LAW

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Preserving The Family At The Cost of Women

-The New Family Courts Bill

THE family courts bill has been passed by both houses of parliament and now awaits the president's assent in order to become law. Several women's organisations have, for some time, been pressurising the government to bring in this bill. Some of these organisations feel that government drafted the bill without consulting those who had been asking for it, and rushed it through without allowing discussion or a single amendment, thus mitigating its usefulness.

They feel that since implementation of the bill and setting up of family courts under it have been left to the state governments with no specific time bar laid down, the law is likely to remain on paper. Yet, though critical of some aspects of the bill, they were in agreement with its overall thrust, therefore women members of parliament supported the bill, thinking it was better to get it through in some form and to ask for amendments later than to have it shelved.

However, the bill, in its overall thrust as well as in its various sections seems to have many alarming implications which seem to have been overlooked by those who hail it as a step forward for women. Let us look at the bill, section by section.

Conciliation Or Justice ?

The title of the bill is most repealing. It is called "A bill to provide for the establishment of family courts with a view to promote conciliation in, and secure speedy settlement of, disputes relating to marriage and family affairs and for matters connected therewith."

It will be noticed that this statement of purpose betrays a definite bias—that of conciliation in disputes related to marriage and family affairs. The purpose of most laws is to settle disputes by establishing the truth, and finding out who is in the right, who in the wrong, that is, whose version of truth is nearer to reality. Whether such establishment of truth leads to reconciliation or not is a separate matter. The law does not set conciliation above truth. The bias of this title pervades every clause of the bill.

So far, matters relating to marriage such as divorce, custody of children, maintenance, disputes over family property, have been dealt with by civil courts. According to the new law, family courts will be set up to deal only with such cases. A separate court to deal only with these cases will help speed up the process, and so far, is a good idea, because dragging out of matrimonial cases can cause a lot of hardship, particularly to women. However, under this new law family courts will follow their own separate procedures instead of following what has so far been called due process of law followed by all courts.

The section dealing with procedure outlines some of the differences. Section (1) reads: "In every suit or procedure, endeavour shall be made by the family court in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, to assist and persuade the parties in arriving at a settlement in respect of the subject matter of the suit or proceeding and for this purpose a family court may, subject to any rules made by the high court, follow such procedure as it may deem fit."

Wherever in this bill the term "family court" is used, the judge or judges are referred to thereby. What the above section, therefore, means, is that instead of judging the merits of the versions put forward by the two parties, the judge is expected to throw his or her weight in favour of arriving at a settlement, and is to behave as a persuader in addition to a judge, just as teachers are sometimes expected to behave as policemen in addition to teaching. In this persuasion the judge may "follow such procedure" as he or she "thinks fit."

Delaying The Process

Further, the next section provides : "If, in any suit or proceeding, at any stage, it appears to the family court that there is a reasonable possibility of a settlement between the parties, the family court may adjourn the proceedings for such period as it thinks fit to enable attempts to be made to effect such a settlement."

It is well known that if the two parties in any civil case request the judge to adjourn a case on the ground that they are in the process of attempting out of court conciliation, the judge normally agrees. But this procedure is not enshrined in the law. Nor is it left to the judge. According to the section quoted above, even if neither of the parties or only one of them wants a "settlement", the judge is entitled to adjourn the proceedings on the ground that he or she feels such a settlement is possible.

This seems to me to be a dangerous clause in so far as a settlement between husband and wife is almost always theoretically "possible" though such a settlement may appear humiliating to the wife and "reasonable" to the husband. It is to be remembered that most judges, if we go by the judgments they deliver in matrimonial cases, hold highly conservative views on the

question of what is "reasonable" behaviour of a husband. In fairly recent cases, judges have held that a wife wanting to live in a separate residence with her husband, away from his parents, or wanting to live in another place to retain her job is unreasonable, and that it is reasonable for a husband to expect his wife to be sexually available to him on demand regardless of her own wishes.

Therefore, the present law, which leaves it to the judge to decide that a settlement is possible and accordingly to adjourn proceedings for any length of time can lead to great hardship for a wife who may be needing a speedy divorce or payment of maintenance or custody of her child. When a case is adjourned for a long time, it is usually a woman who suffers more because men in our society, being, on the whole, more economically and socially stable, have greater staying power while women also face greater pressures to return to their husbands, even under humiliating conditions.

Further, if neither husband nor wife desires a settlement, why should the judge have the power to adjourn proceedings because he or she thinks a settlement possible ? When the two parties have decided to part, in whose interest must they be forced to stay together ?

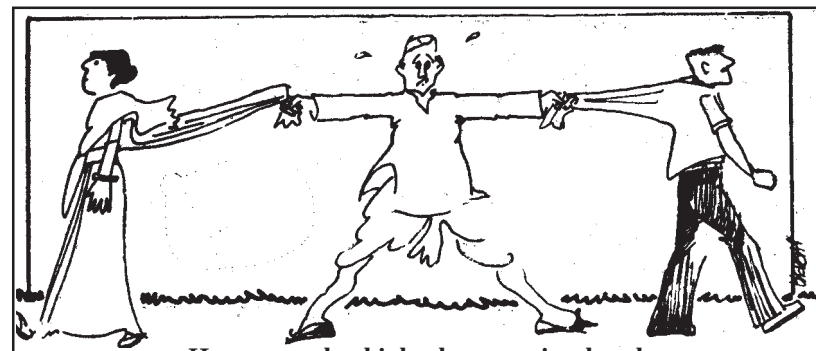
Law Unto Itself

Section 10(1) and (2) lay down that the Code of Civil Procedure, which applies to all civil cases, shall apply to family courts but section 10(3) lays down that this shall not "prevent a family court from laying down its own procedure with a view to arrive at a settlement..."

Such a clause puts a great deal of unqualified discretionary power into the hands of the individual judge. Rather than enlarging the number of choices available to women, this clause diminishes them.

Legalising Social Pressures

So also, section 11 lays down tHat "in every suit or proceeding to which this Act applies, the proceedings may be held *in camera,* if the family court so desires and may be so held if either party so desires." When a case is held *in camera,* members of the public and the press are not permited to be present in court. Many matrimonial cases deal with property and may not be embarrassing for a woman. Publicity or support from women's organisations may in fact be help-ful to her.



How can we let this broken marriagebreak

Since one of the ostensible purposes of this bill is to benefit women and since women may be embarrassed by the publication of certain items, it could have laid down that proceedings should be held *in camera* only if the woman so desires. As the clause is framed, it is possible for the judge to have the proceedings held *in camera* even if neither party so desires. This means that the court's pro-ceedings will not be open to public scrutiny and criticism. In a democratic set up such scrutiny is supposed to be one important way of ensuring that the legal process remains fair.

Lawyers Debarred

Perhaps the most significant change made by this bill is in clause 13. ''Notwithstanding anything contained in this law, no party to a suit or proceeding before a family court shall be entitled as of right, to be represented by a legal practitioner; provided that if the family court considers it necessary in the interest of justice, it may seek the assistance of a legal expert as *amicus curae."*

The ostensible reason for this-provision is that the proceedings are to resemble the discussions that go on in a family or with a marriage counsellor, and that lawyers tend to introduce legal technicalities, thereby delaying the proceedings more than is necessary.

However, it should be noted that the parties are here deprived of a very important right, the right to be represented by a lawyer. This is a right even a criminal has.

Under the present law, clients are free not to engage a lawyer and to argue on their own behalf. Why then a law which deprives people of the right to engage a lawyer ? Why should parties in a matrimonial dispute not have a right that is available to all other litigants ?

In our society, most men are more exposed to and therefore more practised in dealing with the male dominated world of public affairs than are most women. Men are also more used to speaking and arguing in public. Therefore, being deprived of a lawyer it likely to prove more harmful for women than for men.

Amicus curae is a Latin term which literally means "friend of the court" and refers to a person invited by the court to advise it. Normally, when a defendant is too poor to engage a lawyer, the state provides him or her with a defence lawyer who is known as an *amicus curae.* Therefore the *amicus curae* is normally a state appointed lawyer for the defence. This clause could well be interpreted to mean that only the defendant is entitled to be represented by an *amicus curae.* The ambiguous wording of the clause

and its omission to define the term can lead to confusion.

So far, the only cases in which lawyers do not represent clients are labour cases under the Industrial Disputes Act. The express purpose of debarring lawyers from fighting such cases is to promote reconciliation between workers and management in labour disputes. In practice, lawyers do represent parties in these disputes. They simply do not wear their robes, thus acting not in their legal capacity but as "friends" of the parties concerned. It is possible, therefore, that the clause in this bill too will be similarly interpreted and that parties will in fact be represented by lawyers in the _guise of friends.

However, it is highly significant that government chooses to exclude lawyers only in these two .kinds of cases—labour and matrimonial cases. Both are cases in which the parties involved are in an unequal relationship to each other. In many other cases, for example, most breach of contract cases, both parties are businessmen or traders and are equally powerful. But in labour cases, management is more powerful because it has more wealth and more resources than does labour, and in matrimonial cases, husbands are more powerful than wives, for comparable reasons.

It is true that the more powerful party can afford to engage a more skilful lawyer. But welfare organisations can and do try to help the weaker party by providing free legal aid to them. If the law, however, debars lawyers, the parties are thrown on their own resources—wealth, influence, education, experience, which they use to defend themselves. Clearly, in such a situation, the weaker party stands to lose more.

We should also note that the *amicus curae* may be introduced only if the judge considers it necessary, not otherwise. The bill does not specify how the "legal expert" is to be selected, and the wording suggests that the judge will be the deciding authority in selection.

Judge Creates Law

Section 14 lays down : "A family court may receive as evidence any report, statement, documents, information or matter that may, in its opinion, assist it to deal effectually with a dispute, whether or not the same would be otherwise relevant or admissible under the Indian Evidence Act, 1872."

The Indian Evidence Act lays down which kinds of evidence are admissible and which are not. While it is true that some of its provisions may be considered outdated or unnecessarily cumbersome this would call for a revision of the Evidence Act rather than for a wholesale rejection of it in the case of matrimonial disputes while it continues to apply to all other forms of dispute.

The reason for the existence of the Evidence Act is that certain forms of evidence which might be accepted in an everyday situation, for example, by a family when it sits in judgment on an individual, may not have a logical basis, and also because some forms of evi-dence can be easily faked or are otherwise doubtful as indisputable proof. We are all aware how often women are socially defamed because of hearsay or circumstantial evidence of their "immorality." Such evidence would not be admissible in a court, even though unfortunately, lawyers often do adduce it to prove that a woman is of bad character, and judges do take it into account.

By leaving it entirely to the in-dividual judge in a family court to decide which evidence is admissible and which is not, government seems to imply that marital disputes are somehow less serious than are say, disputes over money in business, and therefore, any kind of evidence may be admissible in marital disputes. This attitude, in fact, pervades the entire bill.

More Haste, Less Speed

The idea seems to be that just as labourers should, preferably, get back to work as fast as possible and conduct as few disputes as possible, so also, wives had best get back to the kitchen as fast as possible and not drag out their complaints which are, in any case, not half as serious as are disputes between men in the public world of business and finance. This attitude may seem perfectly reasonable to management or to a husband but may not seem so self evident to a labourer or to a wife.

For a woman, the question of maintenance may be just as important as the question of compensation for breach of contract is for a businessman. Why then should her case be dealt with in a more summary and hasty fashion ? Can there not be a way of providing a woman with interim maintenance; while her case is being fought so that she does not suffer hardship and so that the man does not have an interest in prolonging the case?

Instead of making such provisions which could relieve the hardship that women often face when cases drag on and on, this bill simply says that all the legal procedures should be hastened regardless of whether or not such haste makes waste of the woman's life. For example, sections 15 and 16 lay down that evidence of witnesses may be taken by affidavit and that their evidence be summarised instead of being recorded at length and that the summary be signed by the witness.

It should be borne in mind that when one person makes a summary of what another says, such a summary can never be wholly impartial since the selection is bound to be biased in one way or another. Certain things may be left out because the summariser considers them unimportant. It would be a very alert witness indeed who would, when the summary is read out to him or her, remember what salient details have been omitted. In most cases, the witness would sign the summary and leave it at that. Not

recording evidence at length can lead to important bits of evidence being left out.

Giving of witness by affidavit is similarly open to misuse. The purpose of cross examination of a witness is to ensure that lies are not told and that witnesses are not pressured into giving statements.This purpose may well be obviated by this provision.

Limited Right To Appeal

The section on appeals lays down that an appeal from a family court shall be straight to the high court and not to any lower court. It is to be noted that it is usually much more difficult for a woman to fight a case in the high court which is located in the capital city of each state. It costs much more in time, energy and money.

As it is, a majority of cases never go into appeal because parties give up in despair or cannot afford to appeal. Women, who, in any case, find it difficult to go to court at all, are unlikely to be able to go to the high court. This system of appeals will in effect mean that for most people the decision of the family court will be the last word.

Section 19 (2) says : "No appeal shall lie from a decree or order passed by the family court with the consent of the parties." "Consent" is not defined here. It is normally taken for granted that if both parties ask for a certain settlement, in accordance with which an order is passed, they will not ordinarily appeal against such a judgment. But this is nowhere laid down in law.

However, given that the atmosphere of the family court is one where parties are to be "persuaded" into reconciling, and that women, because of their vulnerable social situation, are more amenable to such "persuasion", it is conceivable that a woman may be pressured into giving "consent" to a settlement which she afterwards may find untenable.

Protecting—People Or Institutions ?

Since the new law leaves so many vital matters to the discretion of the judges in family courts, the process of selection of the judges is important. The bill lays down that "persons who have held judicial office for at least seven years or office or membership of a tribunal or any post under the union or a state requiring special knowledge of law (which branch of law is not specified) for at least seven years, or practised as an advocate of a high court for at least seven years or possess such other qualifications as the central government may, with the concurrence of the chief justice of India, prescribe" shall be eligible for appointment as judges of family courts.

Section 4 (3) 4 lays down : "In selecting persons for appointment as judges—

(a) every endeavour shall be made to ensure that persons committed to the need to protect and preserve the institution of marriage and to promote the welfare of children and qualified by reason of their experience and expertise to promote the settlement of disputes by conciliation and counselling are selected; and

(b) preference shall be given to women."

This section raises several significant questions. What is the institution of marriage which needs protection and preservation? Is the institution of marriage a being with a mind and heart who will suffer and die if not protected and preserved ? The institution of marriage is a set of relations established between a man and a woman which, in our society, gives the man certain rights and powers in excess of those of the woman.

However, even if this were not so, the fact would remain that in every dispute it is a man or a woman who suffers and who is; in need of protection or preservation. There is no case in which "the institution of marriage" is to be protected and preserved in disregard of the two parties involved.

Whenever such a lofty phrase as "protection of the interests of the family" is used, the speaker always means the interests of certain individuals within that family. When there is a dispute, individuals are urged to sacrifice their own interests to those of the family—by which is meant the interests of others in the family,

A unanimous chorus: persuading women into martyrdom

although this is not stated.

It is well known that, on the whole, women are far more often urged to make such noble sacrifices and to protect and preserve their husbands' families at their own personal cost - by giving up their individual human rights.

In our society, today, who may be said to be working to promote and protect the institution of marriage ? The parents who pressure their daughter to go back to her husband and adjust to maltreatment there or those who encourage her to live with dignity even if this means breaking off relations with her husband? Clearly, the former protect the interests of marriage which are identical with those of the husband while the latter protect the woman's interests even if this entails the nonpreservation of the marriage. And between these two kinds of people, it is the former who would be eligible as judges in family courts.

Whose Welfare ?

The clause also says that the judge should be one who has worked to promote the welfare of children. We should remember that the law in the various marriage and guardianship acts governing different communities already lays down what the state regards as "the welfare of children." For instance, under Hindu law, the natural guardian of a legitimate child over the age of five is the father. A mother can get custody of her child only by proving that the father is unfit to bring up the child. Since the law has already defined the welfare of children in a way that goes against the woman who gave them birth, what is the significance of a judge working to promote their welfare?

This is another catch phrase which is used emotionally to blackmail women into putting up with brutal marriages—for the sake of the children. The welfare of the children is invariably assumed to consist in living with their biological father and mother, however incompatible the two people and however much the violence generated

by their living together, rather than in living with a single parent. This is assumed by most people even though there is no evidence that children brought up by both parents, as most children in our society are, grow up into more desirable human beings than those who are brought up by one parent.

The purpose of this clause clearly is that the judge should join in or perhaps conduct the chorus of voices which assures a woman that her duty is to stay with her children at all costs, and to stay with their father too.

It is significant that the law does not lay down that people who have worked to promote the welfare of women will be eligible as judges. Only two criteria are laid down—commitment to protection of the institution of marriage, which in our society means protection of the interests of those who are dominant in marriage, and promotion of welfare of children.

The next clause hands a sop to women by saying that women will be preferred as judges. If a woman who believes that a woman's place is with her husband under any conditions, because the institution of marriage must be "protected and preserved", is appointed as a judge, how will her biological gender help the interests of women except insofar as it may fool them into thinking that she may be more sympathetic to them ?

Also, the next section immediately after this one says : "No person shall be appointed as...a judge of a family court after he has attained the age of 62 years."

The gender of the pronoun in this sentence suggests how seriously we need to take the so called preference to be given to women.

Section 12 says that the family court may, if it wishes, "secure the services of a medical expert or such person (preferably a woman where available) whether related to the parties or not, including a person professionally engaged in promoting the welfare of the family as the court may think fit, for the purpose of assisting the family court in discharging the functions imposed by this Act."

The expertise of these so called experts, apart from the medical experts, is defined only in the phrase "engaged in promoting the welfare of the family." Once again, we cannot overemphasise the fact that if a family dispute comes to court, this means that certain individuals in the family feel that their welfare is not being looked after in the family or is opposed to the interests of certain other individuals in the same family. Therefore, to talk of promoting the welfare of the family is meaningless. In every dispute, individuals are pitted against other individuals.

The family in our society is male headed and male dominated. To promote its welfare or to persuade women into subordinating their interests to the interests of the family is almost always equivalent to promoting the welfare of the dominant men and persuading women to subordinate their interests to those of these dominant men.

More Experts Needed ?

Even if we consider it so necessary that the interests of these dominant men should be protected and preserved, we should remember that every family and community contains a sufficient number of such "experts"

who are well practised in persuading women to reconcile with oppressive male relatives, particularly with husband, father or in-laws because she will thereby "promote the welfare" of the family and of the children. Why introduce such experts into court as well ?

Before a woman goes to court, she encounters innumerable social pressures to reconcile with her husband. Usually, women come to court only when they have made every effort to adjust and reconcile, even to the extent of suffering maltreatment and humiliation for unbelievable lengths of time. When they come to court, they may have the support of some relatives but they also invariably encounter dissuasion from many others.

Therefore, to convert the court into another extended family or *biraderi* debate in which the same outworn arguments of preserving marriage and family at the cost of the individual's dignity and welfare are repeated, as this new law does, is to prolong the torture of the woman and to give a concentrated public and legalised form to the private and more diffused social pressures that she, in any case, faces.

Most communities do have their own *panchayats* or councils of elders which try to intervene in matrimonial disputes, and experience shows that they usually put the interests of the family before the interests of the woman, and encourage reconciliation at any cost. Why not leave marital disputes to these councils if the court is to become another version of them?

What Instead ?

Those women's organisations which supported this bill did so because they were naturally dissatisfied with the way courts function at present. It is true that the legal process in this country is unnecessarily long drawn out, cumbersome and expensive. Few women have the resources to go to court and fewer can continue to fight a legal battle over years.

In matrimonial cases, women suffer special hardship because they are usually thrown on their own meagre resources or those of their natal families. Men take advantage of this situation and deliberately prolong cases so that women give up in despair. To get an order for maintenance by a husband and then to have the order implemented, that is, to see that he actually pays the sum ordered by the judge, is usually such a frustrating and uneconomical venture that many women prefer to forego their right to maintenance rather than to approach the court.

It is clear that changes are needed but I think that changes along the lines laid down in the present bill will only make matters worse, not better, since it gives more arbitrary powers to judges, who will not, in family courts, be a separate pro women species but will be the same people who control legal processes in other courts in giving which are so ineffective justice to women.

Changes along the following lines might be more useful for women :

1. The Code of Civil Procedure, the Evidence Act and other legislation governing procedures and costs should be reexamined and revised with a view to making all legal procedures less cumbersome and costly, and more accessible to ordinary people. Matrimonial cases should not be treated as less serious cases to be dealt with more summarily.

2. Government should provide free legal advice and aid to all who need it, especially to women. There should be a widespread legal aid programme for women, easily accessible in every locality. It should provide information

—*Kanchan*

on rights available to women, and should aim at equipping them to secure these rights. Women who do not have an independent income: should not have to pay any costs or court fees in matrimonial dispute cases. Free lawyers should be available to them. Government should provide them with a special allowance to cover transport to court and other such costs for as long as the case goes on. Employers should be bound to give paid leave to women who are fighting matrimonial cases on the days when they have to appear in court.

3. Courts should be set up to deal only with matrimonial cases so that these cases get priority in hearing and can thus be decided faster. But the procedures followed in these courts should be the same as those followed in other courts.

4. Government should ensure, by framing appropriate laws, that as soon as a woman files a case against her husband, he automatically begins to pay an interim maintenance, fixed at a certain percentage of his income. Rules should be made and machinery set up to recover this sum from the husband and pay it to the wife. The task of getting a maintenance order or an interim maintenance order implemented should not be left to the wife but should be undertaken by government. If the husband claims to have no income, a share of his property should be given to the wife in lieu of interim maintenance. In case the husband has neither income nor property, government should pay a living allowance to the wife until she gets employment.

5. As soon as a woman files a case against her husband and starts living separately from him, she should be given employment by government on a priority basis and also provided with shelter in a hostel. Private employers should also be made to give priority to such women.

Equip Women

Ensuring a woman's economic security is the most important step towards ensuring that she is in a position to fight a legal battle. The woman's economic insecurity during a long drawn out legal case is a major problem confronted by women's organisations. Therefore, effort should be concentrated in this direction and not in the direction of speeding up the legal process in matrimonial cases alone while leaving antiwomen laws intact, since the consequence of this can be that a woman is left destitute much sooner than she otherwise might have been.

If marriage counselling is needed, nothing prevents government from providing free marriage counselling to those who want it. There is no reason to turn a law court into a marriage counselling centre.

Most objectionable is the way the element of choice has been removed. If family courts are to be set up, the least that can be done is to give people the choice of approaching either a family court or an ordinary court. But this new law lays down that as soon as a family court is set up, all matrimonial cases pending in local courts shall be transferred to it. This seems to me a highly arbitrary procedure whereby a person files a case in a certain kind of court where a lawyer, for example, can be engaged, and overnight the case is transferred to another kind of court, where a lawyer is debarred.

It appears that just because a few more women may be taking recourse to legal processes to claim their rights and to challenge the power of men in marriage and the family, this law has been framed as a way of making it more difficult for them and of telling them, yet once again, that they should remain silent, in the best interests of that mysterious entity, "the family", which, of course, means those who control it.

The Fortnight After Diwali, 1984

Never again will the arrow fly,
Flames rise, effigies crumble, crackers
Explode, never the cries of children
Rend the air, without this shadow
Leaping against the sky. How shall we
Light a candle but to illumine
Anguish and flight, these faces stricken,
How play with fire but to awaken
Our night of shame ? Where will the sun find,
Tomorrow, a street unwounded, place
Unmaimed ? How shall we embrace, greet, smile ?
How shall we look into each other's eyes ?

-Ruth Vanita