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The Official Emergency Continues – The Ordinance on Sexual Assault: Pratiksha Baxi

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by Lawrence Liang

Guest post by **PRATIKSHA BAXI**

The reform of rape law, which was not a priority for more than two decades, seems more like a 20-20 match now. The spectacle of judicial reform has all the elements of cinematic imagination built into it—violence, voyeurism, repression, tears, scandal, redemption and betrayal. We are all consumers and participants of this judicial spectacle. We veer between manic hope and dark despair as we are left conjecturing how this theatre of judicial reform will enact equality and dignity for survivors of sexual assault. The latest twist in the tale is the introduction of an ordinance, following the Justice Verma Committee (JVC) report.

We are told that the government decided to formulate an ordinance to address sexual violence as an emergency. Strangely enough the text of the ordinance has been kept a secret, other than the press release ostensibly released by the government, hence we can only comment on the series of statements made to the media. It is claimed that the JVC report informed this ordinance, which collates the “uncontroversial” elements in the JVC and the *Criminal Law Amendment Bill 2012*. The ordinance will become the law perhaps on Monday if the President signs it. Until the parliament meets, the ordinance will define sexual assault.

The government accepted the JVC’s demand that their recommendations should be incorporated immediately as an ordinance. In fact Justice Verma on *Times Now* said that the non-controversial aspects of their recommendations should be immediately passed as an ordinance. To quote Justice Verma, “but there are many things which we have said which have been talked of for sometime and there are no two opinions. Now where is the difficulty in promulgating an ordinance to implement them straight away because that is not something which need to await a debate in the Parliament”. (<http://www.timesnow.tv/Exclusives/News/Govt-can-bring-in-ordinance-Justice-Verma/videoshow/4419988.cms>)

The self-construction of the JVC as a manifesto of the peoples’ movements against sexual violence, including the women’s movement and the positioning of the members of the JVC as “heroic” for having finished the report in 29 days should have signalled to us that an ordinance would be scripted as the outcome of this committee. So why are we surprised that there is an ordinance? And

why critique the ordinance? Is it not reasonable that some of the elements of a progressive legislation should be enacted now such as the provisions on acid attack, stalking, voyeurism, and trafficking until a more comprehensive law can be crafted in the parliament? Why should an acid survivor not benefit from this new law—presuming that the state will spend enough money publicising the ordinance to every thana and hospital for three weeks? (<http://www.timesnow.tv/INDIA/Debate-over-rape-ordinance-heats-up/videoshow/4420245.cms>) (<http://www.timesnow.tv/INDIA/Debate-over-rape-ordinance-heats-up/videoshow/4420245.cms>)

One could argue that the opposition is not to recognising that sexual violence is an emergency that women experience everyday rather the important question is what is recognised as an emergency, and when.

1. In the ordinance, the retention of the marital rape exemption is not seen as an official declaration of permanent sexual emergency for married women.
2. The rape of women by security agencies, a state of permanent sexual emergency, continues to need sanction for prosecution from the government.
3. Those politicians charged with rape will continue to wield power to uphold states of sexual emergency for women.
4. Those who are in positions of power and authority to stop mass sexual violence suspend law to allow unimaginable and targetted sexual and reproductive violence are not seen as criminally authoring and authorising states of sexual emergencies.
5. The ordinance does not recognise the states of emergencies declared against young people who choose to marry against social norms of caste, community and religion.
6. The ordinance does not recognise that each medical examination of a rape survivor is experienced as a re-rape; and that this is an emergency.
7. The routinized violence on dalit women, such as stripping and parading especially of those who are punished for transgressing caste hierarchies is not seen as a state of emergency.

The ordinance ascribes blame to women for creating states of sexual emergencies when it proposes a gender-neutral sexual assault law implying that women, like men, sexually assault adult persons, including men in everyday contexts! It appears that the ordinance does not create an exception to make manifest that women do not rape men. Rather dishonestly the ordinance blames women for the sins of men—by positioning them as perpetrators of sexual assault of men in everyday contexts. This creates the possibility of further criminalising women's lives. There is proof of such criminalisation under existing laws, which are gender specific viz, perpetrators.

According to the Delhi government statistics on the profile of female prisoners in the Tihar Jail 'there is increase ... in rape cases by 2.47%' (http://www.delhi.gov.in/wps/wcm/connect/lib_centraljail/Central+Jail/Home/Prisoner+Profile)

During 2011, as per NCRB statistics 766 women were arrested under s. 376 (rape) IPC, 1698 women arrested on the grounds of molestation (s. 354 IPC) and 193 women on grounds of sexual harassment (under s. 509 IPC). In 2011, 43 women inmates died, amongst whom eight women committed suicide in jail. Does the government have any explanation for why the police arrested more than 700 women under s. 376 IPC?

When women's groups oppose gender neutrality viz., including women as perpetrators, one predominant concern has been the manner in which the police misuse the law to criminalise women

who transgress patriarchal norms. The JVC recognised this concern in amending the *Criminal Law Amendment Bill, 2012*.

However, the cabinet seems to have refused to take into account the growing statistics of arrests of women under s. 376 IPC. Nor do they seem to think that men will misuse this provision against women: because in legal discourse only women seem to misuse patriarchal laws against men!

It is evident that ordinance does not revise male laws from the point of view of survivors of sexual assault. Take the example of marital rape. For whom is marital rape controversial? Surely it is not controversial for women who experience sexual violence in marriage. But the men who draft laws smell the fear of those men who cannot be bothered whether their wives want to have sex with them. Surely husbands must be given legal impunity if they sexually assault their wives, argues Abhishek Manu Singhvi, since wives will levy false cases against their husbands, and courts will be flooded with wives accusing husbands of rape. In other words, women who are married are treated *as if* they are pathological liars, and by implication are positioned as a “criminal type” intent on breaking up marriages on false accusations ranging from rape, domestic violence and dowry related harassment.

This argument is obviously ideological rather than sociological. It cannot be argued by anyone that women are less invested in marriage than men, given that patriarchy ensures that status and respectability of a woman in society derives from the fact of marriage. Women nurture their families, far more than men, be it their affinal or natal families. They look after the young and the old. They are dependent on their families economically, socially and politically. Women are told constantly to “adjust” to violent husbands perhaps since such men cannot be courageous to risk true love by surrendering their violent power.

Women have too much to lose if they levy *false* accusations of sexual assault against their husbands. Even mothers who file charges against husbands who rape their daughter are hounded in our courts, police stations and families for being *bad* wives, breaking up the family and threatening social order.

Further, there is no social or governmental support for women who would like to reject marriage. Single women, who are divorced, never married, or do not want to be married to men, are targeted by everyone in manifold ways. The mildest form of discrimination single women face is pity, or derision at not having their *own* family. The assumption that single women are “available” for male sexual experimentation, the lack of safety and the heightened vulnerability without the “protection” of a man, are all elements of enforced heterosexuality.

The government is petrified that the very suggestion that wives are autonomous will unravel the phallogocentric foundations of marriage—based as it is on violence or its threat. Wanting to cling on to the monopoly to rape their wives, these men who make our laws betray a strong attachment to colonial law. This is not surprising since women’s bodies in enforced heterosexuality are colonised by the desires of husbands who enjoy rape. If those who script laws had been accepting of different models of masculinities, and understanding of pluralities of sexual experiences crafted by the experience of the joy of autonomy, they would not have expressed such panicked fear. They would have also deleted s. 377 IPC by way of an ordinance but then heterosexist men despise queer sexuality the most.

The cabinet does not need to conduct a national survey to realise that rape is a preferred mode of violence in marriage. They know that most often heterosexist men do not bother to be solicitous of the desires of their wives or pleasure them. Such heterosexist men do not wish to acknowledge that

there are alternate ways of scripting sexual relationships, which are alive with autonomy, laughter and sexual creativity—precisely because of mutual respect and admiration. If the men in positions of power had experienced such relationships, they would not feel threatened by legislating against the sexual colonisation of women's bodies by their husbands. The law distorts what marriage should mean for both men and women—freedom from violence, expression of love, sexual companionship, and a journey in profound friendship. Love obviously threatens social, legal and political orders far more radically than violent ways of extinguishing a woman's life.

The ordinance declares the continuance of those sexual emergencies in everyday and extraordinary context, which are central to patriarchal power. The spectacle of judicial reform is enacted to detract attention from such permanent states of emergency. Perhaps the Cabinet should clarify what it means by emergency in the first place, since it seems the ordinance, in its current form, embraces the idea of domesticating and even celebrating some forms of permanent sexual emergencies, over others. Nor does it take legislative labour to do away with the medicalization of consent *via* the two-finger test or insist on registration of FIRs irrespective of jurisdiction. This could have been done by executive or judicial decree. Unfortunately, the JVC is also complicit in the making of this spectacle of judicial reform by insisting on the model of 20/20 law reform, and demanding governmental recognition of its heroic labours, without truly understanding the deep structure of sovereign power, which has a necrophilic need for permanent states of sexual emergencies. No wonder the JVC is upset and we can only hope that their suffering makes a radical difference. (http://www.dnaindia.com/india/report_seth-upset-over-ordinance_1795582)

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1. [navin permalink](#)

February 3, 2013 3:01 PM

Just for the sake of clarity, two questions

1. Is it being argued here that if a woman inserts a foreign object in another woman's anus, mouth or vagina without her consent, or in a man's anus or mouth without his consent, such an act should not come under the category of rape? What relief would a survivor of this kind of violent attack have?

2. How many of the women imprisoned in India (as mentioned here) for rape actually charged with abetment to rape? Is abetment to rape listed separately in these statistics?

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2. [Mra Atit permalink](#)

February 4, 2013 11:32 PM

By reading this blog, i can only understand one thing that author feels that all women are born in raja harishchandra family"

enough of feminist propaganda, and let's have better gender neutral laws...

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