

FRONTLINE

Volume 27 - Issue 04 :: Feb. 13-26, 2010

INDIA'S NATIONAL MAGAZINE
from the publishers of THE HINDU

Half measure

T.K. RAJALAKSHMI

The government takes a step towards speedy trial in cases of sexual offence but stops short of making definitional changes in law.

SHIV KUMAR PUSHPAKAR



Law Minister M. Veerappa Moily. His focus has been more on procedural changes.

IN the second week of December, as the country watched the developments in the case against former Haryana Director General of Police S.P.S. Rathore, a host of senior government representatives, including Union Law Minister M. Veerappa Moily, promised to review the laws dealing with crimes against women. Moily's Ministry announced that it would introduce the Sexual Offences (Special Courts) Bill, aimed at ensuring speedy trials in rape cases and including procedural measures to improve the mechanism of delivery of justice. Home Minister P. Chidambaram declared that the police all over the country should be asked to treat all complaints as first information reports, though it was not clear what purpose such an announcement would serve without consultations with the State governments on the issue, since law and order is a State subject.

More worryingly, however, the Law Ministry's draft Bill (a copy of which is with *Frontline*) is not an adequate response to the situation it is meant to address. It is no doubt an important step towards speedy trials of sexual offenders: it stipulates that the trial for any sexual offence shall be concluded as expeditiously as possible, preferably within six months. However, it stops short of making the kind of definitional change, recognising the various forms of sexual assault on women and children, that would make a substantial difference. There is also no reference to an already existing piece of draft legislation, "The Criminal Law Amendment Bill 2002", painstakingly prepared by women's organisations and vetted by the National Commission for Women (NCW). Planned as a Bill in 2002, though it never reached that stage, this document dealt with the definitional aspects of sexual assault as well as procedural aspects of securing justice

for victims. The Law Ministry did not bother to consult either the Ministry for Women and Child Development, the nodal Ministry dealing with women and children, the NCW or women's organisations. Veerappa Moily assured a delegation of women's organisations led by Rajya Sabha member Brinda Karat, who met him, that he would discuss the issue with the related Ministries but ignored the fact that a draft had already been prepared by the women's groups.

Draft by women's organisations

The demand for a comprehensive law dealing with sexual assault was first made at least 17 years ago but it gathered momentum in the past decade. The draft by the women's organisations was initially prepared by former Law Commission member and Supreme Court advocate Kirti Singh; this was then followed by countrywide consultations on the subject, with the NCW taking up the cause. In 2007, a quasi-government report on the magnitude of child sexual abuse further bolstered the demand for a comprehensive law that would cover child sexual abuse.

The government's decision to respond was at least partly because of the sustained media spotlight on the Rathore molestation case, pressure from sections, including the media, the rising crime graph and efforts by women's organisations. Yet, it does not incorporate all the changes in the definitional, substantive and procedural laws relating to child sexual abuse (including molestation and rape) and the sexual abuse of women that were demanded by the women's groups.

These groups, led by the All India Democratic Women's Association (AIDWA), met Veerappa Moily on January 12. Referring to the 172nd Report of the Law Commission regarding sweeping changes in laws relating to rape, molestation and sexual harassment, they argued that the definition of sexual assault and rape in the Indian Penal Code (IPC) was archaic, restrictive and inadequate.

The organisations, which included the National Federation of Indian Women, the Young Women's Christian Association of India, the All India Women's Congress, the Joint Women's Programme, the Muslim Women's Forum, the Centre for Women's Development Studies and the Guild of Service, underscored the immediate need to enlarge the definition of rape to include oral and anal sex. They also pointed out that several forms of sexual abuse, such as incest, stalking and protracted sexual assault, were not even recognised or defined in the

IPC.A.M. FARUQUI



Girija Vyas, Chairperson of the National Commission of Women, at a press

conference in Bhopal in connection with the issue of the increasing violence against women, in October 2009.

Molly, according to a member of the delegation, talked more about introducing procedural changes rather than definitional ones. The memorandum pointed out how on several occasions courts had debated on what the expression “outraging the modesty of a woman” meant. A major definitional change would be to replace this expression in Section 354 of the IPC with “unlawful sexual contact”; besides, the women’s groups said, there must be a distinction between the molestation of an adult and that of a child and that the latter should invite more stringent punishment.

Definition of abuse

The fundamental problem is that all kinds of sexual offences barring rape are covered under Section 354. Child abuse involving anal and oral sex is not treated as rape but as molestation. The women’s groups said that “rape” should be redefined to include oral and anal sexual assault and insisted that the punishment in the case of minors, who are often forced or incited to perform sexual acts on adults, should be more stringent.

The Sexual Offences (Special Courts) Bill, 2010, does talk about amendments to the IPC, proposing the insertion of Section 376E defining unlawful sexual contact. But it does not touch the definition of rape under Section 375. The Criminal Law Amendment Bill, 2002, had suggested the full substitution of the existing Section 375 of the IPC, replacing the existing definition with that of a comprehensive one of sexual assault that meant, among other things, not only penile penetration but the introduction, to any extent, by a man of an object or part of the body into the vagina, or anus or urethra of a woman or a child. This also included the manipulation of any part of the body of a child so as to cause penetration of the vagina, anus or urethra. The document also specified stringent punishment for rape, including incestual rape and rape by a person in a position of trust and authority.

Separate punishments were recommended for public servants and policemen and for people running remand homes and jails and hospitals for committing sexual assault on pregnant women, persons with mental or physical disability or on persons under 16. The recommended provision covered gang rape, persistent sexual assault and assault causing disfigurement or grievous bodily harm to the victim.

R.V. MOORTHY



Kirti Singh, Former Law Commission member and Supreme Court advocate. She initially prepared the draft of the Bill proposed by the women's organisations.

The recommended punishment in all the categories was “not less than ten years but which may be for life and also liable to fine”. Under Section 376, the punishment for rape is not less than seven years, extendable to ten years or for life unless the victim is the man's own wife and not under 12 years of age, in which case the punishment is only for two years. The existing law also gives the right to courts to impose a sentence of imprisonment for a term of less than seven years “for adequate and special reasons to be mentioned in the judgment”.

The document prepared by the women's groups suggested removing Section 376A and introduced a new Section, 376D, defining punishment for unlawful sexual contact. This covered various kinds of unlawful sexual contact, including those with a minor, unlike in the government's draft. Also, it defined a minor as under the age of 16, instead of under 12 as defined in the existing section. It used the word “minor”, while the government's draft uses the term “young person”.

The document of the women's groups defined unlawful sexual contact and suggested the punishment for this. It said if “any man with a sexual purpose touches, directly or indirectly with a part of the body or with an object, any part of the body of a woman, without the consent of such a woman, he shall be punished with simple imprisonment for a term which may extend to three years or with fine or with both. The government draft exempts from punishment men for such non-consensual sexual contact with their wives. Its definition of unlawful sexual contact (Section 376E) says: “Whoever, with sexual intent, touches directly or indirectly, with a part of the body or with an object, any part of another person, not being the spouse of such a person, without the consent of the such other person, shall be punished with simple imprisonment for a term which may extend to two years or with fine or with both.”

Even the quantum of punishment differs in the two documents: that of the women's groups recommend punishment up to five years for unlawful sexual contact with a minor as compared with three years in the government one.

“The government has not taken molestation and its effects, seriously enough,” said Kirti Singh, who is also the legal convener of the AIDWA. The piecemeal approach of the government while looking at laws governing sexual assault has disappointed women's groups.

Changes in Indian Evidence Act

The government's draft proposes amendments to the Indian Evidence Act, 1872, borrowing, almost literally, from the draft of the women's groups, but stops short of adopting all its suggestions. For instance, it proposes the insertion of Section 53A in the Act – an amendment that could have been made long ago – with respect to the issue of consent and the character of the victim: “In a prosecution for an offence under Section 376, 376A, 376B, 376C, 376D and 376E or for attempt to commit such an offence, where the question of consent is in issue, evidence of the character of the victim or of her previous sexual experience with any person shall not be relevant on the issue of such consent or the quality of consent.”

But it is silent on another suggestion made by the women's groups that Section 114A of the Indian Evidence Act be modified on the issue of consent. Their draft suggested that if a person alleged to have been sexually assaulted has stated that it was not with consent, courts were to presume that it was so. The government draft has not incorporated this suggestion, though it has accepted another addition to the Indian Evidence Act. – “where the question of consent is in issue, it shall not be permissible to adduce evidence or to

put questions in the cross-examination of the victim as to her general immoral character, or as to her previous sexual experience with any person for providing such consent or the quality of consent”.

Changes in law relating to police investigation

The women’s groups have welcomed the procedural amendments in the Code of Criminal Procedure (Amendment) Act, 2008, relating to police investigation, medical examination of the victim, videotaping of the statement of a young person and separation of the child victim and the accused in the courtroom.

But this Act was notified as late as December 2009. It stipulates that offences under Section 376 and Sections 376A to 376D of the IPC should be tried, “as far as practicable”, by courts presided over by women judges and lays down the procedure in the case of arrest of a woman, stipulating that an arrested person shall be examined immediately by a medical officer.

It also provides for the recording of a rape victim’s statement at her residence and, “as far as practicable”, by a woman police officer in the presence of the victim’s parents or guardian, or a social worker. There is also a provision enabling the recording of statements/confessions by audio-video electronic means. The Act says, too, that the trial of offences under Sections 376 to 376D, IPC, shall, “as far as possible”, be completed within two months.

The women’s groups have also suggested other procedural amendments such as immediate medical attention and counselling for victims of sexual abuse, particularly children, in view of the trauma they undergo. Expert witnesses such as child psychologists and doctors, they said, should be allowed to depose on the victims’ behalf and children should not be made to give statements repeatedly to the police, magistrates and courts.