domestic and international laws concerning illegal adoption. This part highlights the inadequacy of domestic legal measures in effectively deterring unlawful activities that may occur throughout the different phases of the adoption procedure. With respect to international law, the issue of illegal adoption is examined in light of its contravention of the UNCRC's stipulation on the best interests of the child.⁹ Additionally, there is a lack of clarity in international legal frameworks concerning the incorporation of orphan production into the scope of human trafficking.

The second part of the paper pertains to the rectification of the insufficiencies of the 1956 Immoral Trafficking (Prevention) Act and the Indian Penal Code, which have a general definition of "child trafficking", and compares them with the 2003 Goa Children's Act.¹⁰

The third part of this paper examines the 146th report of the 13th Law Commission. This report recommends the addition of Section 373A to the Indian Penal Code, which would render the sale of women or children unlawful, irrespective of the primary or secondary objectives of the transaction or their visibility.¹¹

The fourth part of this paper involves an analysis of the 2008 modification made to Russian legislation on human trafficking and suggests that such an amendment should be introduced in the Indian Jurisprudence, as well. This amendment stipulated that the act of purchasing or vending an individual would be classified as trafficking, irrespective of whether it was carried out with the purpose of exploiting the person. The paper also investigates whether the alteration in prosecution strategy in Russia resulted in efficacious convictions in instances of orphan production.

The paper culminates by emphasising the necessity for legislative action to modify the extant human trafficking legislation, drawing upon the Russian Child Trafficking Law as an illustrative instance. The paper delves into the distressing actualities of illicit adoptions while emphasising the pressing requirement for an all-encompassing approach that places children's needs at the forefront. This approach would facilitate the creation of an environment that promotes acceptance, growth, and welfare and recognises children as equitable contributors in the adoption procedure.

⁸ The Immoral Traffic (Prevention) Act, 1956.

⁹ The United Nations Convention on the Rights of the Child, 1989.

¹⁰ The Goa Children's Act, 2003.

¹¹ Law Commission of India, *Sale of Women and Children*, Report No. 146, 13 (February 1993), available at: <http://www.bareactslive.com/LCR/LC146.HTM> (last visited on May 11, 2023).

II

The Legal Framework Governing Unlawful Adoptions Within India

The Indian Constitution's Article 23¹² explicitly prohibits human trafficking, thereby safeguarding individuals' fundamental rights against exploitation. In addition to the aforementioned, it is noteworthy that Article 39(f)¹³ of the State Policy Directive Principles serves as a protective measure for minors, shielding them from exploitation and the adverse effects of "moral and material abandonment", albeit lacking legal enforceability. It is worth mentioning that the practise of designating a child as "abandoned" or "surrendered" by the state, despite being unlawful, is frequently employed to generate a population of parentless children.¹⁴

The Juvenile Justice Act of 2015 expanded the scope of the "child in need of care and protection" concept to encompass children who have been "abandoned" or "surrendered". According to Section 38 of the Juvenile Justice Act of 2015, it is mandatory for the Child Welfare Committee to declare children who have been abandoned, orphaned, or surrendered as legally free for adoption. The methodology employed must adhere to the directives issued by the Central Adoption Resource Authority (CARA), which are founded on the principles outlined in the *Laxmi Kant Pandey v. Union of India* legal precedent¹⁵. Additionally, adherence to Section 33 of the "Juvenile Justice (Care and Protection of Children) Rules, 2007" is required for the process of legally giving a child for adoption. This section outlines the necessary steps for such a declaration.¹⁶

The phenomenon of orphan manufacturing refers to situations where the process of identifying a child who is legally available for adoption, as outlined in the Juvenile Justice Act of 2015, is either circumvented or executed in an unethical manner that contravenes the Act's stipulations, regulations, and CARA guidelines. As a result of illegalities at various stages of the adoption process, child trafficking under the guise of adoption will have the scope to proliferate.¹⁷

Regarding the large number of children orphaned as a direct consequence of the pandemic and the protection of such orphaned or abandoned children from child

¹² The Constitution of India, 1950, Art. 23.

¹³ The Constitution of India, 1950, Art. 39(f).

¹⁴ The Juvenile Justice Act, 2015, S. 38.

¹⁵ *Laxmi Kant Pandey v. Union of India*, AIR 1987 SC 232.

¹⁶ Juvenile Justice (Care and Protection of Children) Rules, 2007, Rule 33.

¹⁷ Sara Bardhan, et. al., *The Challenges and Unaddressed Issues of Child Adoption Practises in India* (September 16, 2021, THE WIRE), available at: <https://thewire.in/society/challenges-issues-child-adoption-practises-india> (last visited May 13, 2023).

trafficking and the flesh trade, the Supreme Court ruled in a Suo motu petition that "no adoption of affected children should be permitted in contravention of the provisions of the JJ Act, 2015". It further stated that "state governments and union territories are directed to take action against NGOs and individuals who indulge in illegal adoptions".¹⁸ Sections 80 and 81 of the Juvenile Justice Act 2015 come into the equation at this point. It provides for punitive measures if adoption is not carried out in accordance with the prescribed procedures. They criminalise offering or receiving children outside of the procedures outlined in the Act, as well as buying or selling them. The aforementioned actions carry a penalty of imprisonment ranging from three to five years or a monetary fine of one lakh rupees.¹⁹

The Jalpaiguri child trafficking case is a notable illustration of the phenomenon of "manufactured orphans". The case was initiated subsequent to the discovery that newborns were being transported in containers typically used for biscuits. A medical professional who also served as a member of the Child Welfare Committee orchestrated the delivery of infants born to unmarried mothers or women from economically disadvantaged backgrounds, subsequently fabricating the separation of said children from their biological parents by alleging that they had passed away during the birthing process. Subsequently, several minors were trafficked overseas for unlawful adoption without undergoing the necessary vetting or official protocols. The individual in question received legal sanctions in accordance with the Indian Penal Code, specifically under Section 420, which pertains to the act of cheating; Section 370 (5), which concerns the trafficking of multiple minors; Sections 467 and 468, which relate to forgery; Sections 468 and 120B, which pertain to criminal conspiracy; and Section 201, which addresses evidence tampering. Additionally, the individual was also subject to the provisions outlined in Sections 75, 80, and 81 of the Juvenile Justice Act.²⁰ It is imperative to acknowledge that the inclusion of the term "trafficking" in the Indian Penal Code is contingent upon the revelation that the illicit adoption was executed with the intention of perpetrating some form of exploitation.²¹

¹⁸ *Contagion of Covid 19 Virus in Children Protection Homes, In re*, 2021 SCC OnLine SC 426.

¹⁹ The Juvenile Justice (Care and Protection of Children) Act, 2015, S. 80, 81.

²⁰ *Children Have Been All but Forgotten', SC Castigates National and WB Child Rights Commissions for Jurisdictional Tussle in Jalpaiguri Trafficking Case*, BAR AND BENCH (13 Jan., 2020), available at: <https://www.barandbench.com/news/litigation/sc-castigates-national-and-wb-child-rights-commissions-for-jurisdictional-tussle-in-jalpaiguri-trafficking-case> (last visited May 13, 2023).

²¹ *Supra* note 7.

III

Legal Framework Governing the Practise of Illegal Adoption at the International Law

The thematic report of the United Nations Special Rapporteur on the Sale of Children delineates illegal adoptions as those that stem from criminal activities such as child abduction, child sale, and trafficking, as well as from wrongful conduct in the declaration of adoptability, misrepresentation of legal documentation, or coercion. Additionally, any illicit acts or practices, including the absence of explicit consent from biological parents, improper financial gain by intermediaries, and associated corrupt practices, are considered illegal. The study on illegal adoptions in India will centre around the primary international instruments that have been ratified by the country.

I. The Convention on the Rights of the Child, 1989²²

The child's best interests are given priority in all adoption-related scenarios as stipulated in Article 21 of the Convention on the Rights of the Child. The adoption of a child necessitates authorization solely by proficient authorities in adherence to relevant laws and procedures. Additionally, it mandates that the adoption be permissible considering the child's status concerning parents, relatives, and legal guardians. Furthermore, it requires that the individuals involved have provided their informed consent to the adoption if deemed necessary.

The Convention on the Rights of the Child explicitly stipulates that minors possess the entitlement to protection against acts of sale, trafficking, and abduction, as outlined in articles 21 and 35. In contrast, unauthorised adoptions pose a threat to, and often infringe upon, various important regulations outlined in the Convention.

Article 7.1 of the Convention on the Rights of the Child stipulates that it is imperative to ensure, to the greatest extent feasible, that children have access to information about and receive nurturing from their biological parents. Article 8.1 of the Convention on the Rights of the Child stipulates that children possess the entitlement to safeguard their identity, which encompasses their nationality, name, and familial connections, as acknowledged by legal statutes, without any illicit intervention. According to Article 8.2, in situations where a child is unlawfully denied access to certain aspects of their identity, it is the responsibility of States Parties to offer suitable support and safeguarding measures to facilitate the prompt restoration of the child's identity. As per Art. 9.1 of the Convention, it shall be ensured by State Parties that a child shall not be separated from his or her parents against their will.

²² The United Nations Convention on the Rights of the Child, adopted *via* General Assembly resolution 44/25, Nov. 1989.

II. Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography (OPSC)²³

According to Article 3 of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography (OPSC), selling a child includes "improperly inducing consent, as an intermediary, for the adoption of a child in defiance of applicable international legal instruments on adoption" and such offences must be criminalised whether committed "domestically or transnationally, or on an individual or organised basis".

III. The Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children: an international legal instrument that aims to combat human trafficking²⁴

In Article 3, the term "trafficking in persons" is defined as the act of recruiting, transporting, transferring, harbouring, or receiving individuals through the use of force, coercion, abduction, fraud, deception, abuse of power, or exploitation of a position of vulnerability. This exploitation may involve the provision or receipt of payments or benefits to obtain the consent of a person who has control over another individual, with the ultimate goal of exploiting the victim. The term "exploitation" encompasses a range of activities, including but not limited to the prostitution of others, sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, or the removal of organs.

The definition of exploitation in the Trafficking Protocol is not clearly defined, as it only specifies the minimum components that it encompasses.²⁵ The absence of specificity in the Trafficking Protocol's examples allows for the inclusion of illegal adoption practices, despite not being explicitly referenced. The inconclusiveness of the omission stems from the fact that the list is open-ended. As stated in reference ²⁶, the Protocol does not specify the mandatory targets of exploitation, nor does it offer precise delineations of what qualifies as exploitative behaviour. According to the text, it can be deemed rational to assert that the individual who falls prey to exploitation must be someone who has been subjected to transportation, transfer, harbouring, or reception. David M. Smolin

²³ Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (2000), *available at*: 07, <https://www.ohchr.org/en/instruments-mechanisms/instruments/optional-protocol-convention-rights-child-sale-children-child> (last visited Sep., 2024).

²⁴ Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (2000), *available at* - <https://www.ohchr.org/en/instruments-mechanisms/instruments/protocol-prevent-suppress-and-punish-trafficking-persons> (last visited Sep., 07, 2024).

²⁵ Trafficking Protocol, *Supra* note 119, Art. 3(a).

²⁶ Anne T. Gallagher, *THE INTERNATIONAL LAW OF HUMAN TRAFFICKING* (2010).

contends that the challenge with defining exploitation lies in its reliance on the interpretation of terms such as "unjust" or "improper." Moreover, the term exploitation connotes a negative connotation of utilising or leveraging for personal gain or benefit. The challenge in regarding adoption as a type of exploitation lies in the societal conditioning that views adoption as an intrinsically positive rather than detrimental practice.²⁷

But what does exploitation include? For example, labour and sex are clearly included in the definition, even when they are not inherently exploitative. Nonetheless, when coupled with the "commodification" of an individual, such actions transform into inequitable exploitation of the individual for the advantage of another. In this instance, the commodification of individuals through the sale of labour and sex results in their transformation into exploitative practises. Smolin differentiates between the exploitation of the birth family and the exploitation of the child. Adoption is not universally regarded as a positive action from the standpoint of birth families, as it frequently entails the dismantling and devaluation of familial bonds. Smolin argues that adoption can be considered exploitative if the child is obtained through illegitimate means and subsequently utilised by the adoptive parents to fulfil their desire for a child who is not biologically related to them, despite the child receiving proper care and upbringing.²⁸ According to Smolin, the act of illegal adoption entails the exploitation of an infant's nurturing capacity for the benefit of others. In essence, Smolin posits that exploitation is inherent in illegal adoption, regardless of whether the adoptive family is affectionate towards the child. The definition of exploitation is when a person makes use of another human being, thereby violating its fundamental rights. An illegal adoption is an adoption in violation of human rights. Consequently, an adoption that is conducted in violation of legal regulations constitutes an act of exploitation. This is due to the fact that the child is utilised by adoption intermediaries for financial gain and subsequently by adoptive parents who seek to fulfil their desire to establish a family unit. It concerns a violation of the rights of a child as laid down in the UNCRC, as well as the rights of the child's original family to respect family life. As per Smolin's perspective, the act of illegal adoption can be classified as a form of child trafficking.

After having explored the implications of OPSC and the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, in relation to unlawful adoptions, we will proceed to analyse their compatibility with the UNCRC in order to ascertain the extent to which illegal adoptions contravene the principle of the best interests of the child.²⁹

²⁷ Trafficking Protocol, *Supra* note 119, Art. 3(a).

²⁸ David M. Smolin, *Child Laundering as Exploitation: Applying anti-trafficking Norms to intercountry adoption under the coming Hague Regime*, available at: <https://lawreview.vermontlaw.edu/wp-content/uploads/2012/02/smolin.pdf> (last visited Sep., 07, 2023).

²⁹ *Id.*

The United Nations Convention on the Rights of the Child (UNCRC) mandates that state parties take measures to prohibit and penalise the abduction, sale, or trafficking of children. As per the definition provided by the OPSC, the act of "selling children" encompasses any form of transfer of a child from one person or group to another in exchange for remuneration or other forms of consideration. Hence, in compliance with the Convention on the Rights of the Child, any instance where a child is sold by an individual is deemed unlawful and may be regarded as an act of exploitation. As per this definition provided, it can be inferred that the act of selling a child applies to all situations and can be carried out by any individual or collective entity. This encompasses instances where a parent engages in the direct sale of their child to an adoption agency, or where a parent sells their child to a trafficker or facilitator who subsequently sells the child to an adoption agency. The Convention on the Rights of the Child encompasses provisions pertaining to the issue of child abduction. The aforementioned provision stipulates that the involuntary separation of a child from their guardians is prohibited unless such separation is deemed to be in the best interests of the child.

The United Nations Convention on the Rights of the Child (UNCRC) employs a more comprehensive interpretation of trafficking, encompassing the possibility of a child being trafficked with the intention of adoption. The definition in question does not consider exploitation as a prerequisite for categorising illegal adoption as child trafficking, as the involvement of illicit elements and monetary transactions alone suffice to qualify it as such.

The comprehensive examination reveals that orphan manufacturing violates the principle of the best interests of the child under Article 3 of the UNCRC and thus qualifies as "exploitation". Categorising it as such would enable the incorporation of unlawful adoption into the definition of "human trafficking" in both domestic legislation of member states and international legal frameworks.³⁰

IV

Deficiencies in the Current State of Domestic Law

Section 370 of the Indian Penal Code³¹ provides the legal definition of human trafficking in India. The aforementioned provision penalises individuals who employ specific methods to enlist, convey, shelter, transfer, or acquire an individual for the objective of exploitation. Such methods may encompass intimidation, physical compulsion, duress, deceit, misrepresentation, abduction, misuse of authority, or enticement. Exploitation,

³⁰ Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 35.

³¹ The Indian Penal Code, 1860, S. 370.

on the other hand, isn't defined but is declared to include any act of physical or sexual exploitation, slavery, or practises analogous to slavery, servitude, or the forced removal of organs, for which the punishment ranges from 7 to 10 years in jail with a fine. The aforementioned notion bears a striking resemblance to the definition of trafficking as stipulated by the UN Protocol and further delineates the exclusion of unlawful adoptions from its characterization of exploitation.

Incorporating Section 370 into a First Information Report (FIR) in instances of unlawful adoptions can prove challenging, particularly when the fabricated orphan is not transported to another nation or subjected to subsequent physical or sexual exploitation. This is in contrast to the Jaigalpuri child trafficking incident,³² wherein the minors were conveyed to foreign countries in biscuit containers, thereby being subjected to physical exploitation.

It is impossible to deny that the sale of women and children, regardless of the end purpose, amounts to or resembles human trafficking. Although the term "traffic" is defined as a systemic course of behaviour consisting of a series of occurrences rather than a solitary act of sale, it is important to acknowledge that a solitary act of sale violates the essence of Article 23 of the Indian Constitution.³³

The Constituent Assembly of India, responsible for drafting the country's constitution, recognised human trafficking as a grave concern, as evidenced by the inclusion of Article 23 in the Indian Constitution, which prohibits both "human trafficking" and "forced labour". However, despite the Constitution's emphasis on addressing trafficking, the Immoral Trafficking (Prevention) Act, 1956 (ITPA), which serves as India's primary anti-trafficking legislation, solely pertains to trafficking those state of affairs which result into prostitution. Consequently, non-prostitution trafficking falls outside the purview of the ITPA. Additionally, it can be observed that the ITPA does not make a clear distinction between children and women as separate groups of individuals who have been trafficked, except for the provision of enhanced penalties for instances of trafficking that involve minors who have been subjected to commercial sexual exploitation. Stated differently, the legislative framework fails to acknowledge the significance of specifically addressing anti-trafficking issues pertaining to minors.

The Goa Children's Act of 2003 is the only legislation in India that provides a comprehensive definition of child trafficking. As per Section 2(z), the term "child trafficking" encompasses the act of procuring, recruiting, transporting, transferring, harbouring, or receiving individuals, whether legally or illegally, across borders or within a country, through means such as coercion, force, abduction, deception, fraud, abuse of power or vulnerability, or by providing or receiving payments or benefits, with

³² *Supra* note 20.

³³ Kiran Bhatti, *A Review of The Immoral Traffic Prevention Act, 1986*, available at: https://cprindia.org/wp-content/uploads/2022/01/A-Review-of-the-Immoral-Traffic-Prevention-Act-1986_Final-Edit.pdf (last visited May 13, 2023).

the intention of obtaining the consent of a person who has control over another person, for the purpose of monetary gain.³⁴

This serves as evidence that the current legislation on domestic child trafficking is insufficient to effectively tackle the widespread issue of unlawful adoption practices. It is time for the central government to learn from the Goa state law, which broadly defines child trafficking in accordance with UNCRC principles.³⁵

Section 373A as a Code of Pessimism

The 13th Law Commission of India, in its 3rd and 146th Report of 1993, proposed the addition of Section 373A to the Indian Penal Code.³⁶ The report underlined the necessity for such insertion and why the present set of norms and regulations do not adequately combat the "social evil of the sale of women and children".³⁷ Former Minister of State for Home Affairs, Mr. Kiren Rijju, answered Mr. Motilal Vohra's query in Rajya Sabha on the non-implementation of the above suggestion. The minister expressed disagreement regarding the necessity of implementing the proposed alteration, citing the adequacy of the current legislation, particularly the revisions made in 2013.³⁸

The Indian Penal Code (IPC) delineates, in Sections 372 and 373, the illegality of engaging in the sale, hiring, or any other form of disposal of a minor. The aforementioned sections pertain to an individual who has not yet reached the age of majority. The aforementioned elements are limited to a specific transaction for the intended objective. The scope of this activity is restricted to engaging in prostitution, engaging in unlawful sexual intercourse with any individual, or participating in any other activities that are deemed illegal or immoral. Section 370A was incorporated into the Criminal Law Amendment of 2013, with a specific focus on cases where the victim has been trafficked for sexual exploitation. This amendment serves to restrict the interpretation of the term "for sexual exploitation".³⁹

The Hindu Adoptions and Maintenance Act of 1956 contains a pertinent section that may have applicability in this context. The seventeenth section of the aforementioned Act prohibits the act of levying a fee to place a child for adoption. This provision is applicable in cases where the sale of a child occurs in conjunction with, or as a complement to, adoption, wherein a child is sold in conjunction with or in addition to

³⁴ *Id.*

³⁵ The Goa Children's Act, 2003, S. 2(z).

³⁶ Law Commission of India, *Supra* note 11.

³⁷ Law Commission of India, *Supra* note 11.

³⁸ *Id.*

³⁹ *Reasons for Non-implementation of Section 373A*, RAJYA SABHA DEBATES (07 Aug., 2014), available at: <https://www.mha.gov.in/MHA1/Par2017/pdfs/par2014-pdfs/rs-130814/RS%203751.pdf> (last visited Apr., 30, 2024).

the adoption process. When the malfeasance under consideration is unrelated to adoption, it is deemed inefficacious and cannot be operationalized.

All the legal matters discussed pertain to the existence of an item available for purchase. The aforementioned restrictions are not applicable in situations where the transaction was executed without any intention of this nature. The recommendation for amendment by the Law Commission was based on the restricted extent of the two aforementioned sections, a stance that is deemed appropriate. There exists a rationale for expanding the ambit of legal provisions to encompass instances where a female or a juvenile is trafficked, irrespective of the transaction's immediate or ultimate objective and its perceptibility. The Supreme Court, in the legal matter of *Roxann Sharma v. S.*,⁴⁰ also acknowledged the issue. According to *Arun Sharma (2019)*, it is inappropriate to treat a child as a mere property.⁴¹

The presence of an unlawful or unethical objective may amplify the degree of criminality; however, the absence of such a motivation does not reduce the atrocity of the deed. The act of engaging in such a transaction result in the dehumanisation of the individual who has been subjected to being sold, rented, or otherwise disposed of.⁴² From the perpetrator's standpoint, the act is demoralising and, in the absence of legal consequences, may foster a gradual erosion of their regard for human values and dignity. They exhibit a tendency to view others as commodities to be exploited for financial gain.⁴³

The aforementioned underscores the necessity of addressing the gap in the present legal framework concerning the trade of females and minors. Specifically, it is imperative to enact measures that would forbid the transaction in situations where the exchange is not intended for any overt or covert objective. The state has yet to take significant action in response to the Law Commission's recommendation to amend Section 373A, despite nearly three decades having elapsed since the recommendation was made. Undoubtedly, there is a growing demand for this supplement.⁴⁴

⁴⁰ *Roxann Sharma v. Arun Sharma*, AIR 2015 SC 1966.

⁴¹ Indian Penal Code, 1860, S. 372, 373; The Indian Penal Code, 1860, S. 370(A), inserted *vide* the Criminal Law (Amendment) Act, 2013.

⁴² The Hindu Adoption and Maintenance Act 1956, S. 17.

⁴³ J. Alexander, *Why the United States should define illegal adoption practices as human trafficking* 35 *Houston Journal of International Law* 3 (2014).

⁴⁴ L.A. McCarthy, *Transaction Costs: Prosecuting Child Trafficking for Illegal Adoption in Russia* 6 *ANTI-TRAFFICKING REVIEW* 31–47 (2016).

V

Russian Legislation on Human Trafficking and its Potential Applicability in India

An amendment to the Russian human trafficking law in 2008 established that the act of purchasing and/or selling a person, irrespective of whether it was done for exploitative purposes, constituted trafficking. Consequently, it can be observed that the Russian law enforcement authorities prioritise the transactional aspect of human trafficking, which involves a direct exchange of money for the sale of a person, over the more ambiguous notion of exploitation as defined in the various international conventions and protocols ratified by Russia.

It is a common occurrence for Russians to cite the statistic that twenty Russian infants who were adopted by American families have been subjected to homicide. Matthew Mancuso, an American citizen, was found guilty of committing incest and rape against his daughter, who was adopted from Russia in 2005. Additionally, he was found to have disseminated images of his daughter on websites that feature child pornography. Although side payments and gifts, often directed towards orphanages and their staff, were prevalent in adoption practices during that period, the media consistently emphasised the transactional aspects of adoption in cases where the process did not go as planned.⁴⁵

The occurrence of these tragedies could have been prevented if adoptive parents had refrained from paying bribes to acquire these children or evaded the necessary screening procedures. The focus on the transactional aspect of child trafficking and unlawful adoption is a component of a narrative that has been in existence for two decades. From the standpoint of Russian law enforcement and, by extension, the Russian state, the act of profiting from a child rather than relinquishing them to a state-run orphanage facility is considered a criminal offence.

In contrast to the quality of care that a child would receive at a state facility, it is deemed inappropriate for a parent to jeopardise the child's well-being by selling the child to an unfamiliar purchaser with uncertain motives. The utilisation of this strategy has proven to be highly efficacious in cases involving the illicit trafficking of children for the purpose of adoption. After 2008, nearly all cases of unlawful adoption that were tried under human trafficking statutes culminated in guilty verdicts. In 2010, the conviction rate for defendants was 80%, while in 2011, it was 100% for all six defendants. In 2012, 83.3% of defendants were found guilty, with one case still awaiting a verdict at the time of this writing. By 2013, a total of seven projects had been initiated, with four having

⁴⁵ Maggie Farley, *Father Is Convicted in Child-Rape Case*, LOS ANGELES TIMES (24 Aug, 2005), available at: <https://www.latimes.com/archives/la-xpm-2005-aug-24-na-girl24-story.html> (last visited Sep., 07 2024).

been concluded and the remaining three still in progress. Each of the offences entailed two aggravating factors, namely "trafficking a known minor" and "trafficking individuals in a dependent state", leading to sanctions that varied between three and nine years.

VI

Conclusion

The issue of illegal adoptions has become a significant concern in the realm of children's rights over the past few decades. The incidence of illicit adoptions has surged in light of the ongoing pandemic. As per research conducted by India Today, numerous minors who have been bereaved of one or both parents due to COVID-19 are being subjected to "trafficking" by individuals and groups involved in unlawful adoption operations. India has over 8,000 operational childcare institutions (CCIs), yet only 5,850 of them are officially registered with the National Commission for Protection of Child Rights (NCPCR). The collective number of children residing in childcare institutions (CCIs), encompassing both registered and unregistered individuals, amounts to 232,937. The aforementioned cohort exhibits a higher vulnerability to receiving inadequate healthcare services, being subjected to sexual and physical maltreatment, and being victimised by human trafficking. Given the increasing severity of the situation, it is imperative that the government revise the existing laws pertaining to unlawful adoption.⁴⁶

The focal point of the investigation has been the financial exchange that constitutes the core of a trafficking offence. The existing legislation fails to recognise illegal adoption as a form of child trafficking, despite the established equivalence between the two. The paper has analyzed two potential methodologies that could be considered for the purpose of amending domestic legislation to reduce the occurrence of unlawful adoptions. The initial measure entails the revision of the legislations that prohibit the act of trafficking minors for the purpose of sexual and physical exploitation. The act of selling a child for adoption, regardless of the intention to exploit the child, is classified as trafficking. As previously indicated, the act of offering or receiving children outside of the procedures provided in the Juvenile Justice Act 2015, as well as the act of buying or selling them, are criminalised under Sections 80 and 81 of the aforementioned legislation. Nonetheless, according to the Juvenile Justice Act, the highest possible punishment for such actions is a prison sentence of three to five years or a monetary

⁴⁶ *Trafficking in Persons Report: Russia*, U.S. DEPARTMENT OF STATE, 2022 (19 Jul., 2022), available at: <https://www.state.gov/reports/2022-trafficking-in-persons-report/russia/> (last visited May 14, 2023).

penalty of one lakh rupees. The act in question exhibits a discernible discrepancy between the magnitude of the transgression and the extent of the penalty prescribed.

VI

Recommendations

In accordance with the Russian trafficking law, the Goa Child Trafficking Act of 2003, and the recommendation put forth by the 146th Law Commission report, it is imperative that the government expeditiously revise the trafficking law to encompass instances of illicitly selling minors for adoption, irrespective of whether such actions were motivated by exploitative intentions.⁴⁷

Furthermore, it is recommended that the legislative body contemplate expanding the scope of the term "exploitation" as outlined in the trafficking provisions of the Indian Penal Code to encompass illicit adoption practices. Rather than crafting new legislation explicitly targeting illegal adoption, it might simply be incorporated into the current definition of child trafficking.

In addition, the act of stigmatising parents who resort to selling their offspring due to dire circumstances presents significant policy implications with regard to the government's responsibility to establish social policies and initiatives aimed at aiding families who perceive that selling their child is their sole option. Allocating more budget to social programmes that tackle substance abuse, unemployment, homelessness, gender discrimination in the workplace, and other child care initiatives could prevent many cases of child trafficking. Acknowledging children as equitable participants in the adoption process necessitates not only enhancing institutional regulations but also implementing an all-encompassing approach that prioritises the requirements of a child to foster an atmosphere of inclusivity, growth, and contentment. To achieve this objective, it is recommended to implement a comprehensive approach that prioritises the needs and perspectives of children.

⁴⁷ Nitin Jain, *et. al.*, *The pandemic's ruthless toll: Covid orphans up for sale!*, INDIA TODAY (30 Nov., 2021), available at: <https://www.indiatoday.in/india/story/covid-orphans-sale-illegal-adoption-sting-operation-video-1882630-2021-11-30> (last visited May 14, 2023).