

NOTES ON THE REFORM OF LAW FOR RAPE AND ALLIED OFFENCES

PART ONE

INTRODUCTION

1. The Criminal Law Amendment Bill, 1980, introduced by the Hon'ble Union Home Minister in the Lok Sabha on 11 August 1980 testifies to the governmental and parliamentary concern with the tragic incidence of violence on Indian women and the determination to refashion criminal law, in its style and substance, for more effective protection of women. The urgency with which the entire problem was considered is indeed noteworthy. The Statement of Objects and Reasons acknowledges "the pressing demands inside and outside Parliament" for the reform of the law. The Bill in its conception manifests, in the best democratic traditions, swift governmental responsiveness to articulate public concern over a national issue.
2. As signatories to the Open Letter to the Chief Justice of India in the Mathura case, we too felt it to be our duty to participate in the national debate concerning reform of the law of rape. Three of us who signed the Open Letter prepared on May 1, 1980, a Memorandum Concerning the Law of Rape. This was submitted to the Hon'ble Home Minister, the Hon'ble Minister for Law and Justice, some members of Parliament, governmental and semi-governmental agencies and groups interested in reforming the law relating to custodial violence on women. We find the Bill responsive to some of the suggestions made in that Memorandum, which had an encouraging reception overall. We now offer our comments on the Bill in the same spirit which impelled us to submit the Memorandum.
3. The concern felt by the Union Government over the increasing incidence of rape and the consequential public resentment against the inadequacies and failures of law and legal system, is clearly visible from the Statement of Objects and Reasons. The Government has given earnest and anxious consideration in proposing changes in the Penal Code, Criminal Procedure Code and the Evidence Act to make the law stringent and effective. The objects of the bill are almost non-controversial and laudable. But its thrust in some areas is not quite adequate while in others it seems to be over-reaching its objectives. Moreover a few drafting deficiencies such as lack of clarity and precision have crept into

some areas. In Part Two we make some general policy observations and in subsequent parts we give our detailed comments on each clause of the Bill.

PART TWO

BASIC POLICY CONSIDERATIONS

(i) Need for equal emphasis on preventive aspects

4. The Bill's main forte consists in providing more stringent punishments including mandatory minimum sentences for the various types of the offence of rape. The Bill also envisages measures to facilitate the proof of rape, to make the trial more effective against the accused and less irksome and embarrassing to the victim of rape. The Bill, however, has **not** proposed any preventive and precautionary measures against rape and more particularly against custodial rape.

5. It seems to us axiomatic that deterrent and more deterrent punishments for rape by themselves would not necessarily reduce the incidence of custodial violence. Indeed, custodial violence on women may take, in response to changes in the law, different and more insidious forms. In any case, deterrent punishments will not necessarily make the places of custody reasonably safe for the women who find themselves at the mercy of those having their custody. A more effective way of stopping custodial rape is not to allow, as far as possible, women to be in the custody of male police and public servants. The need to have this preventive or precautionary measures against the growing incidence of custodial rape was in a way recognised when in the recent past several State Governments issued administrative directions to the police to the effect that 'as far as possible no woman should be arrested after sunset and before sunrise.' The proviso to section 160 (1) of the Criminal Procedure Code is another such indication as the proviso puts an embargo on the police power to call a woman-witness to the police station for the recording of her statement. The need to avoid sending women to male police custody has also been recognised by the law Commission in its 84th Report on "Rape & allied offences etc".

(6) It appears to us that the Bill misses a valuable opportunity to incorporate provisions which stress preventive remedies. In our Memorandum (which features here as an Annexure) we had suggested several changes in the Criminal Procedure Code which would minimise, if not altogether eliminate, custody situations for women in their encounters (as witnesses, complainants, suspects, accused, and as offenders) with the law enforcement authorities. We had also suggested changes in the law facilitating bail for women offenders, for adequate legal services to rape victims including the Office of a Public Defender for women. Without disputing the utility of providing for more stringent punishments, specially for the more aggravated categories of rape, we would at the same time like to reiterate the preventive aspects elaborately suggested in our Memorandum. We do hope that these proposals will be given due consideration and will eventually be enacted.

(ii) **Some Questions Concerning Minimum Punishment**

7. The Bill by clause 3 proposes to provide mandatory minimum punishment for every type of rape, the aggravated forms being provided with increased mandatory minimum punishments. It is true that for every such provision there is a proviso whereby the court may for adequate and special reasons to be recorded in writing impose a lesser sentence than the prescribed mandatory minimum.

8. Contemporary penological thought and practice disfavour mandatory minimum punishments. But there may be some justification in providing minimum punishments in case of well defined aggravated forms of rape. In the prevailing atmosphere where the menace of rape is on the increase, the minimum punishment as provided in the proposed section 376(2) appears to be certainly justifiable and we entirely endorse the proposed changes. We would like to go a step further and to suggest that the other aggravated form of rape, like a rape on the blind woman or an insane or invalid woman should also attract mandatory minimum punishments and should also be included in the proposed section 376 (2).

9. However, we do not favour the minimum sentence of 7 years now envisaged by the Bill in section 376 (1) for non-aggravated form of rape. If a penal provision is felt to be unreasonably harsh, it in effect is counter-productive. Rather than strictly implementing what is perceived, as a harsh regime of law, the entire system of administration of criminal justice often tries to save the accused as much as possible from unreasonably harsh punishment. In this process the real culprit is likely to be discharged or even acquitted.

10. Further, it should be noted that in situations of unreasonably lenient or low punishment for rape, the existing law provides for enhancement of sentence. According to the new provision made in section 377 of the Criminal Procedure Code, 1973, the public prosecutor can in such cases, go in appeal to the High Court against the inadequacy of the sentence.

(iii) **Legal Services for Women**

11. The Bill does not make any proposal for providing adequate legal assistance to the victims of rape. In the prevailing social conditions which fail to ensure security for women and considering various handicaps suffered by the victims of rape, it is necessary that the victims of rape are provided special and adequate legal assistance. Experience has shown that it is not enough to depend upon the police and the prosecuting agencies to do full justice to the victims of rape. We accordingly urge that an office of Women's Defender should be created. Competent persons, preferably women, having knowledge of women's problems and eligible to practice law and armed with adequate powers should be appointed Defenders.

(iv) **The need for expedition in rape trials**

12. All criminal trials should be expeditious; but there are special reasons why the trial in case of the offence of rape should proceed more expeditiously. The Bill is silent on these points. It seems to have been assumed that the general provision contained in section 309 Criminal Procedure Code for expeditious disposal of trial proceedings would also effectively extend to proceedings in rape cases. This assumption cannot be sustained in the face of the present realities of the administration of criminal justice. We therefore suggest that the Bill should provide for the insertion of a new section 309-A in Criminal Procedure Code making a specific provision for expeditious trial in rape cases.

(v) **Marital rape**

14. The Bill has abolished the distinction between marital rapes and other rapes, for the purpose of punishment and makes every rape including marital rape a cognizable offence. That means, the husband alleged to have committed marital rape can be arrested by the police without warrant and the police can investigate into the commission of the said offence even though the aggrieved wife or any other relative has not complained. Making marital rape a cognizable offence involves the risk of the police interfering unjustifiably in family life. We recommend that marital rape should continue to remain a noncognizable offence.

PART THREE

SUGGESTIONS FOR CHANGES IN THE CRIMINAL LAW

(AMENDMENT) BILL 1980

(i) **Section 2 of the Amendment Bill**

15. The idea underlying the proposed addition of Section 228-A is to prevent such undue disclosure and publicity of the rape victim as would further aggravate her plight and jeopardise prospects of a relatively normal life. This is made abundantly clear by the Statement of Objects and Reasons which, in para 2 (4), posits that the "prosecutrix should be protected from the glare of embarrassing publicity during the investigatory and trial stages". However, the proposed formulation is so wide as to make printing or publishing of any matter, which may make the identity of the rape victim known an offence. The offence is also one of strict liability. The fact of printing or publication of the name of the victim or any other matter leading to the disclosure of the identity is by itself an offence.

16. Such blanket prohibition on publicity is undesirable. Any public discussion, through print media or otherwise (through mass meetings, distribution of handbills etc.) on an actual incident of rape and allied offences which may eventually be construed by a court to have made known the identity of the victim, will be an offence. The question really is: does the proposed addition contemplate criminalization and penalization of public

discussions and protest concerning rape and allied offences? The present language leaves no doubt that this is the result, even if not intended.

17. Such a result will not protect any real interests of victims of rape and allied offences or of Indian women generally. Indeed, it would considerably facilitate abuse of public power by those officials so inclined (notably some among the Indian police) to commit custodial violence against women. It would also assist the economically and politically more powerful people who will be further protected by this embargo on public discussion, after having secured the submission of those under their power through assaults and rape on women. Such a provision would also make difficult action by women's organizations and concerned groups who wish to mobilize public opinion against default in investigation and prosecution of rape and allied offences.

18. The changes in law should not be such as to penalize and criminalize for the future the very instrumentality which necessitated reexamination of the law concerning rape in the first place. Public opinion and its mobilization by active citizen groups is an ally of even-handed and efficient law enforcement. By making such activation of public opinion impossible through an embargo on public discussion of rape and allied offences, will reinforce the already numerous inhibitions against public participation in the administration of the criminal justice system. Above all, this will achieve the result of curbing the potential of citizens' demand for legal changes made manifestly desirable by their experience.

19. The objective of section 228-A should therefore be restricted to prevention of **undue and deleterious** publicity, for pleasure or profit, of the identity of victims, alleged or real, of rape and allied offences. This laudable objective, suggested in our Memorandum and by many other agencies, should be achieved without incurring any of the social costs described in the preceding paragraphs. We accordingly suggest the addition of the following words in line 11 of the Bill, after the word 'committed':

"and when such printing or publication is not made in good faith for public interest"

20. We also suggest the deletion of the minimum punishment of one month (lines 13-14) and therefore also of the proviso on the grounds mentioned in part one of this note (see paras 7-10).

21. We need not further explain why this addition is necessary and desirable. In view of this, the entire subsection (2) of the proposed section 228-A should be deleted.

(ii) Section 3 of the Amendment Bill

It appears that the proposed new section 375 incorporates all the components of the notion of consent (or lack of it) as provided in section 90 of the Indian Penal Code. This is a welcome change.

23. The real problem with section 375, 'secondly' is not that the meaning of the word 'consent' is not clear. The real problem, as we stressed in the Memorandum, is that the prosecution and courts do not often enough invoke that clause in the absence of evidentiary standards. The mere addition of words 'free and voluntary', as now proposed, would not solve this problem. We sought to provide a set of evidentiary standards in our Memorandum. We again invite your attention to para 23 of the Memorandum, and urge its adoption as an Explanation to section 375.

24. In section 375 'thirdly' we would suggest substitution of the words "or by criminal intimidation as defined in section 503" by the words "to her or any person in whom she is interested". We suggest this because while the words of section 503 are clear enough, a reference to that section in section 375 will directly import in its operation the entire case law of section 503. The prosecution in trials of rape and allied offences would have to prove, if the proposed formulation stands unaltered, all the necessary ingredient of criminal intimidation as defined and interpreted by courts in contexts of offences other than rape.

25. The problem with section 375 'thirdly' was quite direct and simple. The original formulation only referred to consent of the victim when it was obtained by putting her in the fear of death or hurt. The proposal to extend the radius of such threat of hurt to the victim or "anyone else present at the place" was found by us to be inadequate (see para 22 of our Memorandum). We suggested addition, instead, of 'near relations and friends'. The wider expression viz or any person in whom she is interested we now propose is quite adequate. This formulation gives proper protection to the victim without at the same time importing the problematics of section 503.

26. In Explanation 2 to section 375 (line 45), we suggest deletion of the words "under a decree of judicial separation". The protection given to estranged wives living separately from their husbands should not be restricted by reference to "living separately under a decree of judicial separation." Not all women under marital strain or discord who live apart from their husbands seek, for a variety of well known reasons, judicial separation. In the circumstances, the mere fact of living separately from her husband should be enough for the purposes of section 375.

27. We also suggest the addition of the following to Explanation 2; "Whether a woman is living separately or not is a question of fact, depending upon circumstances in each case".

28. The Exception to section 375 should be placed immediately before the Explanation. The exception should refer to "sexual intercourse" and not "sexual offence". The latter appears to us to be a printer's devil. The age of the wife mentioned therein should be consistent with the age mentioned in clause 'seventhly' of the same section : that is, it should be at least sixteen years.

29. We suggest deletion of the words "takes advantage of his official position and"

from clauses (b) and (c) of section 376 (2). (delete from lines 15-16 and 22). We make this suggestion because the public servant or the superintendent or manager of a jail, remand home or any other place of custody established by law or of a women's or children's institution, committing rape on a woman in his custody or in custody of a public servant subordinate to him is *in itself* an aggravating factor, which should attract enhanced punishment. The phrase "takes advantage of his official position" is not merely redundant but it also substantially weakens the realization of the principal objective of the proposed bill, which according to the Statement of Objects and Reasons, is to make the law "more stringent".

We suggest that in clause (d) to section 376 (2) the expression "commits rape on a woman who is receiving treatment in that hospital" read instead "commits rape on the hospital premises on a woman who is receiving treatment". This clarification is necessary as otherwise it would include in the category of aggravated rape, cases of rape committed outside the hospital premises on a woman receiving treatment in the hospital (e. g, as an outpatient).

31. We strongly suggest that an additional category of aggravated rape be added after category (e) to section 376 (2) reading as follows :

"(f) commits rape on a blind woman or a woman of unsound mind or a physically disabled woman".

Clearly, women in this category are among the more vulnerable to rape and allied offences and have been very often unredressed victims of such offences. Society and law owe a special kind of solicitude to them.

32. We see no reason why in Explanation 1 (line 36, page 3 of the Bill) the definition of 'gang rape' is confined to three or more persons. It should read *two* or more persons as the reason for the original formulation is neither self-evident nor desirable.

33. While we appreciate the proposal in sections 376A, 376B and 376C, making sexual intercourse by public servants and others not amounting to rape an offence, we earnestly suggest that the notion of 'seduction' in section 376A and 376B be eliminated. The essence of the offences contemplated by these provisions is that public servant has sexual intercourse with a woman in his custody by taking "undue advantage of his official authority". The addition of the requirement of seduction frustrates this objective, because the term 'seduction' is nowhere precisely defined in the Penal Code. And when it is used as an operative element constituting the offence, it would lead to uncertain, unexpected, and even unacceptable results in terms of the objectives of the proposed changes.

34. We suggest that section 376C should also contain the words "taking undue advantage of his official position" as is the case in section 379A and 376B.

(iii) **Clause 4 of the Amending Bill**

35. Clause (4) of the Bill proposes that enquiry into and trial of rape or allied

offence be conducted in camera. This provision will also include trial of rape where: (i) the victim is murdered (ii) the prosecutrix is not alive at the time of trial and (iii) where there is a joint trial of rape and other offences. No worthwhile social purpose is served in the first two situations in requiring trial of rape in camera. We also believe that even when a trial involves rape and other offences, the court should have the power and discretion to separate the proceedings, one to be held in camera and the other in the ordinary course.

(iv) Clause 7 of the Amending Bill

36. We suggest that an additional entry (to be inserted after the first entry in the table on page 5 of the Bill)

| | | | | |
|--|-------|----------------|-------|-------|
| If the rape is by husband on his wife. | Ditto | Non-cognizable | Ditto | Ditto |
|--|-------|----------------|-------|-------|

The above entry might have been inadvertently missed from the relevant table. For obvious reasons the entry appears to be necessary.

PART FOUR

OTHER RECOMMENDATIONS

37. Our Memorandum made several specific suggestions for the amelioration of women, especially the victims of rape and other allied offences. We reiterate these suggestions, inviting your attention to the detailed reasons for these proposals given in our Memorandum:

- (i) Provision be made, a /a the Children Act, 1960 to ensure that no woman arrested under the law shall be kept in police custody in any circumstances and that police be obligated to inform relatives of arrested woman (see para 6 of our Memorandum).
- (ii) women voluntarily going to police station to register complaints or record statements should be mandatorily informed of their rights (para 7 of our Memorandum).
- (iii) amendment of Indian Penal Code providing for specific punishments for wilful disobedience of directions of law in favour of and for protection of women (see paras 8-9 of the Memorandum)

(iv) provisions for magisterial investigation and examination in cases of custodial rape (paras 10-12 of the Memorandum).

(v) specific changes in Criminal Procedure Code regarding more liberal bail for women (para 13 of the Memorandum).

(vi) provision of legal services to women (para 14-15 of the Memorandum).

(vii) provision of mandatory medical examination of the alleged offender (paras 16-17 of the Memorandum)

(viii) incorporating the sanction of public censure (para 20 of the Memorandum)

(ix) changes in the Indian Evidence Act forbidding disclosure of the victim's moral character, her sexual encounters and relations with persons other than the accused (paras 25-26 of the Memorandum)

PART FIVE

CONCLUSION

38. The foregoing suggestions and comments are designed to strengthen the Bill so that its original aspiration expressed in the Statement of Objects and Reasons, to "make the law more stringent without jeopardising fair trial" be fulfilled in full measure. An amendment to law which, not unjustifiably, focusses on punitive aspects, with enhanced penalties, is indeed a very important step forward. But an effective and just regime of laws will have to go beyond punishment to prevention of custodial violence on Indian women. A more imaginative management of sanctions and directions of law is called for. We have addressed ourselves to this task and we hope that our proposals will receive the consideration of the Union Government and the supreme lawmakers of India in both the Houses of the Indian Parliament.

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ANNEXURE I

A MEMORANDUM CONCERNING

THE LAW OF RAPE

1. Of the many forms of violence against women in India, custodial violence involving rape and molestation, has clearly been on the increase in recent years. Indian women, especially in the rural areas but by no means only there, continue to be subjected, nearly thirty years after Independence, to degrading and inhuman treatment at the hands of the very people whose solemn duty it is to uphold the dignity of human person in the course of enforcement of the law. Rape in police stations or by the police is the most notorious form of violence against women; it is being reported with distressing regularity, and increasing frequency, over the last few years, whether this be in Andhra Pradesh (Rameeza Bee and Shakila cases), Madhya Pradesh (consistent police raping of adivasi women disclosed in 1977-78), Maharashtra (the Mathura case), Punjab (the Patiala episode) or Bihar and Uttar Pradesh (with too numerous instances which cannot be captured by reference to any one incident). The Mathura case on which so much attention got focussed recently is, we believe only the tip of the iceberg crushing the personality and rights of Indian womanhood. But custodial violence of this nature is not confined to police alone. One hears of forced prostitution and molestation in women's prisons and of similar treatment in other institutional homes, shelters and centres for women under the management of State Governments. The dramatis personae are very often public servants. One finds instances even of nurses being raped or sexually molested in hospitals.

2. We focus here on custodial violence on women for the simple reason it disqualifies India as a nation from calling itself as a civilized society. And when such violence occurs at the hands of police it distressingly brings into disrepute the entire institution of police.

3. In the definition of 'custodial violence' we include every violence against women occurring in public places at the hands of public servants. We also include within this notion such violence committed by public servants even when it is so organized as to avoid the venue of public places. But basically our focus is on custodial violence in the sense of violence by public servants in public places such as police stations, women's institutions, hospitals and the like. Our suggestions for the change in the law of rape and necessary changes in other laws other than the Indian Penal Code also incidentally extend to rape and sexual molestation and abuse by public servants at places other than public places.

4. In arriving at our formulations and proposals, we have naturally benefitted by the recent public discussion on the law of rape in the context of the Mathura case (and notably

the fact that women, as citizens and persons, have rights which they ought to respect. On the other hand, women, normally unaware of their standing at law, will find this kind of information useful in their encounters with the law enforcement process. In both ways, this procedure would enhance the police-women relationship. And in any case, the frequently demonstrated potential for violence in such encounters would be somewhat diminished.

Punishment for Non-Compliance With Directions of the Law

8. Even as we propose these changes, we remain aware that directions under the law may be more frequently honoured in breach, Section 166 of the Indian Penal Code (hereafter IPC) concedes this possibility. It provides that if a public servant knowingly disobeys "any direction of the law as to the way in which he is to conduct himself" and he disobeys such direction with the intention or knowledge that it will cause "injury to any person", he shall be punished with simple imprisonment up to one year, or fine or both. But prosecutions under this section are few and it remains possible for directions to be flouted with impunity, as is evidenced by the callous disregard of the direction given in S. 160 (1) Cr. P.C. prohibiting the calling of women witnesses to police stations. The magnitude of the problem in general was recognized when the Rajya Sabha approved in 1978 a change in section 166 of the I. P. C. providing for a higher punishment for this offence. We endorse that suggestion as well as the proposed new section 166-A for the I.P.C.

9. But we believe that to deal with wilful disobedience of the directions of law in situations of custodial violence to women it is necessary to have specific changes. We suggest therefore that the relevant part of the I.P.C. be modified as follows. First, the I.P.C. should clearly and specifically prescribe that non-compliance with any direction of law in favour of and for the protection of women, including directions under Section 160 (1) of the Cr. P.C. (and other directions we have now proposed in the preceding section) shall be punishable with imprisonment up to three years, second, a public servant who in discharge of his duties or performance under the law conducts himself in such a way as to injure a woman shall also be guilty of an offence punishable with similar imprisonment. The latter category will, for example, make it an offence to molest or sexually abuse a woman going to police station on her own volition to make a complaint or record a statement, or a government medical practitioner, in cases of rape, being careless or negligent in performance of his duties in such a way as to cause injury to women.

The Prosecutorial Process in Situations or Situations Violence Including Rape

10. While it is not quite correct to suggest, without any qualification, that police and prosecutors have a wide discretion to prosecute or not to prosecute, we feel that the available discretion in process is often likely to be exercised in ways disfavouring prosecution when police are themselves involved in situations of custodial rape or violence over women. To reduce, if not to eliminate, situations of lack of prosecutorial action or initiative, we suggest that magistrates may be invested with special powers in such cases.

11. First, we propose, that in all cases involving allegations of custodial violence against women where a nocharge report is filed (under section 169 read with section 173 (4) of the Cr. P. C.), the magistrate shall in every case examine the woman alleged to have been raped or sexually abused and then decide as to the acceptance or otherwise of the police report of no-charge. This will ensure that the no-charge report would be accepted only if the magistrate is satisfied not just on the basis of the report or record but only after the personal examination of the victim-woman,

12. Second, we propose as a very special measure justified by the incidence of custodial rape and violence, that the magistrate should have the power, as soon as he gets a report (copy of F.I.R. or otherwise) that a woman has been allegedly raped while in custody of a public servant or by a public servant, he may, if he so chooses, stop the police investigation into the matter and himself conduct an enquiry into the matter. Once again, this proposal is designed to ensure that distortions in prosecutorial processes do not tend to prevent legal redress by women in cases of custodial violence. We also believe that this would add a salutary check on the prosecutorial practices.

13. As mentioned earlier, one way of minimizing the chances of custodial rape and violence to women is to avoid sending arrested women to police custody and to keep them in some other safe custody. Another way of obviating police custody or for that matter any custody, is to release the arrested woman on bail soon after her arrest. With this in mind we feel that in the case of women the bail provisions and processes should be further liberalized. Section 50(2) of the Cr. P.C. may be extended, in cases involving women, to non-bailable offences as well. In cases involving women, the provisions of anticipatory bail should also be further liberalized.

Legal Aid to Victim-Women in Cases of Custodial Violence

14. Absence of adequate provision for legal aid and services is a most conspicuous problem in achieving justice for the Indian people. But in cases of custodial violence against women it assumes a different dimension as in such cases the victim of such violence is much more in need of legal aid and assistance for getting redress. We strongly feel that in the area of custodial rape, the State should forthwith assume obligation to provide legal services. This is because it is one area where the need is manifest and pressing. Custodial rape mocks at the very roots of the claim that India is a rule of law society. It is clearly an area of priority for immediate provision of legal services. Accordingly, we suggest an amendment in the Cr. P.C. enabling the judges and as well placing them under a legal obligation, to appoint a lawyer at State expense in every case involving custodial rape. It is also possible to make the Public Prosecutor render timely and adequate legal services to the victim at every stage of the pre-trial proceeding.

15. We go a little further and suggest that even after this provision for legal services is made, sustained thought may be given to the creation of the institution of Public Defenders

for Women. This institution will ensure a fair deal to Indian women in situations beyond custodial violence by public servants. It will help in a more systematic effort at dealing with violence against women in domestic and marital situations.

Investigation And Trial Process in Cases of Custodial Violence Against Women

16. Medical examination is indeed a crucial aspect of evidence in situations of custodial violence, and especially custodial rape. We suggest that in all such cases there should be *mandatory* physical medical examination of the person alleged to have committed the act of violence against the women. Section 53 Cr. P.C. which provides for the medical examination of the arrested accused person, should thus be made more stringent in respect of arrestees accused of rape and violence against women. Magistrate has no power at present to order medical examination of the accused under S. 53. This power, we think is essential, so that the Magistrate may exercise the same, whenever needed. This examination should be expeditious. Adequate provisions should be made in police rules to this effect; an amendment to Cr. P.C. should specifically make the existing provision in S. 53 Cr. P.C. more stringent.

17. We considered very closely the question of making mandatory the medical examination of the alleged victims of rape or custodial violence, but decided against such a course. For one thing, such a measure would ipso facto mean arrest, thereby creating conditions of encounter between police and women, which we have strived, self-consciously, in this set of proposals, to minimize. For another, we feel that such mandatory requirement could add to the further potential for general harassment of women. We instead propose that every victim must be informed of the need to undergo a medical examination promptly in situations of rape or sexual abuse; that such information be provided in prescribed time in a language understood by the victims; and that the imparting of this information and the response of the victim should be recorded by the police. The police rules should accordingly incorporate these provisions. Moreover, we recommend that the magistrate may have the discretionary power to require medical examination of the victims as soon as he has the report or the information concerning custodial violence affecting woman.

18. As regards the trial process, we agree with the suggestion canvassed recently as far as possible the trial should be *in camera*. The reasons for this suggestion are self-evident. But in the nature of things we would like the court to have discretion to be exercised judiciously in each situation.

Protection Against Curious Publicity

19. We strongly endorse the suggestion made by the Lawyer's Collective that it should be illegal for anyone to report, during the investigation or trial, the name of the

victim of rape or of custodial violence and that the I.P.C. should specifically provide that the publication in any form of such information shall be deemed to constitute defamation under the I.P.C. Moreover, we suggest that the publication of such information should be made a cognizable offence inviting deterrent punishment. We also suggest that the name of the victims may not be reported in law reports or the decisions of courts. We take it that the reasoning underlying these suggestions (the primary aim of which is to enable a victim woman to overcome the trauma and stigma which attaches to in such situations is obvious enough.

Public Censure

20. On the other hand, we suggest that in all cases where a person is convicted of custodial rape, the court may, at the time of passing sentence, impose, in addition, the punishment of public censure by causing the offender's name, residence etc. and the particulars of the offence and the punishment imposed to be published at the offender's expense in such newspapers or in such other manner as the court may direct.

21. First of all, we fully support and thoroughly endorse the addition as envisaged by the Indian Penal Code (Amendment) Bill, 1978, of sections 376-A, 377-B and 376-C proposing specific offences for custodial rapes in the settings of women's institutions and the like. The Bill which was passed by the Rajya Sabha and was pending in Lok Sabha lapsed because of the dissolution of Lok Sabha 1979. We believe that this amendment, duly passed by the Rajya Sabha, and other amendments we now propose, should be passed as a matter of urgent priority even if the rather comprehensive amendments to the Indian Penal Code, under consideration for quite sometime, have to be even further deferred.

The Law Concerning Rape : Some Proposals for Substantive Change

22. Second, we note the formulation of Section 385, clause (c) as approved by the Rajya Sabha. Under the clause, sexual intercourse will constitute rape when it takes place "with her consent, when it has been obtained by putting her in fear of death, *either to herself or anyone else present at the place*" (the italicized portion represents the addition to the existing clause (c) to S. 375). The rationale of this amendment as passed by the Rajya Sabha is clear enough. But we would urge even yet further extension of that scope. And this is that the fear of death or of hurt need not be limited to those present at the place. The words "present at the place" would indicate that the offence is committed in the presence or vicinity of others as in situations of mass rape of adivasis or untouchables. This situation is no doubt within the amended formulation. But other situations of intimidation are not, such as threat to the life of an ailing father or threat of hurt, or death to one's near relations. Such threat too would clearly vitiate consent. We would, therefore, suggest the extension of the proposed amendment as follows: "putting her in fear of death, or of hurt, either to herself or her near relations or friends" (The addition of 'friends' is considered necessary with a view to include the category of people who may not be blood relations but may have as much affinity with the woman as her near relations e.g. a boyfriend or a girl friend). In order to ensure that this provision is not abused or exploited, it would be necessary to specify that such threat would not vitiate consent for the purposes

of this (proposed) section if the woman concerned has sufficient time to have recourse to public authorities. Parallel language as used in section 99 of the I.P.C. in respect of the limitations on the right of self-defence can be extended here.

23. We would also suggest, and endorse a similar suggestions made by others, that in *custodial rape cases* it shall be presumed that the sexual intercourse was without the consent of the woman and that the burden would be on the accused to prove that the woman had given her consent. We believe that this expedient of shifting the initial burden of proof, which is not unknown to the Indian law in general (e.g. in revenue matters, especially customs), should be extended to the area of violence against women in the particular situations of custodial rape.

24. We also suggest further that an explanation should be added to section 375 as follows.

"The sexual intercourse would be deemed to be without the consent of the woman under clause 2 if the consent of woman to the sexual intercourse is apparently obtained by putting her in fear of injury of such a nature and under such circumstances that a reasonable person would infer from them that the fear must have been the most predominant and operative factor in the formation of the woman's consent to the sexual intercourse (or in other words if the consent can be reasonably considered as the off-spring of the fear of injury)".

We suggest this with a view to facilitate greater use of section 375. Secondly, We find that it is unusual to have prosecutions or convictions on the second limb of section 375 where rape is said to have occurred if intercourse takes place "without here consent". This is because, we surmise, of the fact that the definition of 'consent' in Section 90 of the I.P.C. is too general and furnishes no precise evidentiary standards. We feel that the foregoing explanation will help us attain reversal of the relative non-use of the second limb of section 375.

25. Finally, we support the suggestions made by the the Lawyer's Collective that the first part of section 7 of the United Kingdom Sexual Offences Act, 1976 be adopted *mutatis mutandis* by way of a specific addition to the Indian Evidence Act. We suggest that no evidence in respect of the woman's moral character, her sexual encounters and experiences of life with persons other than the accused, shall be allowed in any case of rape or sexual abuse against women, unless the court, for special reasons to be recorded in writing, considered it essential to allow such evidence in the interests of justice and fair trial.

In making this suggestion, we are not endorsing the whole of section 7 of the U.K. Act, which recognizes other exceptions to the main proposal. This is because we feel that most Indian decisions on the subject disclose the not unnatural tendency to give prominence to woman's moral character or sexual life. Although it is not possible to be dogmatic concerning it, we feel that it would be generally accurate to say that in most situations an adverse finding on woman's moral character or sexual conduct and life is often responsible in the total appraisal of the evidence and in eventual acquittal of the accused. Our proposal

allows the accused, as does the English section, for findings of sexual relation or conduct of the woman in relation to the accused. It also provides discretion for the court in special cases, for reasons to be recorded in writing, to permit such evidence if considered strictly necessary. The evidence is thus not altogether excluded. But the attempt clearly is to restrict its role as a normal and staple feature of criminal proceedings in rape cases. We believe that in the Indian conditions, with a pluralistic society having different mores and standards of sexual morality and conduct both in relation to pre-marital and post-marital relations, the present situation allowing evidence on the victim's personal life often tends to result in miscarriage of justice. Neither pre-marital nor post-marital sexual conduct, as sanctioned by diverse cultural mores and standards, should be allowed to exonerate the rapist if the evidence as a whole is against it. Even if it is conceded that this does not happen, we must at least guard against the probability of its happening. Moreover, the victim of a rape, in typical Indian situations, is apt to be misled or confused or led to conflicting testimony when her personal life becomes the subject of sharp forensic practices, legitimate in a court room setting, which may by itself create considerable *psychodynamic* strain in the mind of the victim of a rape.

26. We have in this memorandum tried to identify the principal ways in which a reform of law could help in inhibiting situations of custodial violence, including rape, against women and in sternly dealing with perpetrators of such violence. The suggestions have been accompanied with justifications and statement of reasons wherever necessary. But of necessity these have been confined to brief remarks at the present stage. We hope to have studied response from all individuals and groups in India concerned with the problem of women's rights and status as a part of their concern with human rights in general and with Indian society, culture and law in particular.

We also hope that our suggestions, and responses to them, will receive the earnest and anxious attention of the Members of Parliament, all Legislatures in India, the Government of India and of various States. Every day lost in a vigorous action on this programme may mean continued exposure of Indian women to the cruel trauma of custodial rape and violence. Not to act promptly in this matter is to continue a social situation in which our women may be 'defaced and defiled' with impunity.

LOTIKA SARKAR

RAGHUNATH KELKAR

UPENDRA BAXI

DELHI

1 May 1980.

section 375 and for sections 375 and 376, the following heading and sections shall be substituted, namely:—

'Sexual offences'

375. A man is said to commit "rape" who, except in the case hereinafter excepted has sexual intercourse with a woman under circumstances falling under any of the seven following descriptions:—

First,—Against her will.

Secondly,—Without her***consent.

Thirdly,—With her consent, when her consent has been obtained by putting her in fear of death or of hurt or of any injury***to herself or to any person in home she is interested.

Fourthly,—With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly,—With her consent, when her consent is given under a misconception of fact, when the man knows or has reason to believe that the consent was given in consequence of such misconception.

Sixthly,—With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him of any stupefying or unwholesome substance, she is unable to understand the nature and consequence of that to which she gives consent, or is unable to offer effective resistance.

Seventhly,—With or without her consent, when she is under sixteen years of age.

Explanation 1,—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Explanation 2,—A woman living separately from her husband***shall be deemed not to be his wife for the purposes of this section, whether a woman is living separately or not is a question of fact, depending upon circumstances in each case.

Exception— Sexual***intercourse by a man with his own wife, the wife not being under***sixteen years of age, is not rape.

376. (1) Whoever, except in the cases provided for by sub-section (2), commits

rape shall be punished with imprisonment of either description for a term***which may be for life or for a term which may extend to ten years and shall also be liable to fine :

* * *

(2) Whoever,—

(a) being a police officer, commits rape in the local area to which he is appointed, or in any police station whether or not situated in such local area; or

(b) being a public servant***commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him; or

(c) being the superintendent or manager of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution***commits rape on any inmate of the institution ; or

(d) being concerned with the management or being on the staff of a hospital commits rape in the hospital premises on a woman who is receiving treatment in that hospital; or

(e) commits rape on a woman knowing her to be pregnant; or

(f) commits rape on a blind woman or a woman of unsound mind or a physically disabled woman; or

(g) commits gang rape,

shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine :

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years.

Explanation 1.—Where a woman is raped by***two or more persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section.

Explanation 2.—“Superintendent” in relation to a jail, remand home or other place of custody or a women's or children's institution includes a person holding any

other office in such institution by virtue of which he can exercise any authority or control over its inmates.

Explanation 3.—“Women’s or children’s institution” means an institution, whether called an orphanage or a home for neglected women or children or a widows’ home or by any other name, which is established and maintained for the reception and care of women or children.

376 A. Whoever being a public servant, takes undue advantage of his official authority ***to have sexual intercourse with any woman who is in his custody as such public servant or in the custody of a public servant subordinate to him, such sexual intercourse not amounting to the offence of rape, shall be punished with imprisonment of either description for a term which may extend to five years and shall also be liable to fine.

376 B. Whoever, being the superintendent or manager of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women’s or children’s institution or holding any other office in such institution by virtue of which he can exercise any authority or control over its inmates, takes undue advantage of his official position and***has sexual intercourse with any female inmate of such such jail, remand home, place or institution, such sexual intercourse not amounting to the offence of rape, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

Explanation.—The expressions “superintendent” and “women’s or children’s institution” shall have the same meanings as in *Explanations 2 and 3* of sub-section (2) of section 376.

376 C. Whoever, being concerned with the management of a hospital or being on the staff of a hospital, takes undue advantage and has sexual intercourse with a woman who is receiving treatment in that hospital, such sexual intercourse not amounting to the offence of rape, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

Explanation.—“Hospital” includes any institution for the reception and treatment of persons suffering from illness, or for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation’.

4. In the Code of Criminal Procedure, 1973 (hereinafter referred to as the Criminal Procedure Code), section 327 shall be numbered as sub-section (1) of that section and—

(a) in sub-section (1) as so numbered, the following proviso and *Explanation* shall be inserted at the end, namely :—

‘Provided further that the enquiry into and trial of rape or allied offence shall be conducted *in camera* if the victim of rape or such allied offence is alive at

the time of such inquiry or trial;

Provided further that in case of a joint trial of rape with any other offence, such a joint trial may be *in camera* at the discretion of the court.

Explanation.—In this sub-section, the expression “rape or allied offence” denotes—

- (a) an offence punishable under section 354 of the Indian Penal Code;
- (b) an offence punishable under section 376, section 376A, section 376B, or section 376C of that Code;
- (c) an attempt to commit, abetment of or conspiracy to commit any such offence as is mentioned in clause (a) or clause (b) of this *Explanation*;
- (b) after sub-section (1) as so numbered, the following sub-section shall be inserted, namely :—
- “(2) Where any proceedings are held *in camera*, it shall not be lawful for any person to print or publish any matter in relation to any such proceeding except with the previous permission of the court.”

5. In the Criminal Procedure Code, after section 350, the following section shall be inserted, namely :—

“350A. (1) Where any such offence as is described in sub-section (2) of section 228A of the Indian Penal Code is committed in relation to the proceedings of any Court, such Court may, if satisfied that it is expedient in the interests of justice that such offence should be tried summarily, take cognizance of the offence and after giving the offender an opportunity of showing cause why he should not be punished under this section, sentence him to imprisonment which may extend to three months and also to fine.

(2) In every such case, the Court shall follow as nearly as may be practicable the procedure prescribed for summary trials”.

6. In section 351 of the Criminal Procedure Code in sub-section (1), for the words and figures “or section 350” the words, figures and letter “section 350, or section 350A” shall be substituted.

7. In the First Schedule to the Criminal Procedure Code, under the heading “I.—Offences under the Indian Penal Code”,—

(a) after the entries relating to section 228, the following entries shall be inserted, namely :—

| 1 | 2 | 3 | 4 | 5 | 6 |
|------|---|--|------------|--------------|----------------|
| 228A | Disclosure of the identity of the victim of certain offences, etc. | Imprisonment for two years or fine or both | Cognizable | Non-bailable | Any Magistrate |
| | Printing or publication of a proceeding held <i>in camera</i> in contravention of any law | Ditto | Ditto | Ditto | Ditto* |

(b) for the entries relating to section 376, the following entries shall be substituted, namely :—

| 1 | 2 | 3 | 4 | 5 | 6 |
|------|---|--|-----------------------|--------------|-------------------------------|
| 376 | Rape | Imprisonment for life or imprisonment for ten years and fine | Cognizable | Non-bailable | Court of Session |
| | <u>Rape by husband on his wife</u> | <u>Ditto</u> | <u>Non-cognizable</u> | <u>Ditto</u> | <u>Ditto</u> |
| 376A | Intercourse by public servant with woman | Imprisonment for five years and fine. | Ditto | Ditto | Magistrate of the first class |
| 376B | Intercourse by superintendent of jail, remand, home etc. | Ditto | Ditto | Ditto | Ditto |
| 376C | Intercourse by manager, etc., of a hospital with patient. | Ditto | Ditto | Ditto | Ditto* |

8. After section 111 of the Indian Evidence Act, 1872, the following section shall be inserted, namely :—

“111A. In a prosecution for rape under clause (a) or clause (b) or clause (c) or clause (d) or clause (e) of sub-section (2) of section 376 of the Indian Penal Code where sexual intercourse is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent.”

- Notes : 1. The underlined words, phrases and sentences indicate changes in the Bill as proposed by us.
 2. An asterisk mark in the above text indicates the deletion of words, phrases and sentences in the text of the Bill.
 3. Marginal notes have been omitted.

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