Law Reform on Sexual and Gender-based Crimes in Mass Violence

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The essay discusses sexual and gender-based crimes in mass violence, both by State and non-State actors. In doing so, it draws upon five different contexts within India: communal violence, violence in the context of militarization, caste-based violence, violence in the context of 'development' and dispossession and violence in anti-Naxal operations. In the second part, the essay discusses gaps in Indian legal jurisprudence which are major causative factors for the existing impunity, and pose challenges to justice. As a logical corollary, the third part discusses relevant law reform initiatives that are in process, to address the challenges to justice. These include the Communal Violence Bill, the Criminal Law (Amendment) Bill, 2010 on amending criminal law on sexual assaults, as well as a Revised Scheme for Relief and Rehabilitation of Victims of Rape formulated by the National Commission for Women. In critiquing such law reform initiatives, the essay also highlights the role of women's rights groups that have used standards and concepts of international law and adapting them to the Indian context, thereby enriching the discourse on legal response to sexual and gender-based crimes in contexts of mass violence.

The history of independent India is rife with instances of attacks against the bodily integrity of women, both by non-State actors and State actors, namely, security forces. Sexual violence against women in contexts of mass crimes in India is often a consciously-thought out strategy to
humiliating and subjugating a community. This essay highlights contexts and patterns of impunity, examines the manner in which the violence is addressed through the law, discusses the challenges to justice, and critiques the various ongoing law reform initiatives. In doing so, it draws upon illustrative examples of sexual and gender-based violence from five contexts of mass crimes in India: communal violence, violence in contexts of militarization, violence in contexts of ‘development’ and dispossession, caste-based violence and violence in anti-Naxal operations.

CONTEXTS AND PATTERNS OF IMPUNITY

Communal Violence

During the partition of India in 1947, gender-based violence against women, though individual in character, was mass in scale. Thousands of women were raped, abducted, molested, passed from one man to another, barred and sold as chattel. However, in the interests of nation-building, justice for crimes was accorded low priority and those against women was not on the agenda at all. Mass crimes against women were also committed in the context of the anti-Sikh massacre in Delhi in 1984. It has been argued that there has been a veil of silence over sexual violence perpetrated on women, partly because of the social stigma attached to the victims involved, and partly because they had, at the same time, been orphaned or widowed, and rendered homeless—tragedies that overshadowed their sexual trauma. Despite the documentation on sexual violence against women during the anti-Sikh attacks in 1984, neither the Justice Ranganath Mishra Commission nor the Justice Nanavati Commission of Inquiry gave any specific finding on sexual atrocities against women.

In the communal violence that was perpetrated subsequent to the demolition of the Babri Masjid in 1992, mass rapes against women were documented, particularly in Surat. In the 2002 Gujarat carnage, gender-based violence, which was distinct in terms of its scale and brutality, emerged as the backbone of communal violence and played a fundamental role as an engine for mobilizing hatred against and destruction of the Muslim community; sexual violence was not incidental to the carnage. Many testified to insertion and threats of insertion of objects into women’s vaginas, cutting of breasts, cutting
open the abdomen of pregnant women, and to having been stripped and made to walk naked in public by mobs. In the 2007 and 2008 violence in Kandhamal, women were once again victims of specific forms of violence and intimidation.

The landmark judgment delivered by the Mumbai sessions court in Bilkis Bano’s case is the first case in independent India of sexual assault in the context of communal violence, resulting in a conviction. While the judgment brings a ray of hope, and the trial for sexual assault on Sister Meena (in the context of violence in Kandhamal) is in progress in the courts of Orissa, there are many instances of mass violations which are silenced, undocumented and never reach the courts of law.

Violence in the Context of Militarization

In areas with a high deployment of armed forces, such as the northeastern states and Kashmir, gender-based violence is perpetrated both by security forces and insurgent groups. The rape, torture and custodial killing of Thagiam Manorama in Manipur, by members of the 17th Assam Rifles—is an example of the complete impunity with which security forces operate. The courageous, naked protest by members of the Meira Paibi (a grassroots women’s movement) in Manipur, soon after the Manorama killing, was spurred on by the fact that it was not an isolated instance. The protest highlighted the extreme vulnerability that all women faced in militarized societies as a result of targeted violence against women. The security forces perpetrate sexual and gender-based violence during house to house searches, reprisal attacks and combing operations in villages, when the men are made to gather outside their homes while the women are forced to stay indoors.

Torture and sexual abuse of women in the village of Oinam (Manipur) in 1987, the gang rape of women of Ujamasidin (Tripura) by security forces in 1988, and the rape, sexual assault and forced nudity of many women in Mokokchang Town (Nagaland) in December 1994 are some of the widely known incidents. During the 20 years conflict in Mizoram that ended with the signing of a peace accord in June 1986, there were widespread allegations of torture, rape, extrajudicial killings and arbitrary detention of the Mizo.

In the context of Kashmir, the abduction, rape and killing of two young women Asiya and Noof in Shopian, Kashmir, in May 2009,
highlight yet another instance of the impunity with which security forces commit grave violations. The Shopian rapes and killings are manifestations of a deeper malaise—a consistent pattern of targeted violence against women that is committed with complete impunity.\textsuperscript{16} The extent of sexual brutalities committed on 42 women and girls, including an 80-year-old woman, in Kumanposhpura village of Kupwara district in February 1991 by soldiers of the 5th Rajputana Rifles,\textsuperscript{17} compelled the then District Magistrate of Kupwara to write as follows to the Divisional Commissioner, Kashmir: "The armed forces had turned violent and behaved like beasts. I feel ashamed to put in black and white the kind of atrocities and their magnitude brought to my notice."\textsuperscript{18} In most cases, women do not seek justice, due to a combination of factors such as the stigma attached to rape in conservative patriarchal societies, and the de facto impunity enjoyed by the perpetrators.

Due to the failure to investigate, prosecute and punish the perpetrators, and demonstrate, in a transparent manner, the action taken against security forces charged with sexual and gender-based violence, a Human Rights Watch (Asia) and Physicians for Human Rights report in 1994 concludes: "Indian authorities have signalised that the practice of rape is tolerated, if not condoned."\textsuperscript{19} In response to an application under the Right to Information Act, the Indian government has acknowledged that human rights violations by the paramilitary forces have nearly doubled from 95 cases in 2003–4 to 180 cases in 2007–8. The violations also include rape in custody.\textsuperscript{20}

**Caste-based Violence**

Women are also targeted for gender-specific brutalities in the context of caste-based violence, where they are rendered more vulnerable due to the inter-sectionalities of caste, class and gender. Karamchedu (Andhra Pradesh),\textsuperscript{21} Kumbhar (Rajasthan),\textsuperscript{22} Laxmanpur-Bathe (Bihar),\textsuperscript{23} Bharatpur (Madhya Pradesh)\textsuperscript{24} and Khairlanji (Maharashtra)\textsuperscript{25} are some sites of targeted violence against dalit women perpetrated by members of the upper castes. While the highlighted incidents involve sexual violence on many dalit women in each case, there are numerous instances where the violence is perpetrated on individual women, though it is widespread and systematic, with common patterns. A Human Rights Watch study points out that women are raped as part of ' caste custom
or village tradition, are forced to have sex with the village landlord, and as a form of retaliation to suppress movements to demand payment of minimum wages, to settle share-cropping disputes or to reclaim lost land. Perpetrators include members of the upper castes, landlords and the police.

The judgment related to the Khairlanji killings highlights the difficulties in making perpetrators from the upper castes accountable for the horrific crimes they commit. Among those killed in the Khairlanji massacre were a mother (Surekhla) and daughter (Priyanka), who were subject to sexual brutalities prior to the killings. The sons Roshan and Sudhir are also believed to have been subjected to various forms of torture. In August 2010, the Nagpur Bench of Mumbai High Court confirmed the judgment of the sessions court that treated horrific atrocities to dalits as mere criminal acts committed out of human rage, leading to a non-application of the provisions of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (SC/ST Act).

Significantly, both the sessions court and the high court failed to recognize the sexual brutalities perpetrated on the women, though Priyanka’s body was found stripped of all clothes. The sessions court observed: Accused Nos. 2, 3, 6 to 9 removed clothes of Priyanka before disposing of her severely injured dead body and thereby wanted to get satisfaction to their sexual eyes at such extreme circumstances. Yet, it did not convict anyone for sexual offences. The high court, instead of remedying the miscarriage of justice, concluded that since revenge was the motive, there was no intention on the part of the accused to insult the deceased women or to dishonour or outrage their modesty. It stated:

In order to attract Section 3(1)(xi) of the Act, it is necessary that the accused not belonging to Scheduled Caste or Scheduled Tribe must use force to any woman belonging to a Scheduled Caste or a Scheduled Tribe with intent to dishonour or outrage her modesty. In the present case as stated above, the whole object was to take revenge against Surekhla and Priyanka because the accused believed that they were falsely implicated and as such it is difficult to accept the prosecution version that offence under Section 3(1)(xi) of the Act is made out against the accused.

The high court further found a crime of sexual assault on a woman under Section 3(1)(xi) of the Atrocities Act to be an aggravated form
of offence under Section 354 of the Indian Penal Code (IPC). Since the CBI had not challenged the acquittal of the accused for the offence under Section 354, the high court was not persuaded by the CBI’s challenge of acquittal of the accused under the relevant section of the Atrocities Act.

Absence of justice in the Khairlanji judgment is only the tip of the iceberg. The National Crime Records Bureau (NCRB) statistics indicate increasing incidence of violence against dalit women. Yet the actual reality of crimes against dalits is much worse than these numbers suggest. For example, in September–October alone, there were 13 or more reported instances of gang rapes in Haryana, with a majority of them against dalit women. An analysis of official statistics indicates that the rate of conviction of the perpetrators of atrocities is very low. The low rate of conviction is the result of a combination of factors including the institutional bias of State agencies, leading to biased investigation and prosecution, as well as the absence of a viable victim/witness protection programme. The caste and gender bias in courts of law is a further contributing factor.

Violence in Contexts of ‘Development’ and Dispossession

The intricate nexus between the State and corporations in expropriating land for ‘developmental’ purposes such as mining, allows the rich and the powerful to acquire agricultural land belonging to the poor, thereby seriously compromising the right to life and livelihood of the poor. Nandigram and Singur (West Bengal) and Kalinga Nagar (Odisha) are sites of aggressive clashes of forced land acquisition through brutal atrocities, including targeted sexual violence of the local inhabitants. For example, in Nandigram, in March 2007, women and children, who were at the forefront of the protest, in the mistaken belief that this would stay the hand of the police and members of the CPI(M), bore the brunt of the brutal assault. An 11-member independent women’s team of concerned citizens from Kolkata, which inquired into the violence in Nandigram, observed as follows:

Rape and sexual assault have clearly become dominant weapons of war in the crossfire between vested political interests in Nandigram … Perpetrators have been resorting to sexual assault on women to intimidate, humiliate and
subjugate the opposition. While the opposition has been using incidents of rape to discredit the perpetrators, not to seek justice for the woman affected. We demand a complete and immediate stop to such practices and to all threats of sexual violence too.

Over three years after the violence, the state government was yet to pay compensation to all the injured and killed, as directed by the Supreme Court. None of the perpetrators have been brought to book. The erstwhile state government had appealed against a Calcutta High Court order holding the police action to be unwarranted. In February 2012, the Supreme Court permitted the present state government to withdraw its appeal, clearing the way for action against police personnel.

Violence in Anti-Naxal Operations

The gang rape of eleven adivasi women and brutal sexual assault of many more in Vakupalli village (Andhra Pradesh) in August 2007 is an example of targeted violence against women by security forces in the pretext of a ‘combing operation’ for ‘countering Naxal attacks.’ The inordinate delay by the police, in taking the concerned women for medical examination, ensured that forensic evidence of the sexual assault was lost, thereby scuttling the process of justice.

In Chhattisgarh, the Salwa Judum—a civil militia created and supported by the State—has committed atrocities on civilians with complete impunity, including rape and sexual assault of a brutal nature. Many members of the Salwa Judum have been hired and armed by the state police as Special Police Officers (SPOs). An independent team of women professionals, including the author, after a visit to Dantewada and Bijapur districts of Chhattisgarh in 2008, found that many women and minor girls have been victims of extreme sexual violence, kept as virtual slaves in the camps, and repeatedly raped/gang raped by SPOs within the camps and in their villages. The team recommended that the state should facilitate and ensure people’s right to the process of law in view of the large number of complaints of murder, abduction, assault and sexual violence not being registered due to fear and coercion.

Operation Green Hunt is the purported response of the Central Government to Naxal attacks. In the context of Operation Green Hunt, reports say that rape and sexual violence are rampant, and are a part of targeted attacks against civilians by the police and the private thugs they
represent. On 22 May 2010, three adivasi women of Muleam village near Chintalpur, Chhattisgarh, said that they were raped by members of the security forces. These are not isolated cases. In most, if not all instances, the police failed to register a First Information Report. The arrest of Sani Sori, an adivasi school teacher, in October 2011 and the humiliation and sexual torture that she has been subjected to while in the custody of the Chhattisgarh police subsequently is a case in point. The vulnerability of the victim-survivors and their chances of justice are made more remote by the fact that the perpetrators are either State officials or are backed by the State.

Though the contexts of mass sexual violence against women are varied and disparate, they share a commonality—the rampant impunity with which the violations are perpetrated, both by State and non-State actors, and the near-total absence of justice.

CHALLENGES TO JUSTICE

India faces major challenges in securing justice for women in the context of mass crimes. This section highlights and discusses the major factors, drawing illustrative examples from the contexts elaborated above.

Ill-suited Presumptions in Criminal law

The underlying presumption in the IPC that the sovereign power cannot commit a crime, contradicts reality in the contexts discussed above, where State officials actively commit heinous crimes or shield the perpetrators who do so. State complicity ranges from active participation in the violence to failure to prevent the violence, and failure to act during and after the attacks as mandated by the law. Commissions of inquiry have repeatedly observed a widespread institutional bias of state institutions, particularly the police, against religious minorities in contexts of communal violence. In the Shabnam rapes and killings, the Jammu and Kashmir High Court had observed that either the arrested policemen were involved or knew the guilty. In the Nandigram context, the CBI, which inquired into the violence, has reportedly sought the Supreme Court's permission for initiating proceedings against police officials. Another basic premise of criminal law—the assumption that the State is the custodian of society's interests and is bound to render accountable
the perpetrator of a crime—is also rendered irrelevant in contexts of mass crimes.

Role of Commissions of Inquiry and National Human Rights Institutions

The role and effectiveness of Commissions of Inquiry or the lack thereof is discussed in detail in the chapter titled 'Impunity Writ Large' of this book. Experience with the Commissions set up to inquire into sexual violence is no different. The findings of the Justice Muzaffar Jan Commission in the Shopian rapes and killings have not been acted upon. In the context of sexual assault and killing of Manorama, the Justice Upendra Singh Commission's findings have not been tabled before any authority. Dalit activists had to struggle to make the report of the K.S. Lodha Commission public that inquired into the Khmer carnage, including molestation of many dalit women, in Rajasthan.

While interventions of the National Human Rights Commission (NHRC) in the Gujarat carnage and the National Commission for Minorities (NYM) in the Kandhamal violence have been positive with regard to documenting State accountability, their role in the context of atrocities by the Salwa Judum is dubious. In a writ petition that challenged the constitutional validity of Salwa Judum, the Supreme Court directed the NHRC to constitute a fact-finding committee that would prepare a report on allegations relating to violation of human rights by the Salwa Judum. The manner of its investigation betrays the Commission's complete lack of understanding and sensitivity in documenting sexual violence against women. The team dismissed the testimony of five victim-survivors, who alleged sexual brutalities by members of the Salwa Judum, as untrue and unsubstantiated. Its findings were based on inconsistencies that the Commission found in the victims' statements with regard to the number of victims raped, the number of SPOs who took them away to the camps, number of SPOs who committed the alleged rape and their identity. The fact-finding team clearly did not consider the possibility of extreme trauma faced by the victim-survivors due to repeated violations in captivity over a prolonged period, as a major reason for the purported inconsistencies. The report echoes the findings of the Sadashiva Committee, appointed by the NHRC, where the testimonies of ten out of eleven women who
spoke of sexual violence by the JSTF forces, were dismissed as untrue. These are discussed in further detail in the Chapter 'Impunity With Large' of this book.

Absence of Legal Recognition of Contexts and Gravity of Mass Crimes

While mass sexual violence perpetrated against women constitute offences under the IPC, they do not reflect the gravity of the context, the intent with which such crimes take place or the complicity of state institutions and functionaries. The sexual assault of one woman by a man under 'normal/peaceful' circumstances is vastly different from the commission of the same offence in the context of mass crimes, where the intention is to systematically subjugate, punish or teach a lesson to vulnerable communities by violating the bodily integrity of the women concerned.

The judgment in the Khairlanji case has highlighted the fact that the enactment of the progressive piece of legislation (the SC/ST (Prevention of Atrocities) Act), that clearly spells out acts of sexual assault to be punishable offences, does not guarantee that crimes targeted against dalit women would be perceived in their relevant context. As discussed in the section above, by treating such brutal violence as mere criminal acts committed out of 'human rage', the judgment de-contextualizes and makes invisible one of the most horrific crimes against dalit women in recent Indian history.

The judgment of the International Criminal Tribunal for Rwanda (ICTR) in the case of Jean Paul Akayesu advances the treatment of rape and sexual violence in mass crimes contexts. The Tribunal stated: 'Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity...'. It stated that where rape is used as a method to destroy a group by causing serious bodily or mental harm to members of the group, it constitutes genocide.

The inclusion of rape and other forms of sexual violence within the gamut of 'war crimes', 'crimes against humanity' and 'genocide' in international law are potentially relevant to Indian efforts at legal recognition of gender-based violence in contexts of mass crimes. The
International Criminal Court (ICC) Statute explicitly recognizes rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and other grave forms of sexual violence as war crimes in international and non-international armed conflict as well as crimes against humanity. In addition, gender as a basis for persecution is included in the ICC Statute as a crime against humanity. The ICC Statute also includes trafficking as a crime against humanity that falls into the category of crimes of enslavement. The Elements of Crime of the International Criminal Court, which lay down the elements for genocide by causing serious bodily or mental harm, states in a footnote: “This conduct may include but is not necessarily restricted to, acts of torture, rape, sexual violence, or inhuman or degrading treatment.”

Absence of Legal Recognition of Various Forms of Sexual Violence

The limitations of the IPC definition of ‘rape’, particularly its emphasis on non-consensual penile penetration of the vagina, has been critiqued by many. All other forms of sexual assault fall within the ambit of ‘outrage of modesty’, which is treated as a crime of considerably lesser gravity. The present Indian law on sexual assault has no language to accurately describe sexual and gender-based violence in contexts of mass crimes, such as mutilation of sexual organs, insertion of objects into orifices of the women’s bodies and stripping and parading women naked. For example, Soni Sori’s medical examination found stones inserted in her vagina and rectum. Despite the severity of the assault, this would not attract the present definition of ‘rape’ in the IPC.

In sharp contrast, the definition of rape as a crime against humanity, in the ICC Statute recognises rape as an invasion of the body, includes insertion of body parts or objects in the mouth, vagina or anus and discounts consent by those unable to consent due to age, natural or induced incapacity. The expanded definition in international law, of rape as well as the recognition of crimes such as sexual slavery, forced prostitution, enforced sterilization, forced pregnancy, other sexual violence of comparable gravity and persecution on the basis of gender as crimes against humanity and war crimes, is especially significant with respect to the Indian agenda for reform of the law on sexual violence in contexts of mass crimes.
Culpability of the Police in Failure to Register and Arrest Suspects

Registration of the First Information Report (FIR) sets the criminal investigation machinery in motion. It is an important piece of evidence at the trial.\(^7\) Even in situations of relative peace, getting the police to register an FIR is an onerous task.\(^7\) In contexts of mass crimes where the environment is charged with hatred and fear, and the police often empathetic to the perpetrators or complicit in the violence, justice is scuttled through a failure to register FIRs or by a deliberate, inaccurate registration of FIRs.\(^7\) Processes of justice for the Gujarat carnage and Kandhamal violence are fraught with such examples.\(^7\) In the Vakapalli incident, the police delayed registering the FIR by 13 days.

State complicity, ineffective investigation and corruption also result in a failure to arrest suspects. For example, in the case of sexual assault of Sister Meena in Kandhamal, some perpetrators were arrested and handed over to the Crime Branch only 38 days after the lodging of the FIR by the nun. In the Shopian killings, four police officials, accused of grave dereliction of duty for allowing important evidence to be lost and destroyed in the initial stages of the investigation, were arrested only after the intervention of the Jammu and Kashmir High Court on 15 July 2009—nearly two months after the killings.\(^7\) In the Khairlanji killings, the police arrested accused persons only after widespread protests by civil society, subsequent to which the police officials and medical officers who abrogated from their statutory duties were suspended.\(^7\)

Delay in making arrests emboldens the perpetrators and enables them to intimidate and silence the victim-survivors.

Lack of Impartial Investigation and Prosecution

A prompt and thorough investigation is crucial to ensure that the best possible evidence is seized, preserved and produced in court. The Shopian killings are an example of the complicity of the state agencies in frittering away crucial evidence, thereby scuttling investigation and prosecution. At every stage, those responsible for unmasking the culprit(s) have systematically and deliberately destroyed, tampered with and diluted the evidence, and have thereby misdirected and obfuscated the investigation.\(^7\) The Justice Muzaffar Jan Commission
of Inquiry, established by the government, indicted 4 police officials for
complicity in and connivance with the crime and recommended their
prosecution.78 Indeed, the Commission found that the police officials' act
of tampering with evidence was not just a dereliction of duty but a
deliberate calculated move.79 However, with the CBI concluding that
the two women were neither raped nor killed, it has been noted that
the conspiracy to shield the perpetrators, destroy material evidence
and thereby scuttle processes of justice is 'deep-rooted, well-planned
and systematic'.80 In September 2012, with the Jammu and Kashmir
High Court allowing the family to lay a motion for re-investigation of
the case, there is a ray of hope that justice may yet be delivered.

In the Vakapalli incident too, the police deliberately delayed taking
the victim-survivors for forensic examination. Reportedly, the police also
refused to conduct a Test Identification Parade, although the women
were confident of identifying the accused persons.81

Perhaps ensuring the prosecutor a fair measure of institutional
autonomy and functional discretion, and the separation of investigative
law and order functions of the police—as suggested in the judgment in
Prakash Singh's case82 as well as by the National Police Commission83—
could somewhat mitigate, if not eliminate, this important obstacle
to justice.

Ill-suited Requirements of Procedural and
Evidentiary Law

The rules of criminal procedure and evidence presume the existence
of effective, objective and unbiased state institutions to implement
them. In contexts of mass crimes, the reality of mal-functioning or
dysfunctional state institutions fly in the face of such presumptions.
Norms such as the prompt registration of FIRs and medical and forensic
examination for bodily injuries become difficult, if not impossible, to
apply in contexts where victim-survivors flee from and are fearful of
their attackers for several weeks and months. State complicity in
crimes results in a loss of confidence in State agencies, causing a delay
or failure to approach the police station for registration of FIR. The
trauma suffered by women for weeks and months subsequent to the
crimes may prevent them from making consistent statements to the
authorities and courts of law. Justice H.S. Bedi of the Supreme Court
has emphasized the need to take cognizance of socio-political reality and the 'complete breakdown of the civil administration' whilst examining if the existing procedures and evidentiary standards are being upheld. The present law does not take cognizance of these specific obstacles to justice and the reality of women's experiences in contexts of mass crimes.

Prior Sanction to Prosecute Public Officials and Absence of Command/Superior Responsibility in Indian Laws

A major impediment to accountability for sexual violence, like other crimes in situations of mass violence, is the legal requirement for prior sanction of the concerned government for prosecution of public officials in the Criminal Procedure Code (CPC) and the AFSPA. In addition, the culpability of political leaders and masterminds in contexts of mass crimes is often public knowledge, but does not lead to successful prosecutions and convictions. The absence of command/superior responsibility in Indian laws makes it difficult to hold leaders and masterminds accountable for conspiring, sponsoring and executing attacks. The importance of the concept of command/superior responsibility and the challenges posed by requirement of prior sanctions to prosecute public officials are discussed in detail in Chapter 'Impunity: Writ Large: A Study of Crimes Committed during Anti-Veerappan Operations' of this book. The restricted powers of the NHRC in inquiring directly into violations by the armed forces, further contribute to the climate of impunity in which the armed forces operate.

Absence of a Law on Victim/Witness Protection

In recent times, the absence of a law on victim/witness protection has been most acutely felt in trials related to the Kanchamal violence, where rampant threats to victims and witnesses has led to an increasing number of acquittals. The report of the National People's Tribunal on Kanchamal observed that victims and survivors were willing to depose before the fast track courts, but faced severe intimidation and threats, and women faced threats of sexual assault to themselves and their daughters. Victims and witnesses were not provided with any protection in court.
or safe passage to and from court, it noted. In the context of atrocities against dalit women too, intimidation of the victim-survivor and her family members against pursuing justice is widespread. The Shopian killings have highlighted the attempt to intimidate, coerce and silence key witnesses to instances of rape and killing in a conflict situation, as outlined by the Independent Women's Initiative for Justice.

In the Chhattisgarh context, on 16 June 2009, a local judicial magistrate in a Dantewada sub-district received petitions from six victim-survivors of rape and sexual assault and began recording their testimonies. The move of the magistrate is significant, as the local police have consistently refused to register FIRs against Special Police Officers (SPOs) and members of the Salwa Judum who are accused of perpetrating brutal sexual assault on women. However, the victim-survivors have been harassed, intimidated, taken to police stations where the accused are stationed and reportedly made to give their thumb prints on blank paper, in an attempt to silence them. The ordeal faced by the women highlights the dire need for a witness protection programme. The absence of victim and witness protection measures in Indian law and the need for law reform on this issue, emulating the ICC standards, are discussed in detail in Chapter 'Integrating Victims' Rights in the Indian Legal Framework' of this book.

**LAW REFORM INITIATIVES**

There are several initiatives at law reform and amendments to existing legislations that are potential opportunities in addressing some of the challenges to justice elaborated in the section above.

The Communal Violence Bill

The civil society has engaged with government efforts at enacting a Communal Violence Bill, since 2004. A range of organizations and individuals have made oral presentations, written detailed critiques of versions of government drafts and presented alternative draft bills to the government. In July 2010, the National Advisory Council established a Working Group on Communal Violence Bill, and convened a Drafting Committee and an advisory committee, consisting of government officials and members of civil society. The present author participated in this process as a member of the Advisory Committee.
During civil society's engagement with the Bill from 2004 to 2012, there has been a considerable focus on sexual and gender-based violence. In 2006, when the Parliamentary Standing Committee on Home Affairs invited feedback on the government draft, a group of women's rights activists submitted a memorandum on provisions of the Bill related to gender-based violence. The memorandum recommended including definitions of sexual violence, rape, gender-based persecution, genocide and crimes against humanity, as well as sexual slavery, enforced prostitution, forced pregnancy and forced sterilization. It further recommended for protection of victims and witnesses, and the inclusion of the concept of 'reparations' as is understood in international law.

In January 2008, in response to a request from the Prime Minister's Office, an alternative Bill on the issue, titled The Communal Crimes Bill, was drafted and submitted to the government. This Bill included the following categories of gender-based violence: rape, sexual slavery, forced pregnancy, enforced sterilization, other sexual violence and persecution (including gender-based persecution). The significance of the Bill lies in the fact that it spells out, for the first time, special procedural and evidentiary rules guiding prosecution of sexual violence. These include _inter alia_ a presumption of non-consent, exclusion of evidence concerning the past or subsequent sexual history of the victim; provision of victim's counsel, _in camera_ trials and onus on the accused to prove innocence.

There were several meetings and consultations in 2009 and 2010 held by various civil society groups and networks on the Communal Violence Bill, all of which suggested reforms of laws on sexual violence. One such consultation stated the following in its report:

Sexual violence in situations of communal violence, unlike those in non-communal contexts, is often committed with malicious intent of intimidating, humiliating and degrading the dignity of the victim community using the bodies of women. Inclusion of a wide ranging crimes of sexual violence, in addition to rape, therefore assume great importance in a bill to prevent and punish those responsible for communal violence. We therefore call for the inclusion of rape, forced pregnancy, enforced sterilization and other forms of sexual violence.

The statement further reiterated the need for creating new procedural and evidentiary standards for sexual violence. In July 2011, the National
Advisory Council formulated the Prevention of Communal and Targeted Violence (Access to Justice and Reparations) Bill 2011. Notably, the Bill includes a definition of sexual assault that is substantially broader than the IPC definition of rape (Section 7) as well as a definition of torture (Section 12).

The efforts of civil society’s consistent engagement with the Communal Violence Bill, particularly on gender-based violence, as discussed above, have progressively advanced the debates on the norms and standards necessary on sexual violence against women in substantive, procedural and evidentiary law.

The Criminal Law (Amendment Bill), 2010 and 2012

In India, reform of rape laws has met with official indifference for several decades. The nationwide campaign by women’s groups around 1970–80 on and after the Mathura case brought rape on to public agenda for the first time. The first major changes to the archaic rape laws were commenced in 1983. The inadequacy of these reforms is indicated both by negative judgments based on patriarchal notions of the judges, as well as an abysmally low conviction rate of 4 per cent for rape in ‘peacetime’.

The law reform initiative on this issue has been largely fuelled by the 172nd report of the Law Commission of India, prepared in 2000, which called for a complete overhaul of rape laws. To inform the law reform process, women’s groups sent an open letter to the Union Law Minister, M. Veerappa Moily in January 2010, highlighting some of the aforementioned obstacles to justice for sexual assault.

In March 2010, the government introduced, into the public domain, the draft of the Criminal Law (Amendment) Bill 2010. Women’s groups, groups working on child rights and groups working with lesbian, gay, bisexual, transgender, intersex (LGBTI) people from across the country held consultations and reflected on the extent to which this proposed Bill addresses concrete concerns on the ground. They submitted to the government a critique of the government Bill as well as an alternative draft in June 2010.

The alternative draft completely de-links sexual violence from the notions of chastity, virginity and modesty, and reiterates the act to be a violation of women’s bodily integrity and sexual autonomy. The Statement of Objects and Reasons of the civil society draft submitted to the
government in June 2010, highlights sexual violence in contexts of mass crimes in the following words:

Sexual assault and sexual humiliation are tools that are used against women and others in situations of conflict such as those based on community, ethnicity, caste and religion in order to target the community that they are part of. 102

Some major changes proposed by civil society also include:

• Broadening of the definition of rape to include other forms of sexual violence other than penile penetration of the vagina. It grades the nature of sexual violence, into categories of sexual assault, aggravated sexual assault and sexual offences, based on concepts of harm, injury, humiliation and degradation.
• Gender plurality of victims—that is, making sexual abuse of children and minors, as well as sexual assault on members of the LGBTI groups by men as punishable offences.
• Introducing specific provisions for sexual violence against women in contexts of mass crimes, based on community, ethnicity, caste, religion and language.
• Providing for effective and speedy complaint procedures as well as reparations.

The alternative draft specially recognises sexual assault as part of sectarian violence, which it treats as aggravated sexual assault. 103

New provisions on procedure have been recommended, including for sexual violence in contexts of mass crimes. These include: (i) the right of victims/witnesses to file an affidavit before any metropolitan or judicial magistrate with regard to specific crimes; (ii) the recording of testimonies by video conferencing to overcome the fear or apprehension of victims/witnesses appearing in court; (iii) the appointment of special public prosecutor who are professionally competent and who enjoy the confidence of the victims as a norm in all contexts of mass crimes and (iv) the negation of the requirement of prior sanction of the government for prosecution of a public servant for sexual assault.

Evidentiary standards for contexts of mass crimes are also spelt out, in recognition of the ground realities. The draft reiterates the importance of victim/witness protection, drawing upon international
and Indian standards, including the Law Commission of India's 198th report released in 2006. The draft states that legal initiatives aimed at victim and witness protection ought to focus on human dignity, respect, privacy and right against repeated trauma. The draft proposes that a Victim/Witness Support Unit is established and housed in the existing offices of the Legal Services Authority at the district and state levels. In July 2012, the Union Cabinet approved the introduction of the Criminal Law (Amendment) Bill, 2012. The 2012 Bill does not reflect the concerns expressed and suggestions made by women's groups in 2010. The 2012 Bill is fundamentally different from the 2010 Bill, as it makes the offence of sexual assault a gender neutral provision, both with respect to the perpetrator and the victim. This major change was introduced in criminal law without a consultation/dialogue with women's groups. A preliminary note with regard to objections, concerns and suggestions of women's groups and other activists was sent on 23 August 2012, to the Secretariat of National Advisory Council as well as the Secretary, Ministry of Home Affairs, Government of India. At the time of publication of this book, deliberations with the government are in progress.

Simultaneously a campaign has been launched to abolish the forensic practice of the 'two-finger test' whereby a doctor inserts two fingers into the vagina to determine the occurrence of rape. The test infers the presence or absence of the hymen, which leads to an inference of whether or not the woman is habituated to sexual intercourse. This information is routinely used to weaken a woman's testimony of sexual assault in court. It helps perpetrators escape accountability, in addition to being dehumanizing, traumatic and offensive for the woman. A Human Rights Watch report has called the finger test unscientific and inhumane.184

In a related move, the government's eagerness to assuage public outcry over the Ruchika Girhew case185 led to its mootings of the Sexual Offences (Special Courts) Bill, 2010.186 With its focus on speedy disposal of cases related to sexual offences (as opposed to efficient justice delivery), the Bill suggests establishment of special courts within the sessions courts for trial of cases related to sexual offences. While the Bill prescribes the criteria for public prosecutors and judges in terms of their years of experience, it makes no mention of gender training or prior experience of sensitively handling sexual offence cases. It provides for a summary trial of offences punishable up to three years' imprisonment, and prescribes a
time-bound trial of a maximum of six months. The Bill introduces a new
effence in substantive criminal law—that of ‘unlawful sexual conduct’,
to primarily and explicitly include child sexual abuse within the ambit
of the IPC—without modifying the existing definition of rape. It
reiterates that previous sexual experiences of the woman or allegations
of her immoral character are irrelevant for the consent or quality of
consent. However, the presumption on which the Bill is premised—that
special courts will necessarily ensure justice and sensitivity to victim-
survivors—has been proved wrong in other contexts. The provisions
of the Bill have been critiqued by members of civil society.

Rape Compensation Scheme

In Delhi Domestic Workers’ case, the Supreme Court, in 1995, had
directed the National Commission for Women (NCW) to draw up
a statutory scheme for rehabilitation of victims of sexual assault. The
NCW and the Ministry of Women and Child Development have been
in the process of formulating the scheme over the past 15 years, and
revising the same from time to time. Women’s rights groups have held a
series of consultations with the Commission to put forward their con-
cerns and suggestions. The latest version, called the Proposed Scheme
for Relief and Rehabilitation of Victims of Rape, 2005, has been revised
on 15 April 2010. Despite women’s rights groups repeatedly asking
for the contents to be in the form of an act and not a scheme, and
to formulate a broader scheme for compensating all criminal injuries
for gender-based violence rather than only ‘rape compensation’, these
proposals have not been accepted by the NCW. The Scheme has no
preamble that sets out its rationale and asserts state responsibility to
compensate for its failure in preventing the violence, and no reference
to state obligations to prevent, fulfil and protect women’s human rights
under the Indian Constitution and the CEDAW.

It proposes to establish a Criminal Injuries Relief and Rehabilitation
Board to implement any scheme for rehabilitation of rape victims, and
to consider claims and award financial relief and rehabilitation. The
scheme lists various parameters for determining quantum of compensa-
tion. Surprisingly it provides for a ridiculously low interim financial
relief of Rs 20,000 and a ceiling amount of Rs 2 lakh as final compensa-
tion to the victim in normal cases, and Rs 3 lakh in exceptional cases.
There is no provision for a periodic revision of the slabs of monetary compensation.

While women's groups have repeatedly suggested that the Acid Scheme should be autonomous of the criminal justice system, with a focus on 'injuries' and not 'offences', the NCW draft persists in closely linking the two. An interim award is to be disbursed within three weeks of complaint to the police (para 11a), and the final award is to be disbursed within a month from the time the woman gives her evidence in the criminal trial, or within a year from the date of application to the Board, in situations where there is an undue delay in recording the evidence for reasons beyond her control (para 12a). Thus, payments of compensation have been made conditional upon the woman's positive engagement with the criminal justice system.

Of serious concern is a list of the various grounds on which a claim may be rejected (para 13). These include:

- The applicant failed to take, without delay, all reasonable steps to inform the police, or other body or person considered by the Board to be appropriate for the purpose, of the circumstances giving rise to the injury. (para 13(a)(i))
- The applicant failed to cooperate with the police or Courts in attempting to bring the accused/assailant to justice. (para 13(a)(ii))
- The applicant has failed to give all reasonable assistance to the Board in connection with the application. (para 13(a)(iii))
- Where the applicant after having filed the complaint deliberately turned hostile in the trial and has not supported the case of the prosecution. (para 13(a)(vi))

Rather than adopting sensitivity to reasons for delay in registration of the complaint in contexts of sexual assault, the NCW's draft Scheme seeks to penalize a victim for delay in accessing the legal system through a police complaint, by rejecting her claim for compensation. There is no realistic time limit for reporting the incident, with specified conditions for waiver of the same. The clauses quoted above are therefore ill-suited to sexual and gender-based violence in contexts of mass crimes. Further, the victim-survivor of such violence is sought to be penalized for turning hostile in the trial, despite the fact that no effective measures for victim-witness protection exist as of date. The ordeal faced by witnesses of
cases before the fast track courts of Kandhamal is ample proof of the vulnerability of such witnesses.14 The detailed provisions for rejection of claim stated in the Scheme provide fertile ground for insensitive and callous Board members to deny compensation and rehabilitation to victim-survivors of sexual assault who are in dire need of the same. It is hoped that civil society's continued engagement with the Scheme may positively influence and shape its provisions.

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Mass crime contexts in India, such as communal and caste-based violence, contexts of militarization, anti-Naxal operations and that of forcible land acquisition in the name of development, are sites of sexual and gender-based violence against women. Large-scale impunity exists for such violence, perpetrated both by State and non-State actors. Gaps in Indian legal jurisprudence are major causative factors for the prevailing impunity. These include ill-suited presumptions in criminal law, absence of legal recognition of contexts and gravity of mass crimes, failure of the law to recognize a range of crimes of sexual violence, ill-suited requirements of procedural and evidentiary law, difficulties posed by the law in making public officials accountable, absence of command/superior responsibility in Indian law and an absence of laws on victim/witness protection. The role of Commissions of Inquiry and National Human Rights Institutions in advancing justice for sexual and gender-based violence in contexts of mass crimes has also been less than desirable. The draconian and repressive laws that confer unfettered powers on security forces have been used to cause widespread human rights violations with little scope for justice and accountability. The law has failed to respond with administrative, civil and criminal consequences for officials who have committed grave derelictions of their duties.

A beacon of hope lies in law reform initiatives currently underway, that seek to address some of the obstacles to justice. Despite a lack of consensus and serious differences between civil society actors, such as women's groups, and the government, a law on communal and targeted violence, the Criminal Law (Amendment) Bill, 2012 and the Proposed Scheme for Relief and Rehabilitation of Victims of Rape are some such potential avenues. The civil society, particularly women's rights groups, have used the standards and concepts of international law and adapted
them to the Indian context, recommending newer and innovative legal standards. The discourse on legal response to sexual and gender-based violence in contexts of mass crimes has significantly advanced as a result. In addition, the review of the SC/ST (Prevention of Atrocities) Act that is currently in progress, as well as the nationwide campaigns for the repeal of Armed Forces (Special Powers) Act and that of Women against Sexual Violence and State Repression (WSS) are potential platforms for addressing impunity for violence against women in contexts of mass crimes.

NOTES

1. In this essay, 'security forces' is used as an all-encompassing term, consisting of police, armed forces and paramilitary forces. The paramilitary forces have several components such as the Assam Rifles, Rashtriya Rifles, Special Frontier Force, Central Industry Security Force, Border Security Force (BSF), National Security Guards (NSG) and Indo Tibetan Border Police (ITBP). The Central Reserve Police Force (CRPF) is the largest paramilitary force and assists the work of the police. They are controlled by the Ministry of Home Affairs or the Ministry of Defence, Government of India.


6. For more details, see report by Sahiyar, a Baroda-based women's organization, mimeographed copy, report of women delegates to Bhopal, Ahmedabad and Surat, by the AIDWA, CWDS, MDS, NFIW in Tanika Sarkar and Urvashi


9. The report of a National People’s Tribunal on Kandhamal, held on 22-4 August 2010, headed by Justice A.P. Shah (retd), observed with deep concern the silence that prevails in matters of sexual assault at various levels, including documenting, reporting, investigating, charging and prosecuting cases. It further observed that though witness testimonies indicate that sexual violence was rampant, there are very few reported cases, and an even smaller number that have been registered and were pending in the courts. National People’s Tribunal on Kandhamal, Waiting for Justice: A Report, National Solidarity Forum, 2011, p. 173.

10. Bilkis Yakub Rasool is a victim-survivor of gang rape committed in the context of the Gujarat carnage, 2002. She was pregnant at the time of the brutal rape, and witnessed the brutal killing of fourteen members of her family, including her three-year-old daughter. Besides Bilkis, a number of other female family members of hers were raped and killed in the same incident in Dahod district of Gujarat on 3 March 2002. She was the sole survivor of the massacre. Mumbai sessions court convicted 13 out of 20 accused persons in January 2008. For more details, see S. Anand, ‘Bilkis Banos Brave Fight’, Tehelka, 5(4), 2 February 2008.

11. On 10 July 2004, Thangjam Manoroma, a suspected activist of the banned Peoples Liberation Army, an underground outfit operating in the state of Manipur, was taken into custody for interrogation at midnight by a team from Assam Rifles, a paramilitary force. Her family members witnessed her being brutally assaulted in a corner of the house for almost half an hour after blindfolding and tying her hands and feet. The security personnel assured the family that Manorama would be handed over to the nearest police station the next morning. However, the next morning, before the family could approach
the police, news came that Manorama’s body with multiple signs of torture and bullet marks was found lying in a village nearby on the roadside. Post-mortem revealed gunshot wounds in her genitals. For more details, please see Binalakshmi Nepram, ‘Gender-based Violence in Conflict Zones’, available at http://cequinindia.org/pdf/Special_Reports/GENDER-BASED%20VIOLENCE%20IN%20CONFLICT%20ZONES%20by%20Binalakshmi_Nepram.pdf (accessed on 10 January 2012), pp. 1–2.

12. In Oinam, 11 people were killed, hundreds were tortured and sexual abuse of women was widely reported. In Anuradha M. Cheney, (2002), Militarism and Women in South Asia, New Delhi: Kali for Women, p. 131.

13. In Ujanabaidan, 14 tribal women were allegedly gang raped by jawans of the 27 Assam Rifles.


14. Yangbera Ao, a doctor, examined and treated at least 15 or 16 women for rape and molestation, as per the information of the United Women’s Forum. For further details, see Roshni Goswami, M.G. Steekala and Meghna Goswami, (2005), Women in Armed Conflict Situations: A Study by North East Network, Guwahati: North East Network, p. 35. See also Tarini Mehta, ‘Raped by the Army’, Lawyers Magazine, November–December 2008.


19. Ibid.

20. Other violations include arbitrary use of power, abduction or kidnapping, rape, abuse of power, custodial death, custodial rape, custodial torture, death in shootout, fake shootout and ‘illegal detention. For more details, see ‘India: Violations by Paramilitary Forces Almost Double’, The Indian News, 9 January 2009.


23. In Laxmanpur-Bathe (Bihar) dalit women were raped and mutilated before being massacred by members of the Ranvir Sena in 1997. For more details, see Smrita Narula, ‘Broken People: Caste Violence Against India’s “Untouchables”’, *Human Rights Watch*, 1999, pp. 60–5.


25. See n. 27.


27. On 29 September 2006, four members of the Bhotmange family were killed by members of the upper-caste community and their bodies thrown into a canal, in Khairlanji—a village in Bhandara district of Maharashtra. The brutal treatment was meted out to the family members as they had resisted land-grabbing by members of the upper caste. Almost all face-finding reports found that the two women among the four killed, had been sexually assaulted in brutal ways. Some reports suggested that bullock cart poles were thrust into their vaginas, and that the daughter, Priyanka, was raped even after she had been killed. See S. Anand, ‘Understanding the Khairlanji Verdict’, *The Hindu*, 5 October 2008.

28. The judgment was delivered by the ad hoc sessions court at Bhandara district, Maharashtra in September 2008, convicting eight persons. All parties

29. For a critique of the judgment, see Brinda Karat, 'Khairlanji Verdict Blind to Dalit Cause', *The Times of India*, 1 August 2010.

30. Reproduced in para 45(12) of the high court judgment, see n. 28.

31. Ibid., Section 3(1)(xi) of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 reads as follows:

   Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe, assaults or uses force to any woman belonging to a Scheduled Caste or a Scheduled Tribe with intent to dishonour or outrage her modesty.

32. Section 354 of the IPC reads as follows:

   Assault or criminal force to woman with intent to outrage her modesty: Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

33. See n. 28, para 43F of the high court judgment.

34. Everyday, 2 dalits are killed, 3 dalit women are raped and a dalit is assaulted every 18 minutes, as per Crime in India 2005, National Crime Records Bureau, Ministry of Home Affairs, Government of India. However, Amnesty International estimates that only 5 per cent of the attacks are registered. Amnesty International (2005), 'India's Unfinished Agenda: Equality and Justice for 200 Million Victims of the Caste System', available online at: http://www.amnestyusa.org/regions/americas/document.do?id=ENGUSA20051000705001 (accessed on 11 November 2010).


36. The observations by the trial court in Bhanwari Devi’s case that upper-caste men could not have defiled themselves by raping Bhanwari Devi—a lower caste woman—thereby acquitting the accused, are illustrative of the caste and gender bias of the judiciary. In September 1992, Bhanwari Devi, a grassroots
worker of the Rajasthan government’s Women’s Development Programme, was gangraped by members of a Gujar (upper caste) family in retaliation for intervening in the child marriage of a year-old girl in the family, available at http://www.tehelka.com/story_main34.asp?filename=hub131007A_MIGHTY.asp (accessed on 13 January 2012).

37. In Nandigram, on 14 March 2007, about 2000 police officials and several hundred armed members of the CPI (M) attacked about 5000–6000 unarmed residents of Nandigram who were resisting an acquisition of thousand acres of land by the West Bengal government. The government had planned to hand over the land to developers to build an industrial zone, including a proposed chemical plant. According to reports, the police blinded the protestors with tear gas, and then opened fire. The official statistics said that fourteen died and over two hundred were injured. However, the true toll may never be known. For more details, see Satya Saran, ‘A Bridge Too Far’, Combat Zone, May–June 2007. For context of the violence, see Praful Bidwai, ‘From Singur to Nandigram and Beyond: Development as Dispossession’, 27 January 2007, available at http://www.prafulbidwai.org/index.php?tag=Dispossession (accessed on 10 November 2010).


41. For details see ‘Nandigram Deaths: CBI Seeks Nod to Book Cops’, The Times of India, 27 September 2010.

42. The attacks were carried out by the Greyhounds—a cadre of special police personnel, and were carried out in a planned and systematic manner. For more details, see ‘The State of India’s Indigenous and Tribal Peoples 2008’, a report by Asian Indigenous and Tribal People’s Network, May 2008, pp. 12–13, available at www.aitpn.org/Reports/Tribal_Report2008.pdf (accessed on 15 April 2010).

the reports are available on http://cpjc.wordpress.com/reports-by-fact-finding-teams-on-salwa-judum/ (accessed on 14 April 2010).

44. For more details, see Ajit Sahi, 'The Evil that Men Do', Tehelka, 6(28), 18 July 2009.


46. Operation Green Hunt is an unprecedented internal military offensive that is taking place in the forests in parts of Chhattisgarh, Andhra Pradesh, Orissa, Maharashtra, Jharkhand and West Bengal—home to thousands of adivasis. The Operation, which commenced in September 2009, is purportedly an anti-Naxal operation. Unlike in the past, when state governments coordinated such operations, the Central Government leads the operation, involving over 40,000 paramilitary troops and the police.


49. Ibid.

50. See the report of the Justice Jagmohan Reddy Commission on the attacks against Muslims in Ahmedabad in 1969, the report of the Justice D.P. Madon Commission on the attacks against Muslims in Bhiwandi, Jalgaon and Madad in 1970, the report of the Justice Ranganath Misra Commission on the anti-Sikh violence of 1984 in Delhi and the report of the Justice Srikrishna Commission on the attacks in Mumbai 1992–93. Discussed in further detail in Saumya Uma,

52. 'Nandigram Deaths: CBI Seeks Nod to Book Cops', The Times of India, 27 September 2010.

53. The Justice Muzaffar Jan Commission of Inquiry, established to inquire into the causes and circumstances leading to the death of the two women, released its report on 9 July 2009. The Commission had ruled out death by drowning, and indicted four police officials for complicity in and connivance with the crime, and recommended their prosecution. Subsequently, the CBI disregarded the Commission's findings, and concluded that the women were neither raped nor killed, but that they drowned on their own in a river having a depth of 2-2.5 feet.

54. Justice Upendra Singh submitted his final report to the Manipur government on 22 November 2004, but the report has not been made public due to an order of the Guwahati High Court.


58. Ibid., paras 6.76.1–6.76.5.

59. For a critique of NHRC's role in the context of crimes by the Joint Special Task Forces of Tamil Nadu and Karnataka, see Chapter 'Impunity Writ Large: A Study of Crimes by the JSFT' in this volume.

60. Uma, 'Kandhamal', see n. 50, p. 124.


62. Ibid., para 731.

63. War crimes include crimes committed in contexts of international and non-international armed conflict. Common Article 3 to the Geneva Conventions lays down acts that are prohibited during non-international armed conflict. Article 8(2)(c) of the Rome Statute of the International Criminal Court likewise prohibits certain acts from being committed during an armed conflict.
that is not of an international nature, including violence to life and person and committing outrages upon personal dignity.

64. Crimes such as murder, torture and sexual assault would be construed as crimes against humanity if committed as part of a widespread or systematic attack against a civilian population in pursuance of state or organizational policy, with the perpetrator possessing a general knowledge of the attack, as stated in Article 7 of the ICC Statute.

65. Article 6 of the Statute of the International Criminal Court defines genocide as follows:

For the purpose of this Statute, 'genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.

The definition has been reproduced verbatim from Article II of the Convention on the Prevention and Punishment of the Crime of Genocide, 1948.

66. Articles 7(1)(b), 7(1)(c) and 7(2)(c).

67. Article 6(b) of Elements of Crimes of the ICC.

68. See, for example, Flavia Agnes, 'Law, Ideology and Female Sexuality', Economic and Political Weekly, 37(2), March 2002, pp. 844–7. The Law Commission of India, in its 172nd Report, acknowledged the limitations of the present definition of rape and recommended its broadening. The government has initiated a law reform process through the Criminal Law (Amendment) Bill 2010, in acknowledgment of this.

69. Article 8(2) (b) (xxii)-1 of Elements of Crimes of the ICC.

70. Article 8(2) (xxii) of the Rome Statute of the International Criminal Court (ICC) lists out the crimes of rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence also constituting a grave breach of the Geneva Conventions, as war crimes. Article 7(1)(g) of the Statute lists the same crimes as constituting crimes against humanity, when committed as part of a widespread or systematic attack, directed against any civilian population with knowledge of the attack.

72. See, for example, Broken System.
74. For more details, see Uma, ‘Kandhamal’, see n. 50, p. 124 there; Threatened Existence, pp. 49–52.
75. For details, see n. 83.
76. For details of State’s systematic failure at providing justice for dalit atrocities, see Centre for Human Rights and Global Justice and Human Rights Watch, Hidden Apartheid: Caste Discrimination Against India’s ‘Untouchables’, 2007—a shadow report in response to India’s periodic report submitted to the UN Committee on the Elimination of Racial Discrimination (CERD) in 2007.
78. Four police officials—S.P. Jawed Mattoo, Dy S.P. Rohit Basakotra, SHO Shafeeq Ahmed and SI Ghazi Abdul Kareem—who were in charge of the investigation, were suspended after they admitted before the Jan Commission that they had committed grave dereliction of duty and allowed important evidence to be lost and destroyed in the initial stages of the investigation. They were arrested only after the intervention of the Jammu and Kashmir High Court on 15 July 2009.
79. The Commission observed:

Considering the overall facts and attendant circumstances of the present incident, it appears that the deliberate inaction of police left unexplained, is not a bona fide omission, caused by an error of judgment, or a genuinely wrong interpretation of statute, or a mistaken notion of procedure, but seems to be a deliberate attempt to dilute and mellow down this incident.


83. The National Police Commission, in its sixth report, opined that in situations of communal violence, 'adequate interest is not paid in investigation of heinous and serious crimes'. For investigation of such crimes, it suggested the establishment of special investigating squads under the state CID, comprising officers 'of proven integrity and impartiality', and further suggested the separation of the investigation wing from the law and order wing of the police. National Police Commission, Sixth Report, March 1981, para 49.15. However, in its seventh report, it contradicted its own recommendation and opined that 'the work of the police could not be put in water-tight compartments.' National Police Commission, Seventh Report, May 1981, para 50.22.

84. Harendra Sarkar v. State of Assam, 2008 (7) SCR 589: 2008 (9) SCC 204, para 19 of Justice H.S. Bedi's judgment. The case relates to a killing of members of a Muslim family in Assam in the context of anti-Muslim violence subsequent to the destruction of Babri Masjid in 1992. Since the two judges of the Supreme Court who dealt with this case had a difference of opinion on the approach to be taken in ascertaining the evidence before them, the case was placed before a three-judge bench of the Supreme Court in 2008 and is pending judgment at the present point in time.

85. The prohibition is identically worded in Section 6 of the AFSPA and Section 7 of the J&K AFSPA, and is an extension of the requirement of sanction for prosecution of public officials that is stated in the general law—Section 197 of the Criminal Procedure Code. Section 197 of CrPC makes it mandatory to obtain sanction of the government for prosecution of public servants and judges, where such a person is accused of any offence alleged to have been committed in discharge of his official duty. The sanction is to be issued by the authority that has powers to remove the public servant by office—the Central Government in cases of members of armed forces or officers of the Central Government, and the state government in all other cases.


87. The NHRC can only request a report from the Central Government, as per Section 19 of the Protection of Human Rights Act, which prescribes a
separate procedure for inquiring into violations of human rights by the armed forces. The NHRC has repeatedly emphasized the urgency and need for amending the provision to empower the NHRC to inquire more effectively into human rights violations of the armed forces. See, for example, NHRC's Annual Report 2000-01, p. 213. The UN Human Rights Committee too has reiterated the recommendation of the NHRC. See Concluding Observations of the Human Rights Committee on India, dated 4 August 1997, CCPR/C/79/Add. 81 (Concluding Observations/Comments), para 22.

88. For further details, see Sanjana, 'First the Sorrow Now the Shame', Tekel, 7(12), 27 March 2010.

89. See National People's Tribunal on Kandhamal, p. 177, para 23.

90. For example, in December 2005, a 32-year-old dalit girl's hands were chopped off in a village near Bhopal for refusing to withdraw her complaint of rape against two 'upper caste' men, as reported by Rasheed Kidwai, in The Calcutta Telegraph, December 2005. On 22 November 2006, a minor dalit girl was allegedly burnt to death by an upper caste youth—Chhote Singh Rajput—at Sahalwada village, Hoshangabad district, Madhya Pradesh, after she refused to withdraw a complaint of rape against him, as stated in 'Episodic Reactions for 60 Years: Arming the Dalits Now?', ACHR Review, Asian Centre for Human Rights, Review 143/06, 29 November 2006.

91. 'Shopian: Manufacturing a Suitable Story'.

92. For more details of the intimidation faced by survivors of rape who filed private complaints with the magistrate, see Javed Iqbal, 'The Tribal Ruchikas of Dantewada', The New Indian Express, 8 January 2010.

93. The National Advisory Council (NAC) was constituted under the Prime Minister's Office in May 2010 as an interface with civil society. It has been entrusted with the responsibility of engaging with this law on a priority basis. Details of the mandate of the Working Group and members of the Advisory and Drafting Committees as well as the key guiding principles are available at http://nac.nic.in/communal/com_bill.htm (accessed on 10 November 2010).


97. Tukaram & Another v. State of Maharashtra, 1978 Cr.LJ 1864 SC. The rape of a 17-year-old tribal girl by local policemen within the precincts of a police station in Chandrapur district of Maharashtra and the subsequent acquittal of the rapists led to a vehement protest against patriarchal notions
in the judiciary, which accepted the defence's arguments of the previous sexual history of the victim-survivor. The judgment also presumed her consent to the sexual intercourse as her body bore no physical marks of injury or resistance. Networks all over the country co-ordinated protests against this judgment, and demanded a re-trial as well as amendments to the rape laws. The women's movement also demanded sweeping changes to the archaic rape laws.

98. The amendments include inclusion of provisions on rape by a public servant of a woman in his custody (Sections 376B–D of the IPC), enhancement of punishment for rape, provision of minimum mandatory sentence of 10 years for custodial rape, shifting of the onus of proof on the accused in showing absence of consent in custodial rape (Section 114A of the Indian Evidence Act) and deletion of a provision that allowed a person accused of rape to prove that the victim was of 'generally immoral character' (Section 155(4) of the Indian Evidence Act).

99. In Premchand v. State of Haryana (Suman Rani's case), AIR 1989 SC 937, the Supreme Court reduced the punishment from a minimum mandatory 10 years to 5 years imprisonment, for a case of custodial rape, on the ground that the woman was of 'questionable character' and 'easy virtue.' In Mohd. Habib v. State, 1989 Cr. LJ 137 Del, the Delhi High Court acquitted the accused on the ground that there were no marks of injury on his penis, which the Court presumed was indicative of consent. That the victim was a seven-year-old girl who had suffered a ruptured hymen and bite marks on her body was not taken into consideration.

100. The 172nd Law Commission report recommended changing the focus from rape to 'sexual assault', broadening its definition beyond non-consensual penile-vaginal penetration, deletion of Section 155(4) of the Indian Evidence Act that allowed evidence of past sexual history of the woman to be introduced in a rape trial, introduction of graded sentences with higher punishments for rape committed in custody of public officials or in situations of trust, a proposal to make rape laws gender neutral and for decriminalization of Section 377 of the Indian Penal Code.

101. The Open Letter to M. Veerappa Moily to amend laws on sexual violence in India is available online at http://www.petitiononline.com/Moily/petition.html (accessed on 15 November 2010).


103. The relevant section reads as follows:

Section 376(4): Sexual Assault as Part of Sectarian Violence
Whenever

A person or group of persons commits sexual assault on a woman as part of sectarian violence he/she shall be punished with rigorous imprisonment for a term which shall not be less than seven years but which may be imprisonment for life and shall also be liable to fine.

EXPLANATION I: Sectarian violence is any attack committed against the persons and properties of individuals or a group of persons on the basis of their group identity, which can be inferred directly or from the nature or circumstances of the attack. It includes any one or a combination of the following:

Multiple attacks, attacks in mass numbers, attacks over a prolonged period, attacks in a number of places simultaneously and/or attacks with a systematic and consistent pattern.

EXPLANATION II: ‘Group identity’ could be, inter alia, on the basis of religion, gender, caste, class, language, region, political ideology or other identity of the group.

EXPLANATION III: Where a woman is subjected to sexual assault by one or more in a group of persons acting in furtherance of their common intention, each of such persons shall be deemed to have committed aggravated sexual assault within the meaning of this subsection.


105. Ruchika Girhotra was a minor who was molested by the former Haryana Director General of Police SPS Rathore. His conviction after an inordinate delay of 19 years resulted in public outrage. For more details, see ‘After Ruchika: Special Courts for Sexual Offences’, *The Financial Express*, 30 December 2009.

106. The text of the Bill is available at http://mynation.net/docs/sexual-offences-bill-2010/ (accessed on 15 November 2010).

107. For example, see critique of Special Courts for Kandhamal violence in Uma, ‘Kandhamal’, pp. 109–15.


109. *Delhi Domestic Workers’ Forum v. Union of India*, (1995) 1 SCC 14. In this case, where six women working as domestic maids in Delhi were raped by eight army personnel on a moving train, the members of the Delhi Domestic Workers’ Forum petitioned the court as it was prevented by the employers from meeting the victims.

110. One of these is the recommendations submitted by NGOs on the proposed scheme for relief and rehabilitation of victims of rape, endorsed by many organizations and submitted by Partners for Law in Development
and MARG on 7 March 2010 to the National Commission for Women and Ministry of Women and Child Development.


112. Determining factors proposed include type and severity of bodily injury suffered by the victim, expenditure for pregnancy/abortion, loss of employment, non-pecuniary loss for pain, suffering, emotional trauma, humiliation or inconvenience etc. Ibid., para 15.

113. Ibid at para 11(a) and 10(b) respectively.

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