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The Bills To Amend The Rape And Dowry Laws—Mending Or Marring?

TWO bills to amend the laws concerning women are scheduled to come up in the forthcoming monsoon session of parliament. One is the Criminal Law Amendment Bill, to amend the rape law contained in the Indian Penal Code, the Criminal Procedure Code and the Indian Evidence Act. The other is the bill to amend the Dowry Prohibition Act, 1961. Both bills had been referred by parliament to joint committees and have now been submitted in altered form.

These bills are especially significant because they are the result of widespread press coverage, public discussion and protest around the issues of rape and of dowry deaths. It is important for us to consider whether these proposed legislations are likely to have a positive or a negative effect on such rape and dowry cases as reach the courts, or whether they are likely to remain ineffective.

Following the media coverage and the public protests against the supreme court judgment in the Tukaram versus the state of Maharashtra case (see **Manushi** No. 4) in which a policeman rapist was acquitted on the grounds that the victim Mathura was of "immoral character" hence must have consented to inter-course, the union government requested the law commission to make a special study of the law pertaining to rape. The law commission submitted its report in April 1980. On August 12, 1980, the government introduced the present bill in its original form in the Lok Sabha.

1. The bill laid down that all rape trials shall be held in camera and publication of anything relating to such trials shall be an offence.

2. The bill sought to make it illegal for anyone to publish any matter which might make known the identity of a rape victim. This new offence was made cognizable, non bailable and punishable with two years' imprisonment and fine.

3. The bill introduced a minimum of 10 years' imprisonment for policemen, public servants and managers of women's homes or hospitals who commit rape by taking advantage of their official position. There was, however, no provision for the procedural changes recommended by the law commission such as immediate medical examination of victim and accused, disallowing the arrest of women at night and their detainment in police stations overnight.

4. The law commission had recommended that in a rape case "once 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." The bill included this clause only for rape by policemen and public servants. The law commission's recommendation that the woman's sexual history and general character be inadmissible as evidence was not included in the bill.

Since the bill came in for a lot of criticism from women's organizations and other sections of public opinion (see **Manushi No.** 7), it was not voted on but was referred to a joint committee consisting *26* men and seven women members of both houses. After interviewing members of women's and voluntary social organizations, bar association, press organizations, and interested individuals, and soliciting comments from all state govenments, the committee prepared its report which it submitted on November 2, 1982. The bill in its altered form is now due to be moved in parliament. Let us see how far the committee has succeeded in improving upon the bill.

Attack On The Press

The part of the bill which was most criticized was that which lays down that it shall be an offence to report on a rape trial or to make known the identity of a rape victim, and by implication, of the accused either.

The joint committee, instead of scrapping these provisions, has merely made them slightly milder. To publish any matter which may make known the identity of a rape victim remains a cognizable offence but has been made bailable. A section has been added whereby such matter may be published with permission from the investigating police officer, or authorization in writing by the victim, or by her next of kin if she is dead, insane or a minor.

This authorization has to be given to a

welfare organization which is recognized by government It is clear that it is beyond the resources of small women's groups, small magazines or concerned individuals to go to remote areas obtain such authorization. The total effect of the proposed law be to censor rape reporting altogether, and thus at one stroke, make even more invisible than it is already.

Eight members of the committee who have recorded minutes of dissent from the report, have pointed out that the bill came into existence only as a result of sustained press coverage of rape cases, and unjust trials of such cases. If this proposed law had been in existence, public attention could never have been drawn to the Mathura, the Rameezabee and other such cases.

In Camera Trials

The provision that all rape trials be held in canmera has also been retained. No member of the public or the press will have access to a rape trial, nor shall it be lawful to print any matter in relation to such proceedings except wirh the previous permission of the court.

The committee has included a provision whereby if the presiding judge thinks fit, he or she may allow any particular person to have access to the courtroom. Presence of the public and of a vigilant press is one means of ensuring a free and fair trial. To make such presence contingent on the arbitrary will of each individual judge is to take away an important civil liberty, and to isolate the victim even more completely. While it is true that rape victims are often subjected to the idle curiosity of the public in the courtroom, it is equally true but not as often recognized, that the victim suffers much more from the merciless insinuations and cross questioning of the lawyers, and the prejudices of the judges. In such a situation, the victim may often need the support of concerned persons not connected with the court, but not all judges may be sympathetic enough to realize this and to permit entry to such persons.

Some members of the committee, have, in their dissenting minutes, pointed out that a rape victim's identity always gets known in her immediate environment, which is where she may be ostracized. In camera trial cannot prevent this process. Wider publicity is likely to win support and help for her. Therefore they have recommended that in camera trial be provided for only if desired by the victim. As the bill stands at present, the victim has no say in the matter. Even if she wants publicity for the trial proceedings, or if she wants friends or sympathizers to be with her in the courtroom, she is denied these rights unless the judge permits them to her.

Minimum Punishment, But...!

The bill makes a high sounding

proclamation that rape will be punishable with at least seven years' imprisonment, and certain kinds of rape such as gang rape, rape of a pregnant woman and rape by public servants and policemen will be punishable with at least 10 years' imprisonment. However, in a quiet little sub clause, it adds : "provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years (...or) ten years." Since these "adequate and special reasons" are not defined, it is perfectly possible for a judge to let off a convicted rapist with a month's imprisonment on the "special" ground that he is young, or it is his first offence, or he has a young wife, or he is psychologically disturbed, (see **Manushi** No. 6 for such a judgment).

Marital Rape—Does Not Exist?

In the original bill it was stated: "sexual offence by a man with his own wife not being under 15 years of age, is not rape." The committee tries to make this sound nicer by changing the word "offence" to "intercourse." However they clearly share the idea of the framers that rape is more an offence against the husband of a woman than against the woman herself. If rape is intercourse with a woman against her will, how is it possible to declare that a husband cannot commit rape ?

It is shocking that the committee has even removed some positive provisions from the bill. The original bill, framed by the government, had an explanation saying; "A woman living separately from her husband under a decree of judicial separation shall be deemed not to be his wife for the purposes of this section." In other words, if woman is judicially separated from her husband and is living away from him, and if he then has intercourse with her against her will, she will be able to sue him for rape.

The committee, which is supposed to improve the bill, makes the astonishing declaration : "The committee feel that in a case where the husband and wife are living separately under a decree of judicial separation there is a possibility of reconciliation between them until a decree of divorce is granted. Hence the intercourse by a husband with his wife without her consent during such period should not be treated as, or equated with, rape." They dub such intercourse "illicit intercourse" and make it non cognizable, bailable, and punishable with imprisonment up to two years and fine.

What is judicial separation? It is resorted to by many women when their husbands, just to harrass them, refuse consent to divorce. This is particularly the case for Christian women, since Christian marriage law is blatantly discriminatory with regard to divorce. A man can divorce his wife for a single act of adultery, while a woman has to prove adultory with bigamy, adultery with incest or adultery with cruelty before she can get a divorce. Thus many women seek judicial separation as a

means of living away from their husbands, and as a stepping stone to divorce. In such a situation, the man often tries to harass his separated wife by intruding on her privacy, and rape may be resorted to in order to force a child on her and compel her to return to him.

It is clear that if a woman takes such a case to court, the forced inter-course has not resulted in reconciliation. If it had, she would not have sued him. Is the committee really concerned about reconciliation or does it wish to protect the man's property right over his wife, and help him to brutally assert it ?

The idea that inter-course is the husband's right, regardless of whether the wife wants it or not, is also betrayed in another change made by the committee. The bill framed by the government laid down that forced sexual inter-course by a man with his wife who is under 15 years of age will be treated as rape. The committee has altered this to say that forced intercourse by a. man with his wife who is over 12 years of age is not rape.

On the other hand, the bill also lays down that intercourse by a man with a girl under 16 with or without her consent is rape. **Thus, as the bill now stands, if a boy has intercourse with a 15 year old girl, with her full consent, he can be prosecuted for rape by her parents or her husband, but if a man has intercourse with his 13 year old wife against her will, she cannot prosecute him for rape.** Is the bill seeking to protect the property rights of fathers and husbands over women, or to protect the rights of women and girls over their own bodies ?

One of the major issues taken up by the nineteenth century social reform movements was that of the age of consent to intercourse for a married girl. The uproar following the death of a 12 year old due to rape by her husband, led to a widespread debate on the issue, and to the passing of the Sharada Act. As long as child-marriage was more an upper caste phenomenon, girls usually used to be sent to their in-laws' house only after they reached puberty or even later. However, today, with the unfortunate spread of child marriage practices among the so called lower castes, a trend is visible whereby little girls are sent off to their in-laws as soon as possible because parents, in a situation of increasing violence on dalit women by upper caste men, wish to get the responsibility off their hands. Some months ago, the newspapers reported a case of a 14 year old wife in a Delhi slum who resisted intercourse on the wedding night, and was strangled by her indignant husband.

It is distressing that the committee should have taken such a retrogressive stand in favour of men's unlimited right to brutalize their wives, a stand which is outdated even by nineteenth century reform standards.

Minor Changes

The provisions on rape by men in positions of power remain substantially the same. In the original bill intercourse by a public servant with a woman in his custody is a cognizable offence. The committee has introduced a clause to protect such a public servant by making a warrant or a magistrate's order necessary for his arrest.

The shifting of the burden of proof of consent has not been extended to all cases of rape. Thus most victims will still have to prove that they did not consent. The committee has added a phrase to protect the accused in cases of custodial rape. The original bill says that once intercourse is proved, the court shall take the woman's word if the says she did not consent. The committee has added that "sexual intercourse by the accused" must be proved. While this seems to be a minor change, yet it is uncertain how it can be misused in interpretation. If the court chooses to interpret it in a rigidly literal sense, then intercourse by a particular man can never be proved by medical examination since semen cannot be proved to belong to a particular man. Other evidence has to be relied upon to establish the identity of the rapist.

Vital Omissions

Many other very important recommendations made by the law commission and by those interviewed by the committee, have merely been listed as general recommendations, and have not been included in the bill. This means that it is left to the government to introduce separate legislation in these matters if and when it thinks fit.

These matters mainly pertain to procedures of recording evidence in a rape case. It is well known that it is at the primary stage that police bungling takes place, particularly in cases where the culprit is a policeman or a well placed person. Therefore it had been suggested that penalties be laid down for an investigating officer who fails to have the victim and the accused medically examined in time, or who neglects to record evidence. It had also been recommended that it be made illegal for women to be arrested after sunset, or to be detained in police stations overnight. It is not of much use to prescribe more stringent punishment for rape by policemen and public servants or to shift the burden of proof of consent to them if most such cases can never be proved because all evidence is destroyed at the investigation stage. It is not clear why the committee saw fit to list these recommendations as general recommendations instead of incorporating them into the present bill.

The law commission recommended that a woman's sexual history and general character be inadmissible as evidence in a rape trial. This most vital recommendation has not been mentioned by the committee, not even in its general recommendations. Geeta Mukherjee and Susheela Gopalan, in their dissenting note, have pointed out the omission.

A vast majority of rape cases go against the woman precisely because she is put on trial just as much or more than is the accused. The rapist's lawyers invariably try to allege that she was of promiscuous character arid therefore must have consented to intercourse. This is alleged even in the most unlikely of cases, where the rapists were complete strangers, and on the most absurd grounds, for instance, in the Pratap Misra versus state of Orissa, 1977, on the ground that the woman was a midwife, and was the second wife of her husband. Mathura was similarly maligned because she was not a virgin. It

is these allegations that are most humiliating for the woman, and that usually lead to the judges presuming that she may have consented. If the real purpose of the bill is to protect women victims, this clause is much more important than the introduction of in camera trials and the prohibition of publicity. Such examination of the woman's history is also legally unsound, since in no other criminal case is the victim's general character brought as evidence to show that he or she must have desired assault, In fact even the general character of the accused is usually not permissible as evidence of guilt. On the whole, therefore, the committee has amended the bill in such a way that

1. it retains its character as an attack on the freedom of the press and of women's organizations to take up and protest against rape cases ;

2. it acts to isolate the victim by an in camera trial even if she does not wish for one ;

3. it gives arbitrary discretion to each individual judge to give the rapist, even after conviction, a nominal punishment, on special grounds to be defined by the judge;

4. it leaves open all possibilities for police to bungle evidence and intimidate the woman at the investigative stage ;

5. in most cases, it leaves wives, even if separated or minor, vulnerable to "legal" rape by husbands ;

6. it leaves the woman to prove that she did not consent to rape, and it leaves a woman in every case vulnerable to attacks on her character in court, even though it is the fear of such attack which acts as the strongest deterrent preventing most women victims from going to court.

The Dowry Bill

In 1975 the report of the committee on the status of women in India, pointed out that the Dwory Prohibition Act was completely ineffective because

1. it made the offence of giving or taking dowry a non cognizable offence, which meant that only a party to the offence, the girl or her immediate relatives could sue under the Act, which they were most unlikely to do;

2. it allowed an unlimited amount of "gifts" of any kind to be given to the bride, bridegroom or in-laws by the bride's parents.

The report recommended that the offence be made cognizable, that a ceiling of Rs 500 be set on the gifts given to the bridegroom or his parents, and that a ceiling also be set on gifts given to the bride.

However, the joint committee has recommended that

1. The offence of taking dowry should be made cognizable but giving dowry should not be an offence.

2. Taking or demanding dowry should be punishable by six months' to two years imprisonment and fine up to Rs 10,000.

3. There should not be any time limit for lodging a complaint, nor should dowry be defined as only that which is given "in consideration of marriage" since these provisions often hinder the course of justice.

4. The committee has however raised the ceiling set by the Dowry Prohibition Act and has suggested that presents given to the bride up to the value of 20 percent of annual income or Rs 15,000 whichever is less, should not be counted as dowry. Similarly, presents to bridegroom or his relations not exceeding in value three percent of the income or Rs 2,000, whichever is less, and expenses on wedding ceremony not exceeding seven percent of the income or Rs 3,000, the whichever is less, should be allowed. The committee also suggests that in case the bride dies under suspicious circumstances, the presents given to her should revert to her parents.

The reason given by the committee for setting a ceiling which is higher than that set by the Act, is that "this limit is expected within the capacity of the and acceptable to the society." In a society as stratified as ours, there are vast numbers of families who can barely survive on their in and for whom 30 percent annual income to be spent daughter's marriage can cause hardship. On the other hand there are also families, 30 percent of whose income may work out to thousands or lakhs. The question that arises is : is dowry acceptable if it is "within the capacity of parents", however defined, or should the concept of dowry which is based on the idea that a girl is a burden therefore a man must be bribed to take her off her parents' hands, be done away with? As long as concept remains intact, attempts to limit it are bound to remain ineffective, since the mentality of viewing the woman as a worthless object whose worth consists in what she brings, will continue to lead to treatment of women.

Even if the Dowry Prohibition Act is amended according to the committee's suggestions, it is lifely to remain as ineffective as it is at present. However, the amendment of the rape laws, if carried through, may have dangerous implications for all those involved in raising awareness on women's issues, and in combating violence on women therefore we should be alert as regards this bill, and prepare a strategy to confront it if it becomes law. ❐