Kandhamal: Introspection of Initiative for Justice 2007-2014

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KANDHAMAL

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Saumya Uma and Vrinda Grover

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# LIST OF ABBREVIATIONS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>Adv.</td>
<td>Advocate</td>
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<tr>
<td>AIR</td>
<td>All India Reporter</td>
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<td>Art.</td>
<td>Article</td>
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<td>ATR</td>
<td>Action Taken Report</td>
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<tr>
<td>BDO</td>
<td>Block Development Officer</td>
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<tr>
<td>BJP</td>
<td>Bharatiya Janata Party – Political party of the Hindu Right</td>
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<tr>
<td>BPL</td>
<td>Below Poverty Line</td>
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<tr>
<td>CAT</td>
<td>U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984</td>
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<tr>
<td>CBCI</td>
<td>Catholic Bishops Conference of India</td>
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<td>CNI</td>
<td>Church of North India</td>
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<tr>
<td>Cri.LJ</td>
<td>Criminal Law Journal</td>
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<tr>
<td>Cr.PC</td>
<td>Criminal Procedure Code, 1973</td>
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CRPF  Central Reserve Police Force
DCP  Deputy Commissioner of Police
DGP  Deputy General of Police
DIG  Deputy Inspector General of Police
DM  District Magistrate
DSP  Deputy Superintendent of Police
EFI-OLAC  Evangelical Fellowship of India – OdishaLegal Aid Cell
FIR  First Information Report
HRLN  Human Rights Law Network
IASC.G  Inter Agency Coordination Group
ICC  International Criminal Court
ICCPR  International Covenant on Civil and Political Rights, 1966
ICESCR  International Covenant on Economic, Social and Cultural Rights, 1966
ICTR  International Criminal Tribunal for Rwanda
ICTY  International Criminal Tribunal for Former Yugoslavia
IDPs  Internally Displaced Persons
IO  Investigating Officer
IPC  Indian Penal Code, 1860
IPS  Indian Police Service
IPT  Indian People’s Tribunal on Environment and Human Rights
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<tr>
<th>Acronym</th>
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<tbody>
<tr>
<td>JPDC</td>
<td>Justice and Peace Development Group</td>
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<tr>
<td>MLA</td>
<td>Member of the (state) Legislative Assembly</td>
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<tr>
<td>MNREGS</td>
<td>Mahatma Gandhi National Rural Employment Guarantee Scheme</td>
</tr>
<tr>
<td>MP</td>
<td>Madhya Pradesh – a state in India</td>
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<tr>
<td>MOU</td>
<td>Memorandum of Understanding</td>
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<td>NCM</td>
<td>National Commission for Minorities,</td>
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<tr>
<td>NCPCR</td>
<td>A statutory body, National Commission for the Protection of Child Rights</td>
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<tr>
<td>NCW</td>
<td>A statutory body National Commission for Women</td>
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<tr>
<td>NCSC</td>
<td>A statutory body National Commission for Scheduled Castes</td>
</tr>
<tr>
<td>NGO</td>
<td>A statutory body Non-governmental organization,</td>
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<tr>
<td>NHRC</td>
<td>A statutory body National Human Rights Commission</td>
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<tr>
<td>NHRI’s</td>
<td>National Human Rights Institutions</td>
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<tr>
<td>NPT</td>
<td>National Peoples Tribunal</td>
</tr>
<tr>
<td>NREGA</td>
<td>National Rural Employment Guarantee Act</td>
</tr>
<tr>
<td>OFRA</td>
<td>Orissa Freedom of Religion Act</td>
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<tr>
<td>PAC</td>
<td>A statutory body Provincial Armed Constabulary – a type of police personnel</td>
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<tr>
<td>PIL</td>
<td>Public interest litigation</td>
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<tr>
<td>POCO</td>
<td>Protection of Children from Sexual Offences Act, 2012</td>
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<tr>
<td>POTRA</td>
<td>Prevention of Terrorism Act – a draconian law</td>
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<tr>
<td>PP</td>
<td>Public Prosecutor</td>
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PUCL  People’s Union for Civil Liberties
PW  Prosecution Witness
RAF  Rapid Action Force – a type of paramilitary force
ROPA  Representation of the People Act 1951
RSS  Rashtriya Swayamsevak Sangh – National volunteer corps, the ideological organisation of the Hindu Right.
RTI  Right to Information
SC  Scheduled Caste
SCC  Supreme Court Cases
SDM  Sub-divisional Magistrate
SIT  Special Investigation Team
SLP  Special Leave Petition
SP  Superintendent of Police
ST  Scheduled Tribes
TADA  Terrorist and Disruptive Activities (Prevention) Act 1987 Unlawful
UAPA  Activities (Prevention) Act 1967
UDHR  Universal Declaration of Human Rights
UN  United Nations
UNHRC  United Nations Human Rights Committee
UNDP  United Nations Development Program
UP  Uttar Pradesh – a state in India
UPA  United Progressive Alliance – a coalition government in India
VHP  Vishwa Hindu Parishad (World Hindu Council)
Vs.  Versus
W.P  Writ Petition

(retd.),  Retired
Srikrishna  Sri Krishna
INTRODUCTION

The Kandhamal district of Odisha witnessed horrific communal violence on dalit and adivasi Christians in December 2007, followed by violence that was larger in scale and more gruesome in August 2008. The pretext and the supposed trigger to the August 2008 violence was the killing of Swami Lakshmananada Saraswati, (a Hindu religious leader) and his four disciples, including a woman, in his ashram at Jalaspeta, Kandhamal on 24th August. Despite the state government’s announcement that it strongly suspected Naxal involvement in the killings, vicious hate propaganda was spread overnight by Hindu right wing forces against members of the Christian community, blaming them for the same.

The following day onwards, unprecedented violence was unleashed against the Christian minority community in the district. The attacks were widespread, across several blocks and villages in the district of Kandhamal, and were executed with substantial planning and preparation, as indicated by the meetings held by the perpetrators prior to the violence and the financial and other forms of assistance secured months prior to the violence.\(^1\) The violence was targeted mainly at dalit

\(^1\) As observed by the National People’s Tribunal on Kandhamal. For more details, see National Solidarity Forum, Waiting for Justice - Report of the National People’s Tribunal on Kandhamal (New Delhi: 2011), p. 172 (hereinafter referred to as the NPT report)
Christians and adivasis and persons who supported or worked with this community.  

According to government figures, during the violence from August to December 2008 in Kandhamal district, a total of 39 persons were killed, including 2 police personnel and 3 rioters. However, human rights groups estimate that around 100 people were killed, including disabled and elderly persons, children, men and women.

More than 600 villages were ransacked; at least 5600 houses were looted and burnt; at least 54000 people were left homeless; 295 churches and other places of worship, big and small, were destroyed; 13 schools, colleges, philanthropic institutions including leprosy homes, tuberculosis sanatoriums, and offices of several non-profit organizations were looted, damaged or burnt. About 30,000 people were uprooted and lived in relief camps and continue to be displaced. During this period about 2,000 people were forced to renounce their Christian faith. More than 10,000 children had their education severely disrupted due to displacement and fear.

There has been no official estimate of those who suffered severe physical injuries (not leading to death) and mental
Such persons remain invisible in official documentation of the violence. Further, there has been no official estimate of the loss of movable and immovable property of the victims and survivors. An impact assessment study undertaken in 2012-13 in three affected villages as a representative sample, indicates the value of total property and livelihood-related loss at around Rs. 2,28,76,486 while the average loss suffered by each affected family is Rs. 1,86,280. The report acknowledges that this too is an underestimation of the actual loss suffered, as loss of access to healthcare and basic services, transportation costs, loss of education, psychological trauma, injury and disability, breakdown of community and social structures, loss of access to places of worship and permanent loss of livelihood have not been included in the study.

The Kandhamal violence can be viewed in the context of anti-Christian attacks over the past few decades, particularly in 1997-98 and 2014-15. Attacks against Christians in India have been in the form of killings of priests, sexual assault of nuns, and the physical destruction of Christian institutions, schools, churches, colleges and cemeteries. Attacks against Christians are part of a concerted campaign of the right wing Hindu organizations, collectively called the Sangh Parivar. Their main aim is to promote and exploit communal clashes to increase their political power base.

A. Context

Kandhamal is one of the poorest districts in the state of Odisha. It has a high percentage of two of the most

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9 Unjust Compensation – An Assessment of Damage and Loss of Private Property during the Anti-Christian Violence in Kandhamal, India, published by Centre for the Sustainable Use of Natural and Social Resources, and Housing and Land Rights Network (Bhubaneswar: 2013), at p. 22

10 Ibid
marginalized ethnic groups – Panas and Kandhas. Panas, designated as a Scheduled Caste (SC), constitute about 17% of Kandhamal’s population. Over 90% of them are Christians. They are poorer than the Kandhas as they have substantially less access to resources and hold only a small percentage – 9% - of the cultivable land.

The Kandhas, designated as a Scheduled Tribe (ST), constitute about 51% of the district’s population. They are primarily animists and do not fall in the category of religion as a social phenomenon in the same way as Christians, Muslims and Hindus. Being one of the most disenfranchised communities, they have been the target of attempts at religious conversion, both by Christian missionaries and Hindutva forces. Kandhas own about 77% of the cultivable land in Kandhamal.

As a source, not only of livelihood but of dignity and power, land has been a contentious issue among the two most marginalized communities in Orissa. This is particularly so in Kandhamal district, which has only 12% land that is cultivable, about 71% of the area comprises of forests and the remaining area is barren land. The land owned by STs was sought to be protected through the Orissa Scheduled Areas Transfer of Immovable Property (by Scheduled Tribe) Regulation Act 1956, which was further amended in 2002 to regulate all land transfers from STs to non-STs. A study conducted by a government research institution refutes the theory of Panas grabbing land

12 For the purpose of this paper, ‘Hindutva forces’ means groups that are inspired by the goal of Hindu nationalism and the creation of a Hindu state. These include Rashtriya Swayamsevak Sangh (RSS), Vishwa Hindu Parishad (VHP), Bharatiya Janata Party (BJP), Bajrang Dal (BD) and Durga Bahini.
13 Crossed and Crucified: Sangh Parivar’s War Against Minorities in Orissa, Report by PUCL – Bhubaneswar and Kashipur Solidarity Group (Delhi: 2009) at p. 22
from the Kandhas, and states that sundhis (caste Hindus) were responsible for land grabbing.\textsuperscript{14} Yet it has been widely believed (through hate rumours) that the violence in Kandhamal was a result of Panas’ grabbing land owned by Kandhas.

Another reason for the violence, as cited by government officials, is the fake certificates made by SCs to grab the benefits accorded to STs through government policies and schemes. Due to the definition of Scheduled Castes in the Constitutional (Scheduled Castes) Order 1950 issued by the President of India and subsequent amendments to the same, SCs who convert to Christianity loses their SC status upon conversion, while STs continue to retain their ST status even after conversion to Christianity.

In the context of the unjust character of the law, an allegation has been made that the Panas use fake certificates to avail of benefits intended for SCs, despite their conversion to Christianity. The jury of the National People’s Tribunal on Kandhamal observed that since the SC status is directly related to entitlements and benefits in government policies and schemes, a loss of the status deters conversion to Christianity and thus furthers the objective of the communal and divisive forces.\textsuperscript{15}

\textbf{B. Nature & Salient Features of the Violence}

The Odisha government has been categorical in reiterating that the violence in Kandhamal was ethnic in nature – a conflict between the Panas and Kandhas, consequently excluding the role of Hindutva forces and a targeting of Christians in the violence. On the other hand, the National Commission for Minorities was unequivocal in its observation that the violence

\begin{itemize}
  \item \textsuperscript{14} Ibid at p. 27
  \item \textsuperscript{15} NPT report, supra n. 1, at p. 172
\end{itemize}
was “undoubtedly communal in nature and people were attacked on the basis of their religion.”

The National People’s Tribunal on Kandhamal, headed by Justice A.P. Shah (ret’d.), also observed that “the carnage in Kandhamal is an act of communalism directed mainly against the Christian community, a vast majority of whom are dalit Christians and adivasis; and against those who supported or worked with the community.”

Unlike the 2007 violence, the 2008 violence in Kandhamal was widespread, across several villages and blocks. Some of the main features of the 2008 violence were as follows:

- The attacks were executed with substantial planning and preparation, as victim-survivors had witnessed meetings held by the perpetrators prior to the violence, the financial and other forms of assistance sought to support the violence,

- The availability of weapons within the perpetrators, the large numbers of the mob, the availability of burning material and the arrangement of vehicles to carry away looted property also indicate the planning and preparation involved in these attacks;

- Killings and attacks were brutal in nature, and targeted the young and the old alike;

- Burning and destruction of property (residential, official and religious / charitable institutions) was also a predominant form of violence;

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16 Report of the visit of the Vice Chairperson, National Commission for Minorities, to Orissa, 21-24 April 2008 at page 2, para 2; Report on the visit of the Vice Chairperson, National Commission for Minorities, to Orissa, 11-13 September 2008, at para 2

17 NPT report, supra n. 1 at p. 172, para A1.

18 NPT report, p. 173, para B4
• Moveable property was looted, valuable documents and certificates related to educational and professional qualifications, land and property ownership were deliberately destroyed in order to lower the socio-economic status of the victim-survivors;

• Evidence of the attacks were systematically destroyed in order to scuttle the processes of justice and accountability and

• Human rights defenders and social workers have been targeted for their role in assisting victims with aid, relief, rehabilitation and process of justice. The NPT found these to be deliberate acts, intended at cutting off assistance to the victim-survivor community and isolating them. 19

C. Justice Initiatives for Kandhamal Violence: A Mapping

C1. Commissions of Inquiry

Six months after the December 2007 violence in Kandhamal, on 14th July 2008, the state government established a Commission of Inquiry headed by Justice Basudev Panigrahi, under the Commissions of Inquiry Act 1952. The Commission was vested with the responsibility of inquiring into the causes and consequences of the December 2007 communal violence.

The Commission had not submitted its inquiry report till February 2015. As per a report dated 27 February 2015, the Panigrahi Commission has sought another extension for a year from the state government for submission of its report. 20

On 25th August 2008, two days after the gruesome killing of

19 NPT report, page 173, para B5
Swami Lakshmananda, and soon after the gruesome killings of Christians began, the state government announced its decision to set up another Commission of Inquiry. In September 2008, the state government formally established the Commission of Inquiry, headed by Justice S.C. Mahapatra, to inquire into the August 2008 violence in Kandhamal. The Mahapatra Commission submitted a 28-paged interim report to the state government on 1st July 2009, which reportedly sidelined and ignored the role of Hindutva forces in inciting hate and perpetrating violence against dalit and adivasi Christians.

Instead, it endorsed the popular (and official) view that religious conversions, land disputes and issuance of fake caste certificates by the local administration were the major contributory factors behind the violence. The interim report has not been released formally and is unavailable in the public domain. Following the death of Justice Mahapatra in May 2012, the proceedings of the Commission halted and were commenced again in March 2013 under the chairpersonship of Justice A.S. Naidu.

The proceedings of this Commission of Inquiry too have not been concluded at the time of publication of the present report. The present study devotes a chapter to examining the role and efficacy of the commissions in delivering justice and ensuring accountability of perpetrators for the violence.

C2. Fast Track Courts

During the communal violence in Kandhamal, there have been more than 3,300 complaints, but only about 820 FIRs were registered. Out of these, only 518 cases were charge sheeted.

22 Justice A.S. Naidu was appointed to the post in September 2012.
The police treated the remaining cases as false reports, allegedly due to lack of evidence. Out of the 518 cases that were charge sheeted, 247 cases were disposed off. The Fast Track courts were established at the end of 2008 and began functioning in 2009. The judges were Shoban Kumar Das in Fast Track Court 1 and Chitta Ranjan Das in Fast Track Court 2. Judge C.R. Das was later transferred and replaced with judge B. N. Mishra.

The Fast Track Courts functioned up to March 2013, when they were terminated. Over 200 cases were still pending at that time, including part-heard matters. After the Fast Track courts were wound up, the remaining cases, most of which are related to arson and less major offences, are pending before the various sessions’ and magistrates’ courts in the district of Kandhamal. It is widely believed that the courts were wound up too quickly, despite a dire need for them to function.

Out of the 30 trials for murder, the courts convicted accused in only two cases. There have been convictions in 4-5 other murder cases, but for lesser offences. Destruction of evidence, particularly after brutal killings, was rampant and systematic. Bodies were often dismembered and thrown in different places including rivers and forests, so the evidence would be destroyed. In some cases, the bodies were burnt completely and the ashes washed away to destroy all traces of evidence. Despite this, there are reportedly very few instances of conviction for destruction of evidence.

Reports have stated that these courts have largely failed to deliver justice and have been sites of “speedy injustice”. A


24 See for example, Kandhamal: The Law Must Change its Course, researched and written by Saumya Uma, edited by Vrinda Grover, published by Multiple Action Research Group (MARG), New Delhi, 2010, hereinafter referred to as the MARG report, pp. 109-113
human rights lawyer opined that the judges were interested in closing the cases and did not apply their minds in rendering justice, as they had a target of concluding and disposing off at least 8 cases per month, and 200 cases a year. Almost all the victims’ lawyers and activists that the authors conversed with for the present study echo the same feeling of discontentment with the dispensation of justice. The present study analyses a representative sample of judgments in order to evaluate the efficiency and efficacy of the Fast Track courts as well as the criminal justice system with regard to the Kandhamal violence.

C3. Redress from the Higher Judiciary

Apart from the Fast Track courts, the victims/survivors and their representatives have approached the Orissa High Court at Cuttack and the Supreme Court in a number of instances. One of the first positive orders was passed by the Orissa High Court in the Utkal Christian Council case, directing all police stations across the state to accept complaints and register FIRs related to the Kandhamal violence.

The High Court has also entertained petitions for review, revision and appeal over the trial court judgments in several instances, as well as petitions for transfer of trials from one sessions court to another, particularly in cases of rape and other serious offences. Bail matters, such as the bail plea of Manoj Pradhan – a sitting MLA who was convicted for murder – were also dealt with by the High Court.

Two writ petitions which were filed in the Supreme Court are of prime importance. These relate to relief, rehabilitation and compensation to victims and survivors, as well as to the

25 Interview of Adv. Manas Ranjan by Saumya Uma, June 2014
poor functioning of the criminal justice system, with a request to constitute a Special Investigation Team to re-investigate the cases. Both the petitions remain pending in court, though significant orders have been passed from time to time. These are discussed and analysed in the present study.

C4. National Human Rights Institutions

The National Commission for Minorities (NCM), an independent statutory body established to safeguard the rights of minorities in India, played an active role in monitoring the human rights situation at the ground level. The NCM made four visits to Kandhamal – two after the December 2007 violence and two after the August 2008 violence. The NCM prepared a report with its observations and recommendations for the government on three occasions.27 The National Human Rights Commission (NHRC) received a complaint about the Kandhamal violence from the Catholic Bishops Conference of India (CBCI) on 18th September 2008, based on which its team made a spot investigation from 23rd September to 3rd October 2008. Its report was not formally released. It was by accident that activists working on the Kandhamal violence were able to access the report off the internet.28 The present study analyzes the reports of the NCM and NHRC and their import for justice

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and accountability for the Kandhamal violence.

C5. National People’s Tribunal on Kandhamal

The National People’s Tribunal (NPT) on Kandhamal, held in New Delhi on 22-24th August 2010, was organized by the National Solidarity Forum, which is a countrywide solidarity platform of concerned social activists, media persons, researchers, legal experts, filmmakers, artists, writers, scientists and civil society organizations to assist the victims and survivors of the Kandhamal violence in 2008 to seek justice, accountability and peace and to restore the victim-survivors’ right to a dignified life.

The Tribunal provided a platform for victim-survivors and their families to voice their experiences, perceptions, demands and aspirations to civil society at large. The jury, headed by Justice A.P. Shah (retd.), heard the testimonies of 45 victims, survivors and their representatives, as well as 15 expert testimonies of reports on field surveys, research and fact-finding, as well as statements to the Tribunal. The jury gave its findings and recommendations on a range of related issues.

These include the long-term and short-term causes and impact of the Kandhamal violence, the role, conduct and responsibility of state agencies as well as non-state actors, before, during and after the program, a critique of the functioning of the criminal justice system for fixing criminal accountability and prosecuting the guilty and reparative justice to victims and survivors. The report of the National People’s Tribunal, titled ‘Waiting for Justice’, now forms an important part of the body of resources and documentation on the Kandhamal violence and its aftermath, including one on issues of justice and accountability. The present report draws upon and refers to

29 National Solidarity Forum, Waiting for Justice - Report of the National People’s Tribunal on Kandhamal (New Delhi: 2011)
the testimonies, observations and findings made in the report.

**D. Rationale of this Study**

The study documents six years of the struggle for justice and accountability for the violence in Kandhamal, 2008-2014. There have been many fact-finding reports that have documented the ground realities soon after the violence and thereafter. The present authors have also researched, written and edited a publication examining the violence from the point of view of law, justice and state accountability in 2010 (titled ‘Kandhamal: The Law Must Change its Course’), and participated in the National People’s Tribunal for Kandhamal and contributed to the report produced thereafter in 2011 (titled ‘Waiting for Justice’). The present study, while adding to the pool of information and analysis available on the Kandhamal violence, its causes, consequences and the related state responsibility, stands apart in the following ways:

- It documents, assesses and analyzes the initiatives for justice and accountability taken within Orissa and at the national level, from 2008 to 2014, through various forums, such as the courts, Commissions of Inquiry, National Human Rights Institutions and Tribunals,

- In its analysis, it highlights good practices and lessons learned, and it extends the discussion beyond the ground realities of Kandhamal, to explore and highlight reforms in law, policy and practice that are required to ensure justice and accountability in similar contexts in future.

**E. Methodology Adopted**

This is a qualitative study, which is based on evidence derived from primary and secondary sources, both oral and documentary in nature. It examines and analyses documents pertaining to a representative sample of judgments. Though
such documents pertaining to various court proceedings are of crucial importance, the authors believe that an examination of the aforesaid documents alone will not provide a clear picture of whether justice was rendered in a particular case or not. Hence the analysis of court proceedings, orders and judgments was complemented with interviews of key stakeholders. In addition, information related to the current status of convictions, acquittals, and cases pending in various trial courts in Odisha, as well as other relevant information, was collected and compiled using the Right to Information (RTI) Act.

**E1. Information from Primary Sources**

Information through primary sources include interviews with the following stakeholders:

- Victim-survivors of the violence
- Witnesses over and above the victim-survivors (including expert witnesses);
- Advocates, activists and representatives of non-governmental, church and church-based organisations who have provided socio-legal support to victim-survivors;
  - Superintendent of Police, Kandhamal district; and
  - District Collector, Kandhamal.

**E2. Documents Relied Upon**

The documents that were relied upon for this study include the following:

- Replies from the Odisha government to questions asked through the RTI Act, particularly related to statistics – convictions, acquittals, pending cases, FIRs charge sheeted, cases transferred from Fast Track courts to sessions courts etc.;
Relevant documents related to Commissions of Inquiry (headed by Justice Naidu / Justice Panigrahi and Justice Mohapatra);

Writ petitions filed in the Odisha High Court, along with replies, rejoinders, orders and judgments;

Writ petitions / public interest litigation filed in the Supreme Court, along with replies, rejoinders, orders and judgments;

Relevant case papers in a representative sample of judgments - such as the First Information Report (FIR), charge sheets, recorded statements of witnesses, examination in chief and cross examination of witnesses, as well as the evidence presented in court, judgment and sentence;

• Reports of National Human Rights Institutions, particularly the National Commission for Minorities and the National Human Rights Commission;

• Relevant laws, legal amendments and jurisprudence;

• Relevant government advisories, orders and notifications;

• Statistics provided by National Crime Records Bureau & other relevant government data, where applicable;

• Relevant media reports and reports of non-profit organizations; and

• Relevant UN reports, including those by UN Special Rapporteurs who have visited India.

F. Challenges and Limitations

One of the major challenges was to have access to relevant court documents for analysis. Since several lawyers had handled the cases at the Trial court, High Court and Supreme Court level, coordinating with each lawyer and requesting them to provide a copy of the petition, replies and copies of relevant
orders was a Herculean task. Except the judgments themselves, other relevant court papers in several cases disposed of by the Fast Track courts could not be traced or obtained. In almost all the cases, the FIRs were written in Oriya – a language that neither of the two authors could read. Hence translations have been relied upon.

Many victim/survivors have migrated to other parts of Orissa or to other states in the country, and could not be traced. Others continue to be in hiding as their cases are pending disposal at the trial court or pending appeal, and as they continue to perceive a threat to their lives from the accused and supporters of the accused. Such victims and survivors have maintained contact with very few activists/social workers, so identifying them and interviewing them for this study was a challenging task. This difficulty was exacerbated in cases of sexual assault. Many interviews were conducted in Oriya and Kui, hence despite the best of efforts, some crucial information may have been inadvertently missed out in the process of translations and transcriptions into English. The analysis and findings of this study are based on a representative sample of cases. Hence it is indicative (and not exhaustive) in nature vis-à-vis deliverance of justice in the context of the Kandhamal violence.
CHAPTER I
COMMISSIONS OF INQUIRY

In the wake of the Kandhamal violence, two Commissions of Inquiry were established by the state government and have been functioning simultaneously. This chapter examines the role and efficacy of the commissions in delivering justice and ensuring accountability of perpetrators for the violence. It also extends critique on the potential for Commissions of Inquiry in general, and suggests ways in which their role can be enhanced and made more effective.

A. Commissions of Inquiry in the Context of the Kandhamal Violence

A1. The Panigrahi Commission of Inquiry

Six months after the December 2007 violence in Kandhamal, on 14th July 2008, the state government established a Commission of Inquiry headed by Justice Basudev Panigrahi. The Commission was vested with the responsibility of inquiring into the December 2007 communal violence.

Its tenure has been routinely extended every year for the past six years. As of August 2014, the Commission has not been able to complete its inquiry and its tenure is likely to be extended.
by one more year.\textsuperscript{30} It has reportedly recorded the statement of around 500 witnesses out of a total of 540 witnesses.\textsuperscript{31} It has held at least 68 sittings in various parts of Kandhamal district.\textsuperscript{32}

Although the victim-survivor community did not repose full confidence in the Commission, for reasons discussed below, it did engage with the Commission in the initial months. At least 275 victim-survivors along with their representatives and supporters had filed statements before the Commission. As they began to participate in the proceedings in July-August 2008, Kandhamal was rocked by a second spate of communal violence on 25th August 2008 which was much greater in intensity and much more widespread than the previous one.

For several months thereafter, as the community witnessed the brutal killings of their family members, destruction of their houses, property and habitats, life, liberty and survival issues became a priority. Many families fled from their villages, stayed in the forests, spent several months in relief camps in sordid conditions, while many more fled to Bhubaneswar, other parts of Odisha and beyond.

Those who did not have the means to flee from Kandhamal, stayed within the district in a precarious condition, their mobility restricted due to fear of attacks. Some of the lawyers of the victim-survivors, who were Christians, also faced severe threat. The situation was exacerbated by the failure to arrest the perpetrators. In this context, where the Christian community was gripped with fear, insecurity and uncertainty, it was close to impossible for the affected persons to freely engage with the Commission’s proceedings.

\textsuperscript{30} ‘Kandhamal Panel Tenure Ends, Extension Sought’, The Indian Express, 21 August 2014

\textsuperscript{31} ‘Kandhamal Riots Probe: Two Witnesses Depose Before the Commission’, Pragativadi, 4 June 2014

\textsuperscript{32} Ibid
Moreover, since the Commission’s sittings were held in various parts of the district, the victim-survivors participating in the Commission’s proceedings could easily be identified by the perpetrators and their supporters and so there was an imminent fear of attacks for participating in the proceedings. A formal order for witness protection did little to transform the ground reality, which made it extremely difficult and dangerous for the victim-survivor community to engage with the Commission. Hence the Commission was requested to adjourn its proceedings for two months, to allow time for the restoration of law and order, and for the victim-survivor community to build its confidence again. However it refused to adjourn its proceedings, and according to some sources, proceeded with undue haste.

Such undue haste remains unexplained, in the light of the six-year delay in concluding its proceedings and submitting a report to the government. Perhaps the Commission’s refusal to adjourn the proceedings is indicative of its lack of understanding of social dynamics in contexts of communal violence, and lack of empathy for the victim-survivors whose lives had been shattered. These factors were crucial to gain the trust and confidence of the affected community.

Advocate Dibyasingh Parichha stated that many of the victim-survivors who had filed affidavits before the Panigrahi Commission were targeted during the August 2008 violence; their houses were burnt and they were under the threat of attack.

For example, Fr. Bijoy Nayak, who had filed an affidavit before the Commission, had to flee from his house in Milungia village in G.Udayagiri block as his house had been burnt down. Many others had to similarly flee or were too frightened to depose before the Commission. No proactive witness-protection was provided for by the Commission, Adv. Parichha
observed. Sometimes the Commission assured that it would give directions to the Superintendent of Police for protecting the witnesses. However, it was not clear if those directions were actually given, as no change could be perceived at the ground level.

Archbishop Raphael Cheenath who then headed the Archdiocese of Cuttack and Bhubaneswar, stated as follows in a press statement:

“Our experiences before the Justice Basudev Panigrahi Commission have been demoralizing to say the least. Advocates for the victim communities appeared before Justice Panigrahi and filed statements on behalf of approximately 275 victims and others. They began full-hearted participation in the inquiry despite their reservations as to the independence of the Commission. Their confidence was shaken when the second round of attacks began and they informed Justice Panigrahi that not only the Christian community but also some of the advocates representing the victims had come under the threat of assault and they therefore requested Justice Panigrahi to adjourn the hearing for two months. Justice Panigrahi refused… Not only was the request refused but the Commission is proceeding in undue haste. Some members of the victim community undoubtedly manage to attend but the leading team of lawyers and the main victims cannot attend. It is also very difficult to travel within Kandhamal to meet the victims and prepare them for the proceedings. They have been traumatized and are scared and need to be given confidence to speak out. This is especially so because the assailants are still roaming free in the villages and may, in all likelihood, attack the witnesses for deposing before the Commission. It was expected of the Commission that it would bear some sensitivity in respect of witness protection to maintain the sanctity of the Commission proceedings; but this is not so… This leads me to the conclusion that the Justice Panigrahi Commission is more interested in covering up the misdeeds of the state government and its police force whose actions have been truly shameful, rather than to identify the organizations and prominent individuals behind the fascistic attacks. The Commission wishes to produce its report in undue haste with a view to giving the Chief Minister and his officers a clean chit. In the circumstances
I have no hesitation in stating that I have no faith whatsoever in the Justice Panigrahi Commission.”

John Dayal, a key applicant before the Panigrahi Commission, wrote an application to the Commission, sent by speed post from Delhi. The application is an illustration of the fear and hardship faced in participating in the proceedings of the Commission. It states:

“The general law and order situation in Orissa continues to be aggravating. The Honourable Chief Minister admits 10,000 persons are in government refugee camps. Unknown numbers are in forests. It will be impossible to summon witnesses I may want to cross examine, or who may want to depose for the 2007 violence. The assailants are scot free, and the few arrested may be out on bail… In a past visit to Bhubaneswar, I had to return to Delhi from Bhubaneswar because of the hate and threat environment. I of course could not move out of Bhubaneswar, much less go to Kandhamal or other places hit by the violence. Other witnesses, and past witnesses and applicants are also not in a position to depose before the commission for the same reasons and as such will not be available for examination and cross examination. It is therefore averred that the environment is not conducive to my safety and security. I apprehend a serious threat to my security and to my life and limb, and to my freedom of movement. The Honourable Commission and the State Government, I fear, are in no position to guarantee my safety, security and life. I therefore pray that my deposition be deferred to such future dates as and when the environment is conducive, and my security and safety is guaranteed.”

It was reported that in October 2009, one of the hearings of the Panigrahi Commission at Balliguda camp, was wound

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up ahead of schedule due to non-availability of witnesses.\(^\text{35}\) In another instance, seven witnesses from Brahmanigaon village, Daringbadi Block had been summoned, security arrangements made and a police van was sent to the village to escort the witnesses, and yet none appeared before the Commission.\(^\text{36}\) Despite the time lapse, people’s engagement with the Commission seems no better now. In a sitting held in early June 2014 in Phulbani, merely two persons are reported to have recorded their statements before the Commission.\(^\text{37}\) In fact, given the time lapse, it is only plausible that the victim-survivor community is thoroughly disillusioned with the Commission of Inquiry. As observed by Adv. Dibyasingh Parichha, given the huge delay, the work of the Commission has now become inconsequential and infructuous.

However, there exists a silver lining to the dark cloud. In some situations, representatives of the victim-survivor community have been able to make strategic use of the Commission.

As explained by Advocate B.D. Das, who represented many victim-survivors at the Commission:

“There were over 600 complaints filed; investigation was poor and the charge sheet would not be filed on time. I approached the Commission with applications for expediting the filing of charge sheet in specific cases. The Commission would summon the Superintendent of Police (SP). In order to avoid appearing before the Commission, under the SP’s directions, the charge sheet would then be filed. Some of us tried to use the Commission to catalyse the justice delivery system in this manner, and to avoid approaching the High


\(^{37}\) ‘Kandhamal Riots Probe: Two Witnesses Depose Before the Commission’, Pragativadi, 4 June 2014.
Another manner in which the Panigrahi Commission has been useful is in obtaining government documents and statements, some of which contradict each other, but none of which would otherwise be available in public domain. Such documents have been important in understanding the level of culpability of state agencies. For example, Adv. B.D. Das pointed out a letter produced by the Office of the Superintendent of Police, Kandhamal district before the Commission. The letter, written by the SP to the Director General of Police, requests for additional police reinforcements, as the SP anticipated an eruption of communal violence. No additional reinforcements were provided. The SP’s letter belies his subsequent claim that the police did not anticipate communal violence.

Similarly, other documents provided by the SP’s office to the Commission indicated past incidents of communal violence in the district, and the identification of communally sensitive areas. This was contradicted by police personnel who stated, on sworn affidavits, that there have been no past incidents of communal violence in Kandhamal. The documents submitted by the police to the Commission clearly indicate the culpability of the police personnel, they knew that there had been past incidents of communal violence, they anticipated the December 2007 violence, and yet took little precautions to prevent the same.

A2. Justice Mahapatra / Naidu Commission of Inquiry

On 25th August 2008, two days after the gruesome killing of Swami Lakshmananda, the state government announced its decision to set up another Commission of Inquiry. On 31st August 2008, Justice Sarat Chandra Mahapatra was named as the chairperson of the one-man Commission of Inquiry. On 38 Interview with Adv. B.D. Das on 17 June 2014. Transcript on file with the authors.
3rd September 2008, the state government formally ordered the establishment of the Commission of Inquiry, headed by Justice S.C. Mahapatra. Justice S.C. Mahapatra was serving as the Odisha Lokpal at the time of the government’s announcement, and retired on 28th August 2008.

The legality of his appointment was challenged by a group of lawyers in the Odisha High Court, on the ground that under the Lokpal Act, he could not accept any other appointment of the state government or hold a public office. Justice Mahapatra contended that the post of Chairman of a Commission of Inquiry did not fall under the category of public office. The High Court reportedly ruled in his favour. Though the legality of the appointment was cleared through the court, the legitimacy of his appointment was in question, as discussed below.

When the Mahapatra Commission of Inquiry commenced its work, the aftershock of the August 2008 violence, more widespread, intense and gruesome than the December 2007 violence, had not died down. As described in A1 above, victim-survivors were hiding in the forests for several days, the poorest of the poor living in relief camps, while others fled to other parts of the state or to nearby states. They were mentally traumatized, financially impoverished, faced physical insecurity and had to address their immediate needs of food, clothing, shelter and medical assistance for themselves and their family members. Survival needs took precedence over the struggle for justice.

If the Panigrahi Commission showed its callousness in refusing to adjourn the proceedings despite this situation, the Mahapatra Commission matched it by setting an impossible and unrealistic deadline of 15th November 2008 for the filing of affidavits. Based on the affidavits filed, the Commission was to develop a framework and procedures by the end of November 2008. The Commission was unable to understand
that the victim-survivors would require legal assistance in filing the affidavits, that such legal assistance was difficult as lawyers who were willing to assist the victim-survivor community were also targeted during the violence, and that it would take time to organize legal assistance and explain to the community the importance of engaging with the Commission.

In one of his first visits to Balliguda block in Kandhamal district after the commencement of the Commission, Justice Mahapatra reportedly opined as follows: “Communalism is not the primary reason for the riot. The problems began ages ago. It can be attributed to the bitterness of the two communities.” This echoes the stand taken by the state government to lay the blame for the violence on dalits and not on Hindutva forces. The premature observation, made even before the commencement of the proceedings and the examination of witnesses, appeared to be a case of pre-judging and indicated a pre-existing bias. Thereafter, the Commission held a daily press conference, where details of the proceedings were divulged, much to the discomfort of victim-survivors who feared that they might be targeted for having engaged with the Commission.

A large section of the victim-survivors, after much thought and deliberation, decided to boycott the Commission. A letter written by the Sampradayik Hinsa Prapidita Sangathana (Association of Survivors of Kandhamal Communal Violence) sums up the factors that led to the boycott:

1. During your days visit to Kandhamal you made a statement stating, inter alia, that the Kandhamal violence is not communal violence but is of ethnic origin. This statement you made even before a proper inquiry was begun. [Enclosed is copy of one of the media reports.]

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2. *After the Commission began hearings, you made it a practice to brief the press on your “judgment” or ruling of the day.*

3. *The Commission formulated leading questions on issues such as conversions which were sociological in nature and in fact would further incite the violence which was still going on unchecked.*

4. *Responsible public officers like Pravin Kumar, police Superintendent, former and present police DG Gopal Nanda and Monmohan Praharaj were made to give the absurd but sensitive statements about religious conversion as if it was crime and then what role Police had taken to control the crime. The Police officers did not tell about why they could not prevent the march of funeral procession of Swami Laxmanananda with instigated mobs. Such statements caused further desperation among the witnesses and victims fighting their cases in Fast Track Courts and aggravated the situation. They should be summoned and held responsible for these acts.*

5. *BJP president, Suresh Pujari’s presence inside the Courts is threatening to the witnesses and inspiring the culprits. Moreover he is allowed to enter into the commission chamber under garb of a lawyer and before the press meet is conducted.*

6. *Recently, in response to the question of Mr. Adikanda Sethy, MLA, Chhtrapur; the Chief Minister, Mr. Navin Pattnaik, said in the Assembly that the RSS, VHP and Bajrang Dal activists were involved in the Kandhamal violence. The commission should summon the records of the Assembly and take note of this as part of its proceedings, which it has not said it has done.*

7. *Your media statements have shown clearly that you have pre-decided and have already come to the conclusion about the violence without going through all the evidence that could have come before the Commission if it had proceeded without preconceptions and patent bias.*

8. *In the face of all these, we are left in no other position than to boycott the proceedings of the Honorable commission, holding it biased and its*
statements based on preconceived notions which are not rooted in facts or investigations.\textsuperscript{40}

As explained by Adv. Dibyasingh Parichha, the victim-survivors lost confidence in the Commission and started boycotting it. The proceedings became one-sided. Although 500-700 affidavits have been filed with the Commission, less than 50 affidavits were from victim-survivors.

The Mahapatra Commission submitted a 28-page interim report to the state government on 1st July 2009. The report reportedly sidelined and ignored the role of Hindutva forces in inciting hatred and perpetrating violence against dalit and adivasi Christians. Instead, it endorsed the popular view that religious conversions were a major factor behind the violence. Furthermore, it upheld that tribal grievances, land disputes and issuance of fake caste certificates by the local administration triggered the unrest which took 40-odd lives.

It concluded that the sources of the violence were “\textit{deeply rooted in land disputes, conversion and re-conversion and fake certificate issues}”; echoing the line of explanation adopted by the state government.\textsuperscript{41} The judge reportedly opined: “Suspicion among the scheduled tribe and scheduled caste inhabitants of Kandhamal is the main cause of riots with the tribals suspecting that ‘Pano’ dalits were capturing their land through fraudulent means,” \textsuperscript{42}

The judge said that the government should take steps


\textsuperscript{42} Ibid
immediately to remove differences between the two communities.\textsuperscript{43} The report included recommendations for remedial measures to check recurrence of communal violence in Kandhamal district. These include a recommendation that the state government “expedite freeing of tribal land in possession of non-tribals, take up fake certificate cases and remain vigilant to conversion and re-conversion.”\textsuperscript{44}

The report did not blame any organization or government body for the violence, as per its own admission. The report has not been released and is unavailable in the public domain. There has been an attempt to obtain a copy of the same through the Right to Information Act, however, the State Government denied this request in the interest of public security.\textsuperscript{45}

On 13th May 2012, Justice Mahapatra died after a brief illness. The proceedings of the Commission came to a halt for some months, subsequent to which Justice A.S.Naidu was appointed to the post in September 2012. In March 2013, the Naidu Commission began its proceedings. It issued notices to leaders and members of the Christian community, including Archbishop Cheenath and John Dayal, under S. 8B of the Commission of Inquiry Act. The notices called upon the persons to submit their affidavits in response to allegations made against them by others in the Commission. This provided a new avenue for the victim-survivor community to engage with the Commission. The confidence inspired by Justice A.S.Naidu has reportedly led to the filing of 30-40 affidavits from the victim-survivor community.

The Mahapatra Commission had the potential to take
confidence-building measures among victim-survivors, as their active participation in the Commission’s proceedings was crucial for its own credibility. It could have:

a) restricted the presence of local MLAs at the proceedings, thereby creating a congenial and conducive atmosphere in the Commission for depositions,

b) acknowledged and addressed the genuine concerns of victim-survivors for their and their family members’ physical security,

c) exercised discretion and sensitivity with regard to questions posed to victim-survivors in the Commission, and

d) respected their privacy and maintained confidentiality by not divulging details of the proceedings. However, the Commission frittered away a valuable opportunity for building confidence among victim-survivors, which would have encouraged them to participate in its proceedings in large numbers.

A Commission of this kind ought to be duty-bound to facilitate the participation of victim-survivors in its proceedings. However, this has not been the case. As explained by Adv. Dibyasingh Parichha, who has regularly appeared in the proceedings as a lawyer representing victim-survivors:

“The proceedings in the Commission of Inquiry are a lengthy and cumbersome process. The witnesses have to travel to Bhubaneswar to depose. We have to arrange for their safe travel to and from their villages, their food and stay. It has been expensive. Very few victim-survivors have filed affidavits due to the cumbersome and lengthy nature of the proceedings. The Commission has given no thought to how the poor victim-survivors would travel to Bhubaneswar to participate in the proceedings. It has made no logistical arrangements for the victim-survivors whatsoever. This reflects a callous attitude of
the Commission as well as the state government which established the same.”

A major drawback of the Mahapatra / Naidu Commission has been the enormous delay in arriving at any findings with regard to the August 2008 violence. Justice delayed is definitely justice denied. When the Commission began its work, its mandate was to submit the report within six months. As with most other Commissions of Inquiry, this never happened, and the tenure of the Commission has been extended at least five times. It was reported that the Justice Naidu Commission was likely to submit its report to the government by mid-2014. However, this has not happened. Another report predicts that the Naidu Commission will not be able to conclude the proceedings and issue its report before December 2015. Reasons cited for the delay are non-cooperation of the state government as well as the witnesses. The timeline below shows the fatal time lapse.

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>25th August 2008</td>
<td>State government announced its decision to set up a Commission of Inquiry</td>
</tr>
<tr>
<td>31st August 2008</td>
<td>Justice S.C. Mahapatra named as the chairperson of the one-man Commission of Inquiry</td>
</tr>
<tr>
<td>September 2008</td>
<td>Justice S.C. Mahapatra, retired High Court judge, was formally appointed as chairperson of the Commission of Inquiry to probe into Kandhamal violence of 2008</td>
</tr>
</tbody>
</table>

47 ‘Probe into Kandhamal Riots Nowhere Near Completion’, The Hindu, 22 August 2014
48 Ibid
<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to February 2009</td>
<td>Affidavits submitted by persons</td>
</tr>
<tr>
<td>March 2009</td>
<td>Commission begins examining witnesses – including 65 government</td>
</tr>
<tr>
<td></td>
<td>officials, and some BJP leaders</td>
</tr>
<tr>
<td>1st July 2009</td>
<td>Interim report submitted by Justice Mahapatra</td>
</tr>
<tr>
<td>Till April 2012</td>
<td>Over 200 witnesses examined, about 20 left to be examined by the</td>
</tr>
<tr>
<td></td>
<td>Commission.</td>
</tr>
<tr>
<td>12th May 2012</td>
<td>Justice S.C. Mahapatra dies</td>
</tr>
<tr>
<td>September 2012</td>
<td>Justice A.S. Naidu appointed as the chairperson of the one-man</td>
</tr>
<tr>
<td></td>
<td>Commission of Inquiry, inplace of Justice S.C. Mahapatra</td>
</tr>
<tr>
<td>March 2013</td>
<td>Justice Naidu Commission begins its work</td>
</tr>
<tr>
<td>Thereafter</td>
<td>Proceedings are pending.</td>
</tr>
</tbody>
</table>

### B. Commissions of Inquiry: The Law & Practice

#### B1. The Legal Framework

The Commissions of Inquiry Act 1952 provides the legal framework for the appointment and functioning of Commissions of Inquiry. According to S. 3 of the 1952 Act, either the state government or the central government “may” pass a resolution for appointment of the Commission in either of the two Houses of Parliament / legislature, “if it is of opinion that it is necessary to do so”. The state and central governments have total discretion in deciding whether or not a Commission of Inquiry should be established, as an extension,

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49 Kandhamal Riot Probe Chief Dies, Indian Express, 13th May 2012
they may choose to establish the same only when it is politically expedient to do so.

The court observed that the discretion given to the appropriate government to set up a Commission of Inquiry must be guided by the policy laid down, namely, that the executive action of setting up a Commission of Inquiry must conform to the condition that there must exist a definite matter of public importance into which an inquiry is, in the opinion of the appropriate Government, necessary or is required. The court further stated:

“We are not unmindful of the fact that a very wide discretionary power has been conferred on the Government and, indeed, the contemplation that such wide powers in the hands of the executive may in some cases be misused or abused and turned into an engine of oppression has caused considerable anxiety in our mind. Nevertheless, the bare possibility that the powers may be misused or abused cannot per se induce the court to deny the existence of the powers.”

The purpose of the appointment of a Commission of Inquiry is to “make an inquiry into any definite matter of public importance”. The purpose is kept vague and the language broad enough to cater to the appointment in various situations, including communal violence, caste-based violence, instances of corruption and major scandals, natural disasters and maladministration. The Commission has the powers of a civil court; such as summoning witnesses and examining them under oath, directing the production of documents, receiving evidence on affidavits, calling for a public record, issuing directions for the examination of witnesses or documents.

51 Ibid at para 39, p. 306
52 S. 3, Commissions of Inquiry Act 1952
53 S. 4
specific circumstances, it has the additional powers of search and seizure.\textsuperscript{54}

The statements made by a person in the proceedings of the Commission cannot be used against him / her in a civil or criminal proceeding, except in the case of prosecution for giving false evidence through that statement. \textsuperscript{55} Though this is the general rule, where the statement is relevant to the subject matter of the inquiry or where the statement is made in response to a question that is required to be answered by the Commission, this general rule does not apply.\textsuperscript{56}

The state or central government can cause the discontinuance of the Commission once a resolution in this regard is passed by both houses of the Parliament / legislature.\textsuperscript{57} This provision came to be misused at least once – in the case of Srikrishna Commission enquiring into Mumbai communal violence of 1992-93, which was prematurely wound up by the Shiv Sena government when it came into power in Maharashtra, and thereafter reinstated on the directions of the erstwhile prime minister Atal Bihari Vajpayee and in response to a widespread public outrage.

Where a change in the constitution of the Commission takes place and another person fills the vacancy, the law explicitly states that the Commission need not commence the inquiry afresh, but can continue from the stage when the change took place.\textsuperscript{58} This is precisely what Justice Naidu did after he was appointed as the new Chairperson of the Commission of Inquiry, following the death of Justice Mahapatra.

Persons appearing before the Commission have a right to

\begin{itemize}
\item \textsuperscript{54} S. 5(3)
\item \textsuperscript{55} S. 6
\item \textsuperscript{56} Proviso to S. 6
\item \textsuperscript{57} S. 7
\item \textsuperscript{58} S. 8A (2)
\end{itemize}
legal representation and a right to cross-examine witnesses. In the case of victim-survivors of Kandhamal violence, most of whom were poor, illiterate and not familiar with legal procedures, legal representation is a crucial element of their access to justice.

B2. Rationale & Purpose

Although the Commissions of Inquiry Act does not adequately spell out the rationale with which Commissions are established or the purpose they serve with regard to specific contexts, there is no doubt that the commissions have served a very important role in the history of independent India. In the context of inquiry into situations of communal violence, they are useful as:

- They inform the government about the larger political context, inter-communal dynamics and circumstances that contributed to or facilitated the communal violence. In other words, they inform the government about what, when and how the communal violence took place. This is an important role that cannot be undertaken by the courts of law in civil or criminal proceedings, which focus on the individual case before them. In this sense, the commission’s work complements the role of civil and criminal courts;

- They highlight sequence, patterns, nature and magnitude of violence, as well as plans and preparatory activities that were undertaken to inflict the violence - such as incitement, hate speeches and supply of arms and ammunition. This can enable the government to be more vigilant in anticipating communal violence in the future, and taking proactive steps to prevent the same;

- They provide guidance for the executive to take remedial
measures to prevent the recurrence of such violence, through specific recommendations on possible courses of action. These could include measures for ensuring accountability of perpetrators as well as peace-building initiatives for restoring harmony and facilitating social reintegration,

- The Commission of Inquiry performs the role of a fact-finding inquiry, on the basis of which appropriate legal action – criminal, civil and administrative – may be taken against the perpetrators, and reparative justice provided to victims and survivors;

- They facilitate the formulation of appropriate policies, programs and schemes pertaining to communal violence,

- They also serve as an official documentation of history, as they contain the narratives of affected persons and observations of the commission on what, how, when and why the incidents occurred. In this sense, the reports of the commission become valuable government records,

- The commission’s contribute to the public’s right to information, and

- They can help restore public faith in justice and the rule of law.

However, the commissions can serve these important purposes only if certain preconditions exist. First and foremost, the chairperson / commissioner should be a person with credibility and an independent and objective opinion, who is not likely to cave into external pressures to give a finding of a particular kind, or to indict some groups and individuals and not the others. It is equally important that the commissioner enjoys and inspires the confidence of victim-survivors, so that they may be encouraged to depose before the commission. If these two conditions are not met, as in the case of the Kandhamal
Commissions of Inquiry, the true purpose of the commission is lost.

B3. Distinction between Commissions of Inquiry & Courts

Unlike a court of law, which can adjudicate a matter and give a definitive judgment, Commissions of Inquiry has no power to adjudicate; instead, it is duty-bound to investigate and record its findings and recommendations, with no authority to enforce the same. Its recommendations are not binding on the government, unlike a judgment of a court of law. The findings and recommendations may be rejected by the government partially or in totality, and actions for implementing the same may be taken only at the discretion of the government. Its procedure is investigative and inquisitorial rather than accusatory or judicial.\(^\text{60}\)

It acts as the eyes and ears of the government to collect materials for research and analysis.\(^\text{61}\)

B4. Limitations of Commissions of Inquiry

There are several limitations of proceedings under Commissions of Inquiry.\(^\text{62}\) These include

a) The power of the executive in appointing a commission is totally discretionary and cannot be questioned. It may be governed by factors such as public outrage at a particular situation, the need to be “seen” as having taken action and political expediency;

b) It is open to the executive to define the terms of reference

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60 See Janadhir Sarma Sarkar (1990), Commissions of Inquiry: Practice and Principle, New Delhi: Ashish Publishing House at p. 21
61 Ibid, p. 22
62 For a more detailed discussion, see J.B. Monteiro (1964), ‘Commissions of Inquiry: Their Limitations’, Economic and Political Weekly, 11 July, pp. 1137-1141
for the Commission in such a manner as to defeat the purpose of the inquiry;

c) Although time bound, the commissions can continue to function for several years through a repeated extension of their tenure – this has been the case with most commissions;

d) The law does not lay down any obligation of the state / central government to make the findings public. In many cases, the civil society has had to spend considerable effort to advocate for the release of the commission’s report,

e) The executive is not bound to take action on the recommendations made by the commission. Where the commission points to the culpability of the government and its agencies, there is usually an absence of political will to take remedial measures. The government’s response could vary from an outright rejection, to remedial measures taken in a selective or superficial manner.

In practice, setting up Commissions of Inquiry has been used as a diversionary tactic by governments to convince the public that some action was being taken, knowing well that all will be forgotten once the controversy dies down after a few years.63 In the words of Adv. Girish Patel, we have almost a genetic tendency to abuse, distort, corrupt or pervert any public institution created for public good or in public interest. This is what has actually happened to enquiry commissions constituted under the Commission of Enquiry Act 1955.64

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64 Girish Patel (2012), Inquiry Commission – A Farce?, in Daily News and Analysis, 4 April
The commissions have been used as a tool for stalling the discovery of truth by many years, till public interest dissipates and public memory fades. Fr. Ajaysingh opines that the Kandhamal Commissions of Inquiry are an illustration of how the state government trivialized the issue, and has used diversionary tactics to suppress the true facts. They have also become a weapon for serving the narrow political interests of the government in power. The Mahapatra Commission’s interim report is an illustration of the fact that the government misused the commission to reiterate its own positions and propaganda - such as that the violence was ethnic in nature, caused due to forcible conversions, fake caste certificates and land-grabbing by non-adivasis.

In June 2014, the Odisha Chief Minister Naveen Pattnaik admitted before the state assembly that a total of 20 Commissions of Inquiry had been established since 2000, and 11 of them continue to be pending.65

This shows that Commissions of Inquiry are being established in a routine manner, with no follow up done to ensure that they are brought to their logical conclusion in a speedy manner. Furthermore, the state government has failed to table reports of Commissions of Inquiry in the state legislature from 2008 onwards, indicating an utter disregard for the law.66

In the light of the fact that the government has failed to act on the recommendations of earlier Commissions of Inquiry, such as the Wadhwa Commission that inquired into the killing of Graham Staines and his two sons, it is unrealistic to expect victim-survivors and persons/organizations supporting them to engage with Commissions of Inquiry established by the state government. A preliminary report of a fact-finding team inquiring into the Kandhamal violence of December 2007, led

by Dr. John Dayal, observed as follows:

“There are many wise suggestions contained in the Justice Wadhwa Commission report that enquired into the murders of the Staines family, as also in other commissions set up in the aftermath of communal incidents in other states. They need to be implemented, specially those relating to the police and the administration, and fundamentalist organisations, if Orissa is to remain peaceful.”

It is a fact that the recommendations were not implemented, and a more intense attack on Christians took place eight months later, in August 2008.

Additionally, in the Kandhamal context, the commissions have become an extension of the process of vilifying, persecuting and defaming the Christian community and its leaders. During the commission’s proceedings, unsubstantiated allegations have been made against the Church, of forcible conversions and land grabbing from adivasis, in addition, stories have been concocted claiming that Christian leaders plotted to kill Swami Lakshmananda.

Such vilification serves many purposes – a) it makes the leaders vulnerable to legal action, thereby causing harassment to them, b) it intimidates other victim-survivors into silence and deters them from engaging with the commissions, and c) it causes further fissures among the already fractured communities, and catalyses the process of ghettoization; which serves the political interests of communal forces.

**B5. Way Forward**


68 See for example the affidavits of Padmanav Pradhan (PW 59) and Simanchal Patra (PW 92) before the Mahapatra Commission, which attempted to implicate and frame John Dayal in criminal cases of a serious nature.
A public inquiry into the socio-economic, political, religious and cultural dimensions of communal violence bears great significance and extends far beyond the confines of civil and criminal justice processes. If Commissions of Inquiry are to play a substantive role in preventing communal violence, rendering justice, ensuring accountability and providing reparations to victim-survivors, they should be made independent, powerful, effective, transparent, accountable and credible.

Politically motivated appointments of the chairperson and members of the commission could be avoided if they were appointed by an independent committee consisting of persons with both credibility and experience. Similarly, the committee could also determine the terms of reference. The recommendations of the commission could be made mandatory for the government to implement. Alternatively, the commission could submit its report to the independent committee, which could then decide upon remedial actions to be undertaken, and such decisions could be binding on the government. The discretionary power of the government in establishing a commission could be tempered, if the 1952 Act is premised on the right to information of ordinary citizens, rather than as an executive privilege. Several experts have suggested substantive amendments to the 1952 Act and ways of revitalising Commissions of Inquiry so that they can serve the purpose for which they were created in the first place.\textsuperscript{69}

\textsuperscript{69} See Girish Patel (2012), ‘Inquiry Commission – A Farce?’, in Daily News and Analysis, 4 April, where nine recommendations are made for improving the efficacy of Commissions of Inquiry.
CHAPTER II
RESPONSE OF NATIONAL HUMAN RIGHTS INSTITUTIONS

The National Human Rights Institutions (NHRIs), such as the National Human Rights Commission (NHRC), National Commission for Minorities (NCM), National Commission for Women (NCW), National Commission for Protection of Child Rights (NCPCR), National Commission for Scheduled Castes (NCSC) and National Commission for Scheduled Tribes (NCST) are statutory bodies that are created by the government to monitor and safeguard human rights.

Theoretically they are independent of the government and function autonomously, in accordance with the Paris Principles. In addition to Commissions of Inquiry that are specifically established for an incident, the NHRI have a mandate to inquire into violations of human rights, seek explanations from the respective governments and provide recommendations to them to address and remedy the violations.

NCM and NHRC inquired into the Kandhamal violence and provided recommendations to the government on measures to be taken for ensuring justice and peace.
A. National Commission for Minorities

In the context of the Kandhamal violence, the National Commission for Minorities played an active role in monitoring the human rights situation at the ground level. The NCM made at least four visits and issued reports with recommendations to the government. The first two reports were based on visits undertaken by Zoya Hassan and Dileep Padgaonkar - officials of the NCM on 6-8th January, 2008 and Vice-chairperson Michael P Pinto on 21-24th April, 2008, in the wake of the December 2007 violence in Kandhamal. Subsequent to the second and more intense spate of violence in August 2008, the vice-chairperson of NCM once again visited the district for a third time on 11-13th September, 2008. In 2010, the vice-chairperson of NCM, Dr. H.T. Sangliana, visited Kandhamal on 13-16th September and wrote a letter to Naveen Pattnaik, the Chief Minister of Odisha. The contents of these three reports and the letter are analysed and discussed below.

A1. Cause & Nature of the Violence

The January 2008 report was categorical in observing that the Christian community and its places of worship were the principal target of attack, and that they bore the brunt of violence and suffered the maximum damage.70

While the January 2008 report found that the long-simmering Kondh-Pana conflict was in part responsible for the agitation and violence, it cites a second and equally important factor; the anti-conversion campaign conducted by the VHP and Sangh Parivar organizations for the past few years.71

The NCM team concluded that there was no basis whatsoever to justify the anti-conversion campaign, as there had been no cases reported or

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71 NCM’s January 2008 report, p. 3 para 1
filed under Orissa Freedom of Religion Act, and further that, despite the increase in the Christian population in the area from 1991 to 2001, there was no evidence that this increase occurred under duress or on account of inducement to conversion.\textsuperscript{72}

In its April 2008 report, the NCM reiterated that the violence was more than merely a Kui-Pana conflict, and was clearly communal in nature by stating: “the riots were undoubtedly communal in nature and people were attacked on the basis of their religion,”\textsuperscript{73} and “There is no doubt that the rioting was directed by individual religious groups at other groups, i.e. Hindus attacked Christians and the latter retaliated although in much smaller measure.”\textsuperscript{74} The April 2008 report also highlighted an economic motive behind the attack, as Bahmunigaon, a dalit Christian locality that was prosperous, was attacked, while another, which consisted of poorer Christians who provided no competition to the Hindu inhabitants, was not attacked.

After its visit to Kandhamal in September 2008 following the violence in August 2008, the NCM reported that there can be no doubt that the entire Christian community has been completely traumatized,\textsuperscript{75} and that Christians are subjected to repeated threats that they will never be safe if they do not convert immediately to Hinduism.\textsuperscript{76} It reiterated its earlier findings that alleged forced or fraudulent conversions to Christianity had little to do with the attacks on the Christian community, as the Orissa Freedom of Religion Act (OFRA), designed precisely

\begin{footnotesize}
\begin{enumerate}
\item NCM’s January 2008 report, p. 3 paras 2 & 3
\item NCM’s April 2008 report, p. 2, para 1
\item NCM’s September 2008 report, para 2
\end{enumerate}
\end{footnotesize}
to address such conversions, had never been invoked.\textsuperscript{77} The NCM directed the state government to use the provisions of the OFRA to take action against those who seek to convert Christians to Hinduism using threats and force.\textsuperscript{78} There is no evidence that this recommendation has been followed.

\textbf{A2. Presence of Planning & Preparation}

The January 2008 report observed: “Destruction on such a large scale in places which are difficult to access could not have taken place without advance preparation and planning.”\textsuperscript{79} After the August 2008 violence, the NCM noted the viciousness with which even everyday items like motorcycles, auto-rickshaws and tractors belonging to the Christian community had been reduced to ashes.\textsuperscript{80}

\textbf{A3. Culpability of Sangh Parivar Organizations}

The NCM, in its January 2008 report, was emphatic in highlighting the role of Sangh Parivar organizations and the anti-conversion campaign in fomenting organized violence against the Christian community.\textsuperscript{81} It further observed: “The very fact that the Swami was on his way to Brahmanigaon to raise the “morale of the majority community” is indicative of his desire to exacerbate communal tensions.”\textsuperscript{82} It candidly found that the Sangh Parivar organizations were divisive in nature by stating: “Before the VHP’s anti-conversion campaign, the tribal Christians and non-Christians had lived in harmony but the Parivar’s efforts had succeeded in creating a chasm.”\textsuperscript{83}

\begin{itemize}
\item \textsuperscript{77} NCM’s September 2008 report, para 11
\item \textsuperscript{78} NCM’s September 2008 report, para 13
\item \textsuperscript{79} NCM’s January 2008 report, p. 6, para 3
\item \textsuperscript{80} NCM’s September 2008 report, para 5
\item \textsuperscript{81} NCM’s January 2008 report, p. 3, last para
\item \textsuperscript{82} NCM’s January 2008 report, p. 5, para 2
\item \textsuperscript{83} NCM’s January 2008 report, p. 5, last para
\end{itemize}
A4. Dereliction of Duties by the State

The January 2008 report of the NCM observed that there was a concerted effort on the part of government officials to evade and prevaricate on the communal dimension of the conflict, and to explain the violence in terms of the Kondh-Pana conflict.\(^\text{84}\) It asked how close to 2000 trees could have been felled within a matter of hours without planning, organization and the large numbers of people involved in felling. The NCM wondered why the state intelligence agencies were not aware of the felling of trees. It observed that the answers of state officials were not convincing on this issue.\(^\text{85}\)

Further, the NCM, in its January 2008 report, found that the district authorities did not take active steps to defuse the situation and ensure that peace was maintained.\(^\text{86}\) It said “The state agencies, if they had been vigilant, could have prevented the violence arising out of the two bandhs on Christmas.”\(^\text{87}\)

Following the August 2008 violence, the NCM, in its report, criticized the state government’s decision of allowing the funeral procession of Swami Lakshmanananda through a route of 170 kms, which was bound to arouse the passion of the followers. It found little evidence that anyone at the senior levels of either the political or the official establishment participated in or attempted to influence the decision making process in such a vital matter. This was unfortunate because mature advice could have introduced a measure of sanity into the situation and resulted in a balanced, considered response, the NCM noted.\(^\text{88}\) Hence the NCM was candid in holding the state government accountable for failing in its duty to prevent the violence.

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\(^\text{84}\) NCM’s January 2008 report, p. 4, para 1
\(^\text{85}\) NCM’s January 2008 report, p. 5, para 3
\(^\text{86}\) NCM’s January 2008 report, p. 7, para 1
\(^\text{87}\) NCM’s January 2008 report, p. 7, para 2
\(^\text{88}\) September 2008 report, paras 8 & 9
A5. Performance of the Criminal Justice System

The NCM highlighted the low confidence of the people in the implementation of law, subsequent to the December 2007 violence, and emphasized that justice should be done and should also be seen to be done, in the following words:

“On the law and order side, as many as 187 persons have been arrested and 127 cases registered. Yet the overwhelming impression given by the people was that many of the ring leaders are still at large… If people do not have confidence that the law is being implemented without fear or favour and that no-one is above the law, their faith in the efficacy of administration will be eroded. They will then be encouraged more and more to take the law into their own hands. Those who burnt police stations, churches and even government offices must face the consequences of their actions and must be seen by all as having done so.” 89

Subsequent to the August 2008 violence, the NCM reiterated the importance of quick investigation and early filing of charge sheets in courts. It cautioned that if the impression gains ground that those indulging in rioting, arson and murder will get away with little more than a slap on the wrist in the form of arrest and early release on bail and that investigation will invariably be tardy, it will be an invitation to people to take the law into their own hands. 90

A6. Selective Targeting of NGOs

The NCM noted that there was selective targeting of NGOs during the violence, and suggested that the state government probes this question more deeply as the selective targeting has some disturbing implications. 91 It refuted the claim by some that

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89 NCM’s April 2008 report, p. 3, para 2
90 NCM’s September 2008 report, para 14
91 NCM’s April 2008 report, p. 3, para 1
the targeted NGOs were seen as assisting only Christians and not others.

A7. Relief & Rehabilitation

The January 2008 report cursorily mentioned the fact that the government had provided “some immediate relief.” The April 2008 report complimented the state government and its “team of young officers in the district” for providing relief and creating an atmosphere of trust. However, the issue of compensation for destruction / damage caused during the violence to places of worship was addressed squarely by the NCM, and the government’s stand of denying such compensation for the same was questioned in strong terms after the December 2007 violence, in the following words:

In view of the horrendous damage suffered by places of worship and the clear intention behind such vandalism to hurt the religious sentiments of a group of people, the policy of the State Government to deny compensation for the destruction of religious places is not easy to understand. The Vice Chairman was informed that the government had fixed an amount of Rs 2 lakhs as compensation for institutions like schools and hospitals but not for churches, presbyteries and other religious places... Compensation is given to innocent victims of mob violence in recognition of the fact that they have suffered owing to lapses on the part of the state in not providing them with adequate protection and owing to the fact that sections of society breached the law of the land. There is a clear recognition in this that they have been denied the protection they are entitled to expect from the state for no fault of their own. Surely the same applies across the board to religious places damaged and vandalized during riots?... Non official estimates put the damage to churches, presbyteries and seminaries at about Rs 2 crores. Monetary value aside, it is the hurt
inflicted to the psyche of the people through the destruction of places of worship that must be cured and one important way in which it can be done is by assisting through monetary compensation in the work of reconstruction.”

The NCM recommended that the state government immediately extend the policy of giving relief and assistance for rebuilding damaged properties of religious establishments on a war footing. However, the state government did not pay any heed to this recommendation.

Another valuable recommendation that the NCM made was to direct the state government to pay compensation to the next of kin of those persons whose bodies could not be recovered, either because they had been burnt or eaten by wild animals. It said that while Government procedures do call for the recovery of the body and for the performance of a post mortem, a more flexible approach is needed in times like this, and that human suffering on such a massive scale should not be compounded by insistence on bureaucratic procedures.

A8. Preventive and Restorative Steps Recommended

The January 2008 report called upon the state government to look into the speeches of Swami Lakshmanananda to determine whether they amount to incitement of violence and take appropriate action. It called upon the state government to issue a white paper on conversion to dispel fears and suspicions about the Christian community. Both these recommendations were also reiterated in its report of April 2008.

The NCM repeatedly called upon the state government to set up a state minorities commission for safeguarding the rights
of minorities in the state.\textsuperscript{95} Reiterating this in its April 2008 report, the NCM said: “People need a forum to express their differences, their grievances, their difficulties and even perhaps their grouses against the state. A pluralistic, democratic society encourages such open expression.” \textsuperscript{96}

Even as the authorities were called upon to show greater vigilance to prevent the outbreak of violence, the NCM called upon the government to urgently address issues of social exclusion and structural inequities.\textsuperscript{97} It said that the traditional people to people links between Hindus and Christians must be re-established and all should feel part of the same community again.\textsuperscript{98}

The NCM also underlined the necessity for even access to the fruits of development so that economic issues are not allowed to degenerate into communal violence. The NCM observed as follows:

\begin{quote}
If we are to set at rest the scourge of communal violence and build a healthy pluralistic society in which different cultures, religions and lifestyles coexist in harmony, policy makers will have to address questions relating to the uneven access to the fruits of development that globalisation and integration with the larger economy bring in their wake. How exactly this is to be done must be studied carefully by social workers, representatives of civil society and of course government officers but unless this exercise is put in place, we are likely to see repeated bouts of unrest whose root causes may well be economic but which will be given the garb of communal unrest.\textsuperscript{99}
\end{quote}

Subsequent to the August 2008 violence, the NCM reiterated the need for confidence-building measures to build bridges between estranged communities, for lasting and durable peace.

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\item[95] NCM’s January 2008, p. 8, para 7; see also September 2008 report, para 19
\item[96] NCM’s April 2008 report, p. 5 para 3
\item[97] NCM’s January 2008, p. 8, para 9
\item[98] NCM’s April 2008 report, p. 3, para 3
\item[99] NCM’s April 2008 report, p. 2, para 2
\end{enumerate}
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among the communities.100

Needless to say, there is little evidence to indicate that these recommendations made by the NCM, which have the potential for far-reaching positive impact, have been followed by the state government.

B. The National Human Rights Commission

The NHRC received a complaint about the Kandhamal violence from the Catholic Bishops Conference of India (CBCI) on 18th September, 2008. Its team made a spot investigation on 23rd September to 3rd October, 2008. During this visit, the team visited not only various blocks of Kandhamal, but also other districts affected by violence such as Bargah, Gajapati, Ganjam, Khurda and Boudh. The team consisted of four Investigating Officers, all police officials, two of the rank of inspector, one Deputy Superintendent of Police and one SSP.

The team was split into two sub-teams, which inquired into different geographical areas. The team issued its report after visiting 32 villages, 15 relief camps and recording the statements of 92 witnesses, as well as recording the statements of investigating officers who were recording and investigating various complaints related to the violence. It referred to its earlier reports made after a visit to Kandhamal in December 2007 (File No. 825/18/26/06-07) and spot investigations made with regard to specific complaints of rioting in 2008 (File No. 475/18/26/08-09).

The NHRC report on the Kandhamal violence can at best be described as a confused, convoluted report riddled with internal contradictions, as the details below illustrate:

B1. Positive Aspects

100 NCM’s September 2008 report, para 18
The report contains a few positive findings and “takeaways”, even though these findings do not result in strongly-worded recommendations.

Communal Nature of the Violence: For example, the NHRC report categorically says that unlike the December 2007 violence, the August 2008 violence was “primarily communal in nature led by elements of Bajrang Dal, BJP and RSS supported actively by the tribals who were also agitating on the issue of grant of ST status to Pano (SC) Christians.” (para 10.1) It arrives at this conclusion from two facts: a) tribal Christian were also attacked, and b) slogans such as “Bajrang bali ki jai!” and “Swami Lakshmanananda Saraswati ki jai” were heard.

Christian Community Adversely Affected: It finds that “the institutions and churches of the Christians were burnt in large numbers by the fundamentalists.” (para 10.5) and that the Christians had to flee from their houses due to fear of attack by the fundamentalists, and it was not possible for them to move back to their houses since security for each village could not be provided by the district administration(paragraph 10.6) The security provided for the victim-survivors is directly linked to the deployment of police and security forces.

Inadequate Deployment of Security Forces: The report also examines the intelligence received about the impending communal violence and the deployment of police forces. It finds that the deployment of police forces was insufficient for maintaining law and order in the district. (para 10.3.4) Further, that more forces were deployed as the violence spread to different areas of Kandhamal. The report makes a pertinent point that if the forces had arrived in sufficient strength in the initial stages itself, the violence and the number of deaths could have been controlled. (para 10.3.11) However it does not analyze further as to why sufficient forces were not deployed in
time, and who should be held accountable for the same.

Police Complicity and Dereliction of Duty: The report further observes that the riot incidents against Christians and the destruction of their property occurred very much in the presence of armed police force. (para 10.4) Further, it observes that on 25th August 2008, when the procession arrived at Phulbani, the DIG Berhampur, District Magistrate Kandhamal, along with local police officers, three platoons of OSAP and one platoon of CRPF were present in Phulbani but “did not take effective action against the rioters and the rioting continued for several hours.” (para 10.4) Similarly the report points out that in Gajapati district, in Raigarha town, when a church was burnt and several Christian houses were damaged, one platoon of armed force was present at the spot. (para 10.4.2)

The SDM Padampur, in whose presence a church was set on fire, could not answer as to why he did not order a use of force to prevent the burning of the church. (para 10.4.4) It says that these initial incidents, in the presence of the armed police force, “might have sent a message to the rioters that the police was not against them, and consequently the fundamentalist elements could organize themselves and instructed the miscreants to spread the riot to the other parts of the districts.” (para 10.4.3) Although it’s finding points to a grave dereliction of duty by the police through acts of omission, and the climate of impunity that set in due to the failure of the police to act, the report does not indict the police in strong terms or recommend legal / administrative / disciplinary action to be taken against the concerned personnel.

Dissatisfactory Investigation: The report found that the progress of investigation is not satisfactory as the police is occupied with maintaining law and order, and the Christian community is not coming forward to give their statements
openly due to fear (para 11a). No recommendations are made to build confidence among members of the victim-survivor community or to provide them protection. Cases registered against the rioters are not being investigated properly and should be expedited (para 12 recommendation 1)

Sr. AA’s Gang Rape: On the gang rape case of Sr AA, the NHRC confirms the incident to be true, confirms the suspension of six police officials for dereliction of duty, and observes that there was a delay in collection of medical report from the hospital and in arrest of the accused persons. (para 10.10) Yet it holds no one responsible for the delay in the arrest of accused persons.

Swami Lakshmananda’s Killing: The NHRC notes that four constables deployed at the ashram of Swami Lakshmananda were unarmed (para 10.9.4) but does not hold anyone accountable for not providing an adequate armed security cover despite the threats received to the Swami. The NHRC quotes the Inspector General – Crime, Arun Kumar Rai, and states that the killing “primarily appears to be the work of the Maoists who have taken up the cause of the depressed minorities and the dalits” (para 10.9.7).

The IG is further reported to have told the NHRC team that those who carried out the assault on Swami were naxalites, and that the seven arrested by the police, among whom five were Christians, were “not involved in the assault…directly.” (para 10.9.7) Yet the NHRC has not questioned the police on why the Christians were arrested and not those who were directly involved in the assault. NHRC merely recommends “speedy investigation and arrest of the main culprits.” (para 10.9.7)

The report gives a lengthy introduction about the decades of tension between the Kondhs and Panos (from the time before independence) and refers to the Sangh Parivar’s forcible conversions as “a movement to reconvert Panos and Kondhs who had converted to Christianity back to Hinduism” (para 9.4). It further states, without substantiation, that “even now, some members of Pano community are taking advantage of scheduled caste reservations (being Hindus) and at the same time have associated themselves with the Christian community”, finding fault with Panos for associating with the Christian community as if it is a crime to do so. (para 9.4) It concludes that reservations for SC (Pano) Christians was the crux of the December 2007 violence, and that an attack on Swami Lakshmananandabanda provided a spark for the same. (para 9.12)

For the 2008 violence, it says that the root cause of the problem is conversion and that conversion has to be dealt with by the state authorities through proper implementation of Orissa Freedom of Religion Act (OFRA) and it recommended that this be done (para 12 recomm 3). The report finds fault with the district and state administration for adopting a casual approach to conversion to Christianity without following the procedures prescribed in Orissa Freedom of Religion Act 1967. (para 10.2.4) It laments a poor documentation of conversion to Christianity and surmises allurement and inducement as possible factors contributing to conversion to Christianity. (para 11c)

It also concludes that there was a 66% increase in Christian population between 1991 and 2001, with a corresponding increase of only 12.3% in Hindu population (para 10.2.4) (para 11b). It does not mention the bifurcation of Phulbani district while accounting for the population increase. The report also concludes that several Christian missionaries receive foreign
funds and are working to convert the tribals and Panos into Christianity by opening several schools, hospitals and other institutions to show the general public that they are interested in the genuine welfare of the people. (para 9.11)

While it comes down heavily on the state authorities and Christian community for conversions to Christianity without following the legal procedure, it soft peddles the issue of forcible conversion of Christians to Hinduism. This is particularly so in the context of conversion to Hinduism as a pre-condition for many Christians to be allowed back to their villages after the violence, by observing as follows: “It was found during investigation that some Christians converted back to the Hindu religion and they were allowed to come back to their villages.” (para 10.6).

It noted that there were many allegations of forcible conversions and some were verified and found to be true. (para 10.7) “Many of the Christians also reconverted themselves due to the prevailing situation in Kandhamal, in order to return to their native villages and to live in peace.” (para 10.7) The report glosses over the fact that these were forcible conversions to Hinduism and that the Christians succumbed to such conversions due to issues of survival and security.

**B3. Clean Chit to State Agencies … Almost!**

The NHRC painted a hunky dory picture of the relief camps by noting that they were “well established”, the size of the camps was “very large”, that the “basic requirements of food, clothing, shelter and medicines were being met”, the inhabitants did not complain of any shortcomings in the relief operations, the relief camps were guarded by armed guards, there was a stock of medicines at the camps, the doctors were attending to patients in the camps, and district authorities were
making efforts to carry out a census of children to provide them education in the camps. (para 10.8)

This is diametrically opposite to the observations of independent reports that detailed the dismal conditions in relief camps. For example, the National People’s Tribunal on Kandhamal, headed by Justice A.P. Shah (retd.) of the Delhi High Court, highlighted several problems with the relief camps - that the location of the relief camps were in unhygienic surroundings, lack of basic amenities, overcrowding in camps, lack of privacy, lack of medical assistance, inadequate medical assistance to pregnant women and new mothers, absence of psychological assistance and lack of security, among others. 101

Disregarding victim-survivor testimonies to the contrary, the report states that “cognizance of all the cases reported by the Christian community is being taken promptly and cases were registered.” Arrests were also being made by the police. (para 11a)

B4. Soft-Peddling Heinous Crimes & Accountability for the Same

A twenty year old girl CC “sacrificed her life” to save the life of children living in the orphanage at Kuntapalli in Bargah district on 25th August 2008 and another person named Siddheshwar Pradhan “sacrificed his life” protesting against the attack on the Christians in Sullesaru village under the jurisdiction of Tikabali police station. (para 12 recommendation 10)

Recommendation of NHRC: “Commission may consider asking the state authorities to examine such cases for appreciation in appropriate form.” Instead of condemning the heinous killings in strong terms and recommending accountability of

the perpetrators, NHRC says they sacrificed their lives, covering up the heinous and barbaric nature of the killings.

It observes that many violent incidents took place in the presence of the police, both in August 2008 and December 2007, and the police was “reluctant in the use of force”. The state authorities ought to identify the causes and draw reasons for the failure of the police. (para 12 recomm 5) It does not condemn the grave dereliction of duties of the police through acts of omission.

B5. Confusions, Contradictions and Inconsistencies

The NHRC report contradicts itself in several places, making the reader wonder if the entire report was written by one person / team or if parts of it were copied and pasted from elsewhere by someone else. Some examples are as follows:

- The NHRC rejects the testimonies of victim-survivors that the procession of Swami Lakshmananda’s dead body led to violence in the places it passed through. For decoding the sequence of events, the NHRC team has entirely depended on the station diary reports from various police stations without double-checking the veracity of the same with victim-survivors. Based on these reports, the NHRC finds that the procession did not lead to violence as there was no correlation between timing and places of violence with timing of the procession (para 10.2), yet a few paras later, it observes that when the procession entered Phulbani town, the miscreants started damaging and set fire to two churches and houses of Christian families. (para 10.4)

- The NHRC report goes to great lengths to illustrate that the August 2008 violence was not pre-planned but started automatically after the killing of the Swami (para 10.1 and 10.1.1) Yet it states that due to the inaction of the police,
the fundamentalist elements could organize themselves and instructed the miscreants to spread the riot to other parts of the district. (para 10.4.3)

• The NHRC report tries to give a clean chit to the police by stating that there is no evidence of police conniving with the perpetrators of violence and allowing the fundamentalists to attack the Christian community. (para 10.4.6) Yet the report speaks of violence being perpetrated in the presence of the police at Phulbani, Raigarha and Padampur and the police doing nothing about it and stating that this would have emboldened the perpetrators. (paras 10.2, 10.4.2, 10.4.4)

C. Conclusion

The National Human Rights Institutions (NHRIs) are guided in their work by the Paris Principles: A set of international standards that were adopted by the UN General Assembly in 1993. The Paris Principles emphasize the importance of independent functioning of the NHRIs. In the case of the Kandhamal violence, the NHRC does not appear to have inquired and assessed the situation in an independent, non-partisan manner, contrary to the Paris Principles. In contrast, the National Commission for Minorities expressed its continued concern with the issue, by making three visits to Kandhamal in 2007-8. It made an independent assessment of the situation at the ground level, and spelt out various recommendations in its reports, aimed at restoring peace and ensuring accountability for the violence.
CHAPTER III
REPARATIVE JUSTICE: AN UNFULFILLED RIGHT COMPENSATION, RESTITUTION AND REHABILITATION IN KANDHAMAL

This Chapter examines whether the State discharged its obligation to repair the harm caused by the communal attacks to the affected community in Kandhamal and maps the evolving jurisprudence of the duties and obligations of the Indian state in this respect. Currently there is no domestic legislation or policy that articulates the principles upon which the nature and scope of the State’s responsibility towards providing reparative justice to the affected community will be premised. Nor is there any criteria enumerated to determine the nature and quantum of compensation, restitution and rehabilitation. Government schemes and executive and administrative orders for relief and rehabilitation in earlier situations of targeted mass crimes serve as a precedent and some guidance can be derived from jurisprudence laid down by the Courts.

Reparations in respect of victims, as defined by the Rome
Statute, include restitution, compensation and rehabilitation. Reparative justice also imposes an obligation upon the State to give a public apology to the victims and to guarantee the non-recurrence of the violence and harm suffered by the victims. In the Indian context however, in law, policy and judicial decisions, the articulation of the right to reparations is restricted to compensation and rehabilitation. What is awarded to victims by the Indian State falls short of this definition and is limited to arbitrary compensation, ad hoc relief and rehabilitation.

Crucially, this does not include ‘restitution’, which is the re-establishment, as far as possible, of the situation that existed before the wrongful act was committed. Under the concept of restitution, the state is made responsible for restoring status quo ante; for example, rebuilding houses, educational institutions, places of worship and other such places destroyed during the attack. The right to reparations is a right of all victim-survivors of violations, and not only for displaced communities. This section while analysing domestic jurisprudence on compensation, relief and rehabilitation, also studies whether, in the Indian context, the disbursements by the State meet the victim’s right to reparative justice.

Two Writ Petitions filed in the aftermath of the communal attacks on the Christian community in Kandhamal District, and the Replies filed by the State of Odisha before the Supreme Court of India, provide comprehensive information of the losses suffered in terms of loss of life, livelihood and property and also provide us with an understanding of the fear, insecurity and hostility experienced by a community that has been attacked, looted and displaced. In order to contextualise the

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compensation and other relief provided in Kandhamal District, court judgments in other cases of mass crimes, particularly the communal attacks in September 2013 against the Muslim community in Muzaffarnagar, Uttar Pradesh, is referenced here.

On 26th March, 2014 the Supreme Court delivered its common judgment in *Mohd. Haroon vs. Union of India* in 20 Petitions, praying for different relief and directions pertaining to the communal violence in Muzaffarnagar in September 2013. The Writ Petitions filed on behalf of victim-survivors of the communal attacks and displacement, apart from praying for numerous rehabilitative, protective and preventive measures, also raised concerns with regard to the inefficient investigation by the State police and the lapse of procedural laws and hence prayed for entrusting investigation to the CBI or a Special Investigation Team to ensure a fair and effective investigation. The directions given by the Supreme Court in *Mohd. Haroon vs. Union of India*, while applicable only to the facts of the Muzaffarnagar communal violence of 2013, indicate the evolution of domestic jurisprudence on reparations.

The Writ Petitions filed by Archbishop of Odisha, Raphael Cheenath, and the Catholic Bishops Conference of India in the aftermath of the Kandhamal communal attacks, provide a resource to measure the sensitivity of the State to the particular violations suffered by the affected community, and assess how diligent the State is towards its own constitutional duty. These judicial processes help to ascertain to what extent the Judiciary is holding the State accountable to its constitutional and legal duties. With regard to the two Writ Petitions, it is necessary to mention here that this Chapter draws much of its information from the submissions and facts mentioned in the pleadings by the respective parties in the proceedings in the two

Writ Petitions and that the same are yet to be adjudicated upon and finally decided by the Supreme Court.

A. Condition of Victims:

Human rights fact-finding reports place the loss of life in the targeted communal attack at between 75 and 123 persons, though the government has confirmed only 54 deaths.\textsuperscript{104} Majority of those killed were Christian \textit{dalits and adivasis}. Many more were injured. Close to 5000 houses belonging to Christians were destroyed partially or fully, and at least 264 churches and prayer halls were fully or partially desecrated and demolished.\textsuperscript{105} Valuables were looted, crops, cattle, jewelry and title deeds stolen, hundreds of philanthropic institutions such as schools, orphanages, old age homes, leprosy homes, dispensaries, tuberculosis sanatoriums and NGO establishments were also looted, razed to the ground or burnt down. In Kandhamal district alone, approximately 25,000 to 40,000 people were displaced and forced to take refuge in 25 relief camps.\textsuperscript{106}

The relief camps were soon closed down by the

\textsuperscript{104} Kandhamal: The Law Must Change its Course, by Saumya Uma, edited by Vrinda Grover New Delhi, MARG 2010.

Janvikas calculates that about 86 killings took place, in Kandhamal in Chaos: An Account of Facts, Ahmedabad, Janvikas 2009, at p. 15.

A list of 75 persons killed during the violence was submitted to the Supreme Court by Petitioner Archbishop Raphael Cheenath of Bhubaneswar in February 2009. The Archbishop stated that the total killings would be approximately 100, but a compilation of the complete list was impossible as many villages were very sensitive, hostile and inaccessible. The Global Council of Indian Christians says between 75 and 123 killings took place. Discussed in Anto Akkara, Kandhamal: A Blot on Indian Secularism (Delhi: Media House, 2009) at pp. 29-31.


\textsuperscript{106} Ibid.
government. Many of the affected persons fled to other districts in Odisha, and even to neighbouring states, including Andhra Pradesh and Kerala. Of those who returned to their villages, most live on the outskirts or the edge of the village, due to the socio-economic boycott and cultural exclusion and hostility that they continue to face. Long after the attacks, some of the victim families continue to live in temporary shanties, without any regular source of livelihood, and with a bleak and uncertain future.

B. Writ Petitions Before the Supreme Court

On 2nd September 2008, Raphael Cheenath, the Archbishop of Cuttack-Bhubaneswar (hereinafter Petitioner) filed a Writ Petition in the Supreme Court under Article 32 of the Constitution against the State of Odisha and Union of India, challenging the failure of the State Government to prevent communal violence of genocidal proportions committed with an intent to destroy an ethnic and religious group; its failure to protect its citizens, their property, and the rights of the minority Christian community in Odisha from communal attacks from December 2007 to January 2008 and in August 2008.107 Almost a year later, on 4th June 2009, the Catholics Bishops Conference of India (CBCI) filed a Writ Petition on broadly the same grounds, praying for inter alia, the reliefs of rehabilitation, investigation into attacks and conviction of the perpetrators, but emphasising that the communal attacks in Kandhamal and the subsequent failure of the State to rehabilitate survivors and restore law and order constituted a violation of Fundamental Rights as guaranteed by the Constitution, International Law and directives of the Supreme Court. The Writ Petition filed by the CBCI went beyond the 2007 & 2008 communal attacks and

107 Archbishop Raphael Cheenath S.V.D v. Union of India. W.P.(C) No. 404/2008 filed in the Supreme Court of India.
traced the hostility and threats faced by the Christian community in Odisha from Hindu right wing organisations to the murder of Australian missionary Graham Staines and his two minor sons in 1999. The CBCI Petition listed several instances of brutality against the Christian community, committed with complete impunity by local Hindu fundamentalist groups in the decade preceding the 2007-2008 attacks. These included instances of tonsuring the hair of Christian women and forcing them to convert to Hinduism, stabbing to death of a Baptist Pastor, regular burning and destroying of Churches, rape committed upon Christian women specifically upon nuns etc. This Petition also details the socio-economic background of the Christian community in Odisha to show how an already marginalised community was attacked and rendered even more vulnerable. It emphasised the threats and coercion that the Christian community was suffering, to argue that these attacks could not be addressed as a mere law and order problem but rather that they were illustrative of the systemic prejudice and violence faced by Christians in Odisha. In addition to seeking effective redressal for the victims of the 2007-2008 attacks, this Petition prayed that the Supreme Court frame appropriate


109 Catholic Bishops Conference of India v. Union of India. W.P.(C) No.76/2009 filed in the Supreme Court of India.
guidelines to prevent recurrence of communal attacks of this nature.

C. International Human Rights Law:

The concept of remedy for the violation of human rights is crucial to ensure the full enjoyment of human rights. It can be found in several international instruments including the Universal Declaration of Human Rights (article 8), the International Covenant on Civil and Political Rights (article 2), the International Convention on the Elimination of All Forms of Racial Discrimination (article 6)\textsuperscript{110}, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (article 14)\textsuperscript{111} and the Convention on the Rights of the Child (article 39)\textsuperscript{112}.

The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power\textsuperscript{113} contains principles on restitution and compensation for victims. Article 12 states


\textsuperscript{111} Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984 entry into force 26 June 1987, in accordance with article 27 (1), signed by India October 14, 1997. Available at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx accessed on July 10, 2015.


that when compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to (a) Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes, (b) The family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimization.

Another key instrument is the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 2005\(^\text{114}\). According to the Basic Principles, remedies include equal and effective access to justice, adequate, effective and prompt reparation for harm suffered; and access to relevant information concerning violations and reparation mechanisms.\(^\text{115}\) Reparations are said to include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.\(^\text{116}\) Restitution should, “whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one’s place of residence, restoration of employment and return of property”.\(^\text{117}\)


\(^{115}\) Principle 11, Ibid.

\(^{116}\) Principle 18, Ibid.

\(^{117}\) Principle 19, Ibid.
And compensation “should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case”, including physical or mental harm, lost opportunities including employment, education and social benefits, material damages and loss of earnings including loss of earning potential, moral damage, and costs required for legal or expert assistance, medicine and medical services, and psychological and social services.118

In his 2014 report on reparation for victims, the Special Rapporteur in the “Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo De Greiff” has said that material reparations may assume the form of compensation, i.e. payments in cash, or of service packages, which may in turn include provisions for education, health, housing etc.119 However, he warns that “In order for something to count as reparation, as a justice measure, it has to be accompanied by an acknowledgment of responsibility and it has to be linked, precisely, to truth, justice and guarantees of non-recurrence”.120

D. Judicial Decisions in Mass Crimes:

In India the jurisprudence with regard to the reparative justice for victims of communal violence is evolving gradually. It was after the anti-Sikh massacre of 1984 that the Court for the first time addressed this issue. In the 1996 case of Bhajan Kaur vs. Delhi Administration,121 the Delhi High Court, while determining

118 Principle 20, supra n. 10
120 Para 11, Ibid.
121 Bhajan Kaur v. Delhi Administration (ILR 1996 Delhi 754)
the appropriate compensation for a Sikh woman whose husband was killed in the 1984 attacks, observed “Communal violence and riots keep on manifesting with alarming frequency … It is the duty and responsibility of the State to secure and safeguard life and liberty of an individual from mob violence. It is not open to the State to say that the violations are being committed by private persons for which it cannot be held accountable.”

In this case, the State by way of an executive order had given the Petitioner-Widow compensation of Rs. 20,000 on October 20, 1986, which the court held was “grossly inadequate and is far from being just, fair and reasonable”, saying that it did not conform with the spirit of Article 21 of the Constitution because it did not “equip them to lead a life of dignity and proper human existence, and to be able to live an adequate human life to satisfy human wants - if all human wants cannot be satisfied, they should be satisfied so far as possible and at least to the extent of decent human minimum”.

The court also found it relevant that while private individuals, and not state agents, formed a part of the rioting mob, “it was not something done clandestinely for which the State could plead ignorance. At least in the capital of the country the State has requisite resources to prevent the riots”. The court thus increased the amount to Rs. 350,000 for all the widows and dependents of the victims who were killed in the 1984 Anti-Sikh attacks.

In the 2005 case of Manjit Singh Sawhney vs. Union Of India, the Delhi High Court reinforced the ruling in Bhajan Kaur. Here, the petitioner was claiming enhanced compensation for injuries during the 1984 communal attacks. The court enhanced the compensation amount from Rs. Two thousand to Rs. Seventy five thousand plus interest, saying that the

122  Ibid Para 6 and 7
123  Ibid Para 27
124  Ibid Para 28
125  120 (2005) DLT 156
petitioner’s injury demonstrated that “the petitioner was denied the equal protection of law by the machinery of the State as was constitutionally guaranteed to the petitioner under Article 21”. 126

The court also clarified that the state had a duty to pay compensation for breaching “the public duty of not protecting the fundamental rights of the citizens. This computation is not guided by any strict arithmetical formula and it has to be borne in mind that money cannot remove the trauma and the battering suffered by a victim”. 127

In the case of Mohd. Haroon v. UOI, the hon’ble Supreme Court said, in the context of compensation for survivors of rape, that “No compensation can be adequate nor can it be of any respite for the victims but as the State has failed in protecting such serious violation of fundamental rights, the State is duty bound to provide compensation, which may help in victims’ rehabilitation…

However, no rigid formula can be evolved as to have a uniform amount, it should vary in facts and circumstances of each case. Nevertheless, the obligation of the State does not extinguish on payment of compensation, rehabilitation of victim is also of paramount importance. The mental trauma that the victim suffers due to the commission of such heinous crime, rehabilitation becomes a must in each and every case”. 128

The court re-emphasized the need to provide compensation for those injured, the next of kin of those deceased, for the damage caused to movable/immovable properties, and for loss of livelihood.

The court finally stated that “it is the responsibility of the State Administration in association with the intelligence agencies of both State and Centre to prevent such recurrence of communal violence in any part of the State” 129.

126 Ibid. para 31
127 Ibid para 20
128 Mohd. Haroon v. Union of India supra n. 2 at para 87 and 88
129 Ibid para 94
E. Compensation for Loss of Life and Bodily Harm

E1. Quantum of Compensation:

After the first spate of violence in December 2007, the Odisha State government had announced an ex-gratia to the next of kin of the deceased at Rs. 100,000 and after the August 2008 violence, the Odisha government announced an ex-gratia payment of Rs. 200,000 to the next of kin of deceased persons from the Chief Minister’s Relief Fund.  

The central government announced an additional compensation of Rs. 300,000 per person killed during the communal violence.

The Petitioner sought the enhancement of compensation for the families of the deceased to Rs. 500,000. In January 2009, the State of Odisha, in its reply to the Court, resisted this increase claiming that the families of 32 of the deceased persons were given financial assistance of Rs. 200,000 each, which was in addition to the Rs. 500,000 being given to these families by the Central Government as part of its Central Scheme for Assistance to Victims of Terrorism and Communal Violence.

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E2. Accurate estimation of the number of people killed in the violence:

As often observed in situations of communal violence, there is a discrepancy between the official figures presented by the Government and the figures collated by independent, fact-finding and human rights organisations on the number of fatalities caused by the attacks. The former usually pegs the figures quite low to underplay the gravity of the situation. The State arrived at a casualty list of 32 persons. Janvikas, an NGO, calculates that about 86 killings took place. A list of 75 persons killed during the violence was submitted to the Supreme Court by the Petitioner in February 2009\textsuperscript{133}, while also stating that the total killings would be approximately 100, but a compilation of the complete list was impossible as many villages remained hostile and inaccessible. The Global Council of Indian Christians claims that between 75 and 123 were killed.\textsuperscript{134}

A common point of contention with regard to compensation, whether for life or property, across different cases of mass crimes is the assessment of the number of cases that are entitled to compensation. In each situation, the burden of proving entitlement to compensation for loss of life or property or otherwise, falls disproportionately on the victim/victim’s family. In cases of loss of life, the brutality with which murders during mass crimes are executed is such that dead bodies are disposed off and made to disappear. The consequences of the low official figure are that on one hand, the amount of compensation that the state is duty-bound to pay is

\textsuperscript{132} Kandhamal: The Law Must Change its Course, New Delhi, MARG 2010 supra n. 3 at p. 78. Kandhamal in Chaos: An Account of Facts, Ahmedabad, Jan Vikas 2009, supra n. 3 at p. 15

\textsuperscript{133} The details of this can be found in Anto Akkara, Kandhamal: A Blot on Indian Secularism, Media House 2009 supra n. 3 at pp. 29-31

reduced considerably.

On the other hand, victim-survivors have to contend with a callous state machinery that has been both complicit in the violence and apathetic to their sufferings, to secure compensation. The difficulty for victim-survivors to prove that their family member was indeed killed is further compounded by the fact that the aggressors intentionally destroy the body so as to leave behind no trace of the crime through erasure of evidence. The absence of the *corpus delicti* makes proving death of a family member, for purposes of a compensation claim, an evidentiary challenge. (*Destruction of evidence during mass crimes like communal attacks is further discussed in Chapter IV*)

**E3. Compensation for Injury:**

Compensation for injury caused during the violence does not feature in the package announced by the State. The Petitioners sought that Rs. 100,000 be paid to those injured in the attacks and the State government be directed to pay compensation for the medical expenses incurred and provide free medical care for those injured.135

While both the Writ Petitions have sought that the Court direct the State of Odisha to provide compensation to persons injured in the communal attacks, the Court has not passed any interim order on the same and neither has the State of Odisha revised its compensation scheme to include injured persons. Here again is a reminder of Hashimpura where even those who were permanently or partially disabled due to bullet

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135 Archbishop Raphael Cheenath S.V.D v. Union of India. W.P.(C) No. 404/2008 filed in the Supreme Court of India.
wounds were not awarded any compensation by the State.  

E4. Comparative Overview of Quantum of Compensation:

Taking the cost of inflation into account, Rs. 200,000 is substantially lower in real terms than even of the paltry sum of Rs. 150,000 announced by the Gujarat government after the carnage in 2002. It is also much lower than the compensation awarded for killings in anti-Sikh violence and the Bhagalpur communal attacks. In the case of anti-Sikh violence of 1984 in Delhi, the government paid a compensation of Rs. 300,000, which was further enhanced in 2006 through a scheme declared by the central government. The compensation for injuries to

136 On May 22, 1987, around 45-50 Muslim men were taken into custody by a unit of the Provincial Armed Constabulary (PAC) force, from Hashimpura colony adjacent to Meerut, in Uttar Pradesh. They were ordered into a PAC to be taken to the jail. However the PAC drove the truck towards Ganga canal, and here shot the captive men at point blank range and threw their bodies into the water. Then they drove the truck towards the Hindon canal and shot at the remaining men and threw their bodies in the canal. 5 men survived this massacre, as the PAC had given them up for dead. 1 of the survivors has suffered a permanent disability and walks with a serious limp due to the bullet injuries, while other survivors bear the scars of the bullet wounds even after 25 years of the killings. The injured and other survivors were not given any compensation by the UP Govt. when it awarded compensation to the kin of the deceased by a notification dated 15-1-2007. Only 28 years later the Trial Court, in its judgment dated March 21, 2015, while acquitting all the accused PAC men held that the survivors were entitled to compensation under Section 357 A of the Code of Criminal Procedure in accordance with the Victim Compensation Scheme enacted by the State. Anguished by the paltry sum awarded after the long delay, the survivors have filed an appeal before the Delhi High Court against this decision in May 2015. The Appeal is currently pending.

victims of the anti-Sikh violence was enhanced in 2005 by the Delhi High Court.\(^{138}\)

<table>
<thead>
<tr>
<th>Date</th>
<th>Govt./Judicial Order</th>
<th>Description</th>
<th>Amount awarded</th>
</tr>
</thead>
<tbody>
<tr>
<td>5-7-96</td>
<td>Bhajan Kumar v. Delhi Administration</td>
<td>Petitioner’s husband killed by the mob in Delhi during anti-Sikh pogrom in November 1984</td>
<td>Rs. 2,000,000/- (In addition due to a delay of over a decade Rs.1,50,000/- given as interest)</td>
</tr>
<tr>
<td>19-5-05</td>
<td>Manjit Singh Sawhney v. Union of India</td>
<td>Injuries and loss of property</td>
<td>Rs. 75,000/- to the petitioner (with interest calculated for delayed payment @ Rs. 50,000/-)</td>
</tr>
<tr>
<td>16-1-06</td>
<td>MHA Notification No. U.13018/46/2005-Delhi-I(NC)</td>
<td>Compensation on Injuries and Death</td>
<td>Rs. 125,000/- for injury</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Rs. 300,000/- for death</td>
</tr>
</tbody>
</table>

Twenty years after the Bhagalpur communal attacks of 1989, the families of the 844 people killed were paid by the central government, a compensation of Rs. 350,000 each, and those injured Rs. 125,000 each, from which the amounts paid by state government were deducted.\(^{139}\) There are substantial disparities in the compensation amounts awarded by the state and central governments in Kandhamal and in other situations of communal violence. As discussed above, there are no criteria or principles laid down for compensation to victim-survivors of communal violence, leaving the grant of compensation to the

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\(^{138}\) Manjit Singh Sawhney vs. Union of India & Others supra n. 18 at Para 39

arbitrary and ad-hoc decisions of the concerned government.

In *Mohd. Haroon vs. Union of India*, the Supreme Court with respect to the Muzaffarnagar communal violence of 2013, revised the Uttar Pradesh State Government’s compensation package, which provided for Rs. 100,000 in case of death, to Rs. One Million five hundred thousand and held that if any person is declared dead in terms of Registration of Births and Deaths Act, 1969 and Evidence Act, 1872, the State will ‘consider’ paying compensation to the family of such person.\(^\text{140}\)

The U.P. State government during the course of the hearing also submitted that it would give employment to one member of the family of the deceased persons depending on their qualification as a rehabilitative measure.

Further, the Supreme Court, in the context of the Muzaffarnagar communal violence, in a landmark order with regard to sexual violence committed during communal violence, passed directions in a Writ Petition filed on behalf of 7 Muslim women survivors of gang rape committed by men from the dominant community.\(^\text{141}\)

The Apex Court held that the State government was responsible for its failure to afford protection to women. While acknowledging that no extent of pecuniary compensation can alleviate the trauma of sexual violence, the Court ordered the State of U.P to not only pay each survivor an amount of Rs. 500,000 but also to provide for their rehabilitation over and above this one time payment in order to compensate for its

\(^{140}\) Mohd.Haroon v Union of India supra n. 2 at Para 109, 119, 127.10.

\(^{141}\) The Criminal Law Amendment Act (2013) introduced S.376(2)(g) IPC ‘Rape during communal violence’ as aggravated rape, which keeping in mind the procedural and evidentiary obstacles in proving rape during communal violence, attracts S.114A of the Indian Evidence Act which shifts the burden of proof onto the accused in cases of aggravated rape u/s.376(2) IPC.
failure to protect them.\textsuperscript{142}

What is perhaps most pertinent here, is that in each instance of communal violence, the abovementioned compensation packages have been announced, not by the State acting on its own and in recognition of its obligations, but rather only when victim-survivors of the mass crimes have filed petitions before the Court and directions are issued by the judiciary.

\textbf{F. Compensation for Loss of Property:}

After both the first spate of violence in December 2007 and subsequent attacks in August 2008, the Odisha State government announced the following compensation package\textsuperscript{143}:

1. Construction assistance for fully damaged dwelling houses \@ Rs.Fifty thousand 50,000/- and for partially damaged dwelling houses \@ Rs. Twenty thousand 20,000/-
2. Shops/shops-cum-residence \@ Rs. Fifteen thousand 15,000/- to Rs.Forty Thousand 40,000/- depending upon the damage assessment made by the District Administration.
3. Assistance for bicycles damaged \@ Rs.Two thousand 2,000/-
4. Construction assistance for damage of Public Institutions like school, clinic, hostel, hospital etc., \@ Rs.Two hundred thousand.

\textsuperscript{142} Mohd.Haroon v Union of India supra n. 2 at Para 123-126.

\textsuperscript{143} Vide Order no. 405/SR dated 14th February 2008, the Additional Commissioner Relief, Govt of Odisha announced this Relief Package and estimated the number of families affected by the communal violence to be 800. As cited in Kandhamal: The Law Must Change its Course, New Delhi, MARG 2010 supra n. 3.
F1. Assessment of damages incurred to property:

In the Writ Petition filed before the Supreme Court, the Petitioner contended that the relief package announced by the State for fully and partially damaged houses @Rs. 50,000 and Rs. 20,000 was woefully inadequate and also challenged the method adopted by the State government to evaluate damage and calculate compensation as arbitrary, and hence violative of Article 14 of the Constitution.

In this regard, the Petitioner sought for directions to the State of Odisha to constitute an independent commission to frame rehabilitation and compensation schemes and pay all those affected in the communal attacks compensation that is based on the loss incurred at actual market value. The Petitioner contended that the State government should pay at least Rs. 400,000 for fully damaged houses, Rs. 200,000 for partially damaged houses.

The Petitioner submitted that the compensations amounts announced for destruction of property need to be revised according to the actual damage and loss suffered as recommended by the National Commission for Minorities, in the aftermath of their visit to Kandhamal in January 2008.144

This claim is contested by the State of Odisha, which stated to the Supreme Court that the evaluation of losses was inflated by the Petitioner.145 As per the State of Odisha’s assessment of damaged houses- a total of 3,876 houses were affected, including 2,807 fully damaged houses and 1069 partially damaged houses, and the State government has paid Rs. 50,000 for the former and Rs. 20,000 for the latter. In January 2009, it

submitted to the court that nearly 2500 families were given a first installment of Rs.10,000 by January 2009.146 As per the statistics of NGOs, the actual number of damaged houses is above 5,000.147 At least 1000 houses are missing in the government list of damaged houses and hence no compensation is provided to their inhabitants.

The state government made the payment of the second installment of the compensation for rebuilding the damaged homes conditional upon the house being constructed up to the plinth level. However, due to the scant relief and care provided by the state, most families spent the interim compensation of Rs. 10,000 in meeting their basic and emergency needs.148 This has rendered many victim-survivors ineligible to claim the next installment of compensation.

What is also of serious concern is the arbitrary nature of assessing a house as ‘partially’ or ‘fully’ damaged. Independent fact-finding reports observe that many of the houses that are classified as partially damaged by the government are not fit for habitation.149 Accordingly, many families whose homes were seriously destroyed and had to be rebuilt, received compensation for ‘partially damaged houses.’ During the assessment undertaken by government officials, many houses enlisted as ‘partially damaged’ later collapsed due to heavy rain and other factors when the victim-survivors were in relief camps.150 This matter was not taken into consideration by the

146 Ibid.
147 Ibid.
149 Ibid.
150 Counter-Affidavit dated 15th January 2009 filed on behalf of State of Odisha in W.P.(C)404/2008
As a result, such houses were considered as ‘half-damaged’ and the affected families received only Rs. 10,000 from the state government and Rs. 20,000 from the central government as compensation. In many cases, however, the victim-survivors have not received the central government amount of Rs. 20,000. The punitive approach adopted by the Odisha government is contrary to the concept of victim’s inviolable right to reparations.

F2. Conditional compensation upon foregoing the right to return:

While the District Emergency Officer held that an interim relief of Rs. 10,000 each had been distributed to more than 2,800 Christian families by mid-March 2009, the Petitioner highlighted before the Supreme Court that the state officials had conveyed to the victim-survivors that their eligibility to receive further compensation was contingent upon their vacating the relief camp and returning to their villages. While conditional compensation is problematic in itself, linking it with a compulsion to vacate the relief camp and return to the village, irrespective of the socio-political conditions prevailing in the village, has been challenged as a serious violation of basic rights and breach of state obligations.

Here the approach adopted by the Supreme Court in the aftermath of the Muzaffarnagar communal violence that led to large-scale displacement of the Muslim population in rural western Uttar Pradesh, is of relevance. Taking serious note of the order passed by the State of U.P to give displaced Muslim families a compensation amount of Rs. 500,000 if they signed a bond to never return to their ancestral home or village, the Supreme Court in Mohd. Haroon v. UOI directed that if these families after receipt of the compensation amount decide to return to their original village due to the fact that the
law and order situation has improved and threat perception has decreased, the State is not to recover the amount already paid to the families, “but only ascertain genuineness of families concerned in their efforts to resettle at the same place”151

G. Relief Camps:

The State Government’s orders after December 2007 and August 2008 provided that all those displaced due to the communal violence would be entitled to shelter in relief camps with food, clothing, tents, lighting etc. arrangements for as many days as required by the victims.152

The Petitioner contended that the State of Odisha had failed to provide sufficient rehabilitation and resettlement even 10 months after the communal attacks, and that the living conditions in the relief camps were abysmal, resulting in 2 deaths by February 2008. The State of Odisha in its counter-affidavit stated that it had set up 25 relief camps in the district and cited the decrease in the number of people living in the relief camps from 25,000 in September 2008 to around 8000 by December 2008 as an indication of the effectiveness of its rehabilitation packages.153

However, Petitioner Raphael Cheenath in the Additional Affidavit filed in October 2009 disagreed and stated that number of residents had decreased because there was a bomb-blast in one relief camp due to which people left fearing for their lives, and due to the inhospitable conditions in relief camps people were migrating to other states.

151 Mohd.Haroon v Union of India supra n. 2 at Paras 66 and 123.8.
H. Charitable Religious Organisations and other NGO’s Restrained from Engaging in Relief from the Government:

A disturbing feature of the post-communal violence in Kandhamal was the blockage of relief material to victim-survivors, and the prevention of relief and fact-finding work. After the anti-Christian violence of December 2007, Manish Kumar Verma, the Collector of Kandhamal, banned relief work by non-profit organizations including Christian groups for the families of victim-survivors of the violence through an Executive notification. Even ten days after the violence, the government did not allow human rights organizations as well as a fact-finding team led by the opposition leader of the State Assembly to enter the affected villages. The ban was lifted in May 2008, five months after the violence, through an order of the Supreme Court that quashed the Collector’s notification.

Precious time was lost in the interim for attending to the injured and providing relief and rehabilitation to all victim-survivors. This Notification aggravated the breach of faith between the victim community and the administration. The notification is an indication of impunity in governmental action. The Supreme Court order quashing the malicious notification ought to have caused embarrassment and deterrence to the state government. However, this was not so. In the August 2008 violence, the government once again prevented the entry of the Central Minister of State & Home Affairs, Sriprakash Jaiswal, and opposition leaders of the state, into the affected areas for first hand information on the scale and nature of violence.

154 Kandhamal: The Law Must Change its Course, MARG supra n. 3 at p. 64, Anto Akkara, Kandhamal: A Blot on Indian Secularism supra n. 3 at p. 98-99
155 Order No.115/Emg dated 11.1.2008 of DM/Collector to all Sub-collectors, Kandhamal District as cited in Kandhamal: The Law Must Change its Course, MARG supra n. 3.
The government also banned relief agencies, non-profits and charitable organizations from conducting relief work among the victim-survivors.\textsuperscript{156}

The state not only abdicated its responsibility towards providing relief measures in a prompt and adequate manner, but also ensured that help did not reach the devastated victim-survivors. Once in the camps, victim-survivors’ had no access to or communication with the outside world, because all ‘outsiders’ were denied permission to enter. Reports document that permissions were denied to nuns, priests and local nurses for many months.\textsuperscript{157} However, reports also point out that members of the Bajrang Dal and Durga Vahini were able to freely walk into the camps and threaten the victim-survivors, thereby increasing their sense of fear and insecurity even within the camps.\textsuperscript{158} Taking note of this, the Supreme Court directed the Odisha government to ensure that “those who are in the relief camps are protected and no miscreants shall be allowed to visit the camps to create any problem”.\textsuperscript{159}

The District Magistrate of Kandhamal issued an Order in January 2008 to all the Sub-Collectors in the District that no charitable, religious or non-governmental organisations would be allowed to carry out any relief work and that anyone who

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\textsuperscript{157} Kandhamal: The Law Must Change its Course, MARG supra n. 3 at p. 65, Kandhamal in Chaos: An Account of Facts, supra n. 3 at p. 14


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violated this direction would face action under criminal law. 160

The Petitioner, the highest Church representative in the area, was himself disallowed by the Police from entering Kandhamal district by virtue of this Order. When challenged, this Order was upheld by the Cuttack High Court on the grounds that there was no scope for judicial review. 161 Aggrieved by this, the Petitioner filed an appeal in the Supreme Court, which in April 2008 granted a stay on the Order of the District Magistrate. 162 The matter was disposed of by the Supreme Court in April 2009.

Justifying the District Magistrate’s Order, the State of Odisha in its counter affidavit to the Writ Petition states, “to avoid fermentation for communal ill feeling, no organisations of a particular religious faith were allowed to administer relief to the victims. Rather the Collector took the balanced decision that any such organisation willing to provide relief may do so through the government machinery under the district administration.” 163

Quite contrary to its stated objective, the Order caused further polarization and mistrust on the ground. In January 2009 the State of Odisha provided the Court with a list of NGO’s and other organisations who are involved with relief and rehabilitation work in Kandhamal and also stated that an Inter-Agency Coordination Group (IASCG) was formed in

160 Order No.115/Emg supra n. 54
161 Order dated 28th January 2008 in Raphael Cheenath, S.V.D.Arch of Cuttack v. Union of India & Ors W.P.(C) 1257/2008 filed before the High Court of Odisha at Cuttack.
163 Counter Affidavit dated 10th September 2009 filed on behalf of State of Odisha in W.P.(C) 404/2008 at Para 42
October 2008 to coordinate relief efforts of different actors.\textsuperscript{164}

\textbf{I. Resettlement and Rehabilitation of Livelihood:}

Another relief sought by the Petitioner from the Supreme Court is to direct the State of Odisha to formulate a pension or employment scheme for the relatives of those killed. The Petitioner brought to the notice of the Supreme Court that despite the State of Odisha’s claims with regard to rehabilitative measures, sustainable steps, like ensuring the survivors whose NREGA job cards and BPL ration cards have been destroyed in the attacks are provided fresh documents, have not been taken and a majority of the survivors continue to have no way of accessing these basic services and entitlements. Almost all the victim-survivors in Kandhamal are classified as ‘below poverty line’ (BPL) families.

The amount of compensation received from the government was too meager for the affected families to even resume their former subsistence existence. Families have been impacted by the death of the bread earner and some were permanently disabled, leading to inability to work and loss of livelihood. Most of the families whose houses were damaged because of the violence were not able to rebuild or repair their homes due to lack of finances. The majority of the affected families depended on forest produce and used forest land for agriculture and other allied activities. But after the violence they have been evicted from their agricultural, homestead and forest land, which has severely impacted their livelihoods and economic conditions. The financial condition of families who were dependent mostly on agriculture or forest produce has been greatly affected.

\textsuperscript{164} Counter Affidavit dated 15th January 2009 filed on behalf of State of Odisha in W.P.(C) 404/2008 at Para 6, 7, 8.
Those families who had private businesses were severely affected by the targeted violence, as their business establishments were burnt and they have not been able to generate resources to restart their businesses. In many areas there was no provision for basic services. There are no electricity and sanitation facilities at Ambedkar Colony, which houses 40 families. In Nandagiri, only a few of the 150 houses have electricity.

Seventy percent of the affected families depend on daily wage labour in agriculture, construction and domestic work, for their survival. In the aftermath of the violence, most families remained displaced for a year, without any means or access to livelihoods. After returning to their original villages, the majority of families have found it very difficult to resume their previous livelihood practices.

Most families now work only within their own community, where work opportunities are limited. Feelings of insecurity and fear among some of the victim-survivors deter them from working for people of other communities. The Mahatma Gandhi National Rural Employment Guarantee Act (MGNREGA) is considered to be an important source of employment. However, it is irregular and insufficient, and the prejudiced attitude of gram sathi (official village MGNREGA volunteers) and Panchayati Raj Institution leaders towards the victim-survivors’ further impedes their employment opportunities and benefits.

About 1,000 displaced families continue to live in slums in Bhubaneswar, without any support from the government. They are keen to return to their villages and resume their former livelihoods but the specter of and fear and insecurity haunts them.

The Supreme Court, through its judgment Mohd. Haroon v Union of India, with regard to the Muzaffarnagar
communal attacks, directed that pension schemes for aged persons be implemented effectively and that farmers who have lost their means of livelihood, namely tractors, cattle, sugarcane crops, etc., be paid “adequate compensation” as determined by the State government.\(^{165}\)

Neither the State nor the Central government took effective or sufficient steps to ensure that the livelihood of members of the Christian community, who bore the brunt of the communal attacks, was restituted. The communal attacks of 2007 and 2008 pushed the affected Christian community further to the margins, leaving them more vulnerable.

**J. Right to Education:**

Shortly after Petitioner Archbishop Raphael Cheenath filed the Writ Petition, an Intervention was filed on 27th January 2009 by Radhakanta Tripathy, human rights activist and lawyer, on the grounds that the State of Odisha and the Board of Secondary Education, Odisha, were violating Articles 14, 21 and 21A of the Constitution. He argued that the State of Odisha and Board of Secondary Education had failed to restore normalcy which has resulted in the disruption of the education of children, as schools were shut down for five months, especially children who are due to give their board examinations, due to the destruction of schools and infrastructural facilities.

Also in the absence of rehabilitation measures, children were unable to rejoin school. This intervention asserts that due to the failure of the State to maintain law and order, the livelihood and earning capacity of parents/guardians has been seriously affected, as a consequence of which they were in no position to meet the expenses required for their children’s education. Even after restoration of peace the State had failed

\(^{165}\) Mohd. Haroon v. Union of India supra n. 2 at Para 128
to reopen schools which had resulted in the students being disqualified from writing the board examinations due to lack of attendance. Moreover, the pre-board examinations were not conducted in violence-affected villages.\footnote{Intervention dated 27th January 2009 filed by Radhakanta Tripathy in W.P.(C) 404/2008.}

The Intervener submitted that almost 60 SC/ST residential schools in Kandhamal district of Odisha do not have electricity connection and have been facing problems of unsafe drinking water, unhygienic food and unhealthy living conditions. As many as 111 girl students of Phiringia Sevashram School and 100 students of Ranapatuli Sevashram School have left the school, unable to face the hardship.

This Intervention sought that the State of Odisha exempt children of survivors from payment of fees, extend the last date for filing application forms for the Class 10 Board examinations, postpone the board examinations scheduled for March by 3 months to give the students time to prepare, provide them with textbooks and other material, and hold extra classes to prepare students for the upcoming examinations.

The State of Odisha did not file any response to this intervention, nor did the Supreme Court pass any interim orders or issue directions on these aspects. Due to no timely intervention, the affected children’s right to education and their future prospects are directly impacted.

Not only did the State renege on its constitutional obligation, but it also infringed upon international human rights law, which recognizes that the right to education is universal, even in emergency and post-emergency contexts. The right to education has been articulated in several international instruments, including the Universal Declaration of Human
Rights,\textsuperscript{167} the Convention on the Rights of the Child,\textsuperscript{168} and the International Covenant on Civil and Political Rights\textsuperscript{169}. In its General Comment 13, the Committee on Economic, Social and Cultural Rights has said that education should be available, accessible, acceptable, and adaptable.\textsuperscript{170} India has ratified these international covenants and is therefore under an obligation to respect them.

Furthermore, in 2008, the Special Rapporteur on the right to education released a report on the right to education in emergency situations.\textsuperscript{171} The report emphasized that, “States have an obligation to respect, protect and fulfill the right to education, whether or not an emergency situation prevails. In

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\textsuperscript{171} Report of the Special Rapporteur on the right to education, “Right to education in emergency situations” A/HRC/8/10, 20 May 2008 http://www2.ohchr.org/english/bodies/hrcouncil/docs/8session/A.HRC.8.10.Add.4_sp.doc accessed on July 9, 2015. In para 5 of his report, the Special Rapporteur defines an ‘emergency’ as “any crisis situations due to natural causes such as earthquake, tsunami, flood or hurricane, or to armed conflict, which may be international (including military occupation) or internal, as defined in international humanitarian law, or post-conflict situations, which impair or violate the right to education, impede its development or hold back its realization”. Arguably, the present situation could fall within the definition of an emergency.
addition, the right to education inheres in each person regardless of legal status, whether refugee, child soldier or internally displaced person”

The Special Rapporteur urged “as a first step that this right should be recognized by States… as an integral part of the humanitarian response to conflicts and natural disasters”. He recommended that states “develop a plan that prepares for education in emergencies, as part of their general educational programs, to include specific measures for continuity of education at all levels and during all the phases of the emergency”.

In 2010, the UN General Assembly passed a resolution on the right to education in emergency situations, asking states to ensure, amongst other things, that post-conflict recovery included the “facilitation of early access to education, learning and training”, and “to ensure the participation of women, children and young persons in those processes”.

Like in the case of other human rights, if the right to education is violated, even in a post-emergency context, individuals are entitled to remedy and reparations.

K. Restitution of Churches and other Religious Properties:

Since the December 2007 violence in Kandhamal, the

172 Para 37 Ibid.
State Government was reluctant to provide compensation for damage to and destruction of churches and prayer halls, stating that there was no precedent for giving compensation for places of worship. The NCM refuted this position stating that, “the argument that compensation for damage to religious places has not been given in other riots is not valid. There have not been many instances where places of worship have suffered the extensive, inhuman and brutal damage seen in Kandhamal district.”

The NCM further pointed out that, “it is the hurt inflicted to the psyche of the people through the destruction of places of worship that must be cured and one important way in which it can be done is by assisting through monetary compensation in the work of reconstruction.” After the August 2008 violence, the government had strongly opposed the demand for a total of Rs. 30 million compensation for reconstruction of damaged and destroyed places of religious worship in Kandhamal; stating that: “It is against the secular policy of the State to pay any compensation for the religious institutions.” Right-wing Hindu organisations like VHP and Bajrang Dal had also opposed the demand for compensation.

Specifically in relation to attacks on Churches and philanthropic institutions like schools, hostels and orphanages connected to the Church, the Petitioners contended that the State of Odisha was violating Articles 14, 21, 26, 29 and 30 of the Constitution by excluding Churches and Church institutions damaged or destroyed in the communal attacks from their compensation policy. The State of Odisha, through the

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176 Ibid.
177 Ibid.
Additional Commissioner, passed an Order in February 2008 excluding Churches from being entitled to claim compensation for the destruction caused during the communal attacks.178

Petitioner Raphael Cheenath challenged this Order in the Odisha High Court,179 and subsequently when the Odisha High Court upheld the State Government’s order, filed an Appeal before the Supreme Court.180

Petitioner Raphael Cheenath engaged a registered evaluator and provided the Court with a valuation of damage incurred by Churches, and sought that the State government compensate Churches according to this estimation i.e Rs. 30 million.

Before the Supreme Court, the State of Odisha justified its Order excluding Churches from being compensated for destruction caused to them, by stating that compensation for religious institutions does not come under the ‘secular policy of the Government of Odisha’181 and, “That the aforesaid policy of the Government is fair and non-discriminatory and being secular in nature, is in consonance with the tenets of the Constitution.”182

While the Petition was pending before the Supreme Court, the State of Odisha reconsidered its earlier stance and vide Government dated 15th November 2008 announced financial assistance for the repair and reconstruction of

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178 Order No-405/2008 by Additional Commissioner Relief, Dt. February 14, 2008 as cited in Kandhamal: The law must change its course, MARG supra n.3.
179 Raphael Cheenath, S.V.D. Arch. of Cuttack v. Union of India & Ors W.P.No.1257/08 filed before the High Court of Odisha.
180 Raphael Cheenath, S.V.D. Arch. of Cuttack v. Union of India & Ors SLP(C) No.7796/2008
181 Counter Affidavit dated 19th September 2008 filed on behalf of State of Odisha in W.P.(C) 404/2008 at Para 36
182 Counter Affidavit dated 19th September 2008 filed on behalf of State of Odisha in W.P.(C) 404/2008 at Para 47
damaged places of worship\textsuperscript{183}:

For Prayer Halls/smaller Churches:

Fully damaged: Rs. Fifty thousand

Severely damaged: Rs. Twenty thousand

Partly damaged: Rs. Ten thousand

Bigger Churches:

Fully damaged: Rs. Two hundred thousand

Partly damaged: Rs. One hundred thousand.

\textit{Conditional compensation to Churches and other places of worship:}

The State Government Order dated 15th November 2008 states that assessment of damages will be made of all places of worship, however in cases of structures which were on objectionable land, the financial assistance will only be disbursed if the institution undertakes to re-build or shift their structures to unobjectionable land. As in the case of compensation to property discussed above, this compensation too carried conditionalities that were designed to deny compensation to the beneficiaries. Firstly, it excluded compensation for movable property that had been damaged/burnt during the violence, irrespective of the scale of loss, “due to difficulties in making a realistic assessment at this stage”.\textsuperscript{184}

Secondly, it required the representatives of the institutions to furnish an undertaking that in case the place of worship had been built on objectionable land, the building

\textsuperscript{183} Government Order No. IVF (M)- 2/2008- 48165/R&DJM dated 15.11.08 from Commissioner, Secretary to Government to the Collector and District Magistrate http://www.odisha.gov.in/revenue/Archives/kandhamal/48165Dr.15.11.08.pdf accessed on July 10, 2015.

\textsuperscript{184} Notification of the Revenue and Disaster Management Department of the government of Odisha, dated 15 November 2008 as cited in Kandhamal: The Law Must Change its Course, MARG supra n. 3.
would be constructed at an unobjectionable site. It is difficult to imagine that the Odisha State government would not have known that in Kandhamal, due to severe restrictions on land transfer to non-tribals, many of the churches were built on tribal lands with the consent of the owners. The consequence of the directive is that all such churches which were damaged during the violence would be eligible for compensation only if they were being built at an alternative place. On the other hand, the compensation of Rs. 50,000 for a fully damaged prayer hall and Rs. 200,000 for a fully damaged church was highly inadequate to secure land and construct a church on it.

The state government has prepared a list of 195 churches and church institutions that were damaged, against a list of over 250 damaged churches and prayer halls prepared and submitted to the government by the victim-survivor community. Out of 195 structures, only 60 are listed to be free of any legal flaws on ownership. In other words, destruction of / damage to 135 structures would be compensated only if they agreed to be relocated. The government had earmarked Rs. One million five hundred nineteen thousand as compensation to 60 churches and prayer halls free of legal impediments, while it has earmarked Rs. Two million six hundred sixty thousand to 135 churches provided they agree to relocate to non-objectionable land.

L. Peace Committees – encouraging harmony or engineering coercion

Peace Committees were introduced by the State of Odisha as a ‘confidence-building measure’ after the communal attacks of 2007 and 2008, and have been repeatedly cited as an

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185 Kandhamal: The Law Must Change its Course, MARG supra n. 3 at p. 83, Kandhamal: A Blot on Indian Secularism, supra n. 3 at p. 46
186 Ibid.
example of the State’s efforts to restore normalcy. However, the Petitioners have repeatedly expressed that the Peace Committee meetings are spaces where survivors are brought face to face with the accused and other influential members of right wing vigilante groups, who attempt to threaten and coerce the survivors to withdraw their FIR’s, resile from their statements and even convert to Hinduism. The response of the State of Odisha before the Court was to simply deny these allegations as false on the ground that they were not supported by evidence of police complaints of threat and intimidation.

**M. Contra-allegations: Intervention filed by Kui Sanskruthik Parishad:**

Subsequent to the filing of this Petition, Padhmanav Pradhan, President of the Kui Sanskruthik Parishad, filed an intervention arguing that the conflict was a sectarian conflict and not a communal conflict. His argument essentially was that members of both communities suffered losses and were injured in the communal attacks and that the State’s rehabilitation and restoration policies are discriminatory as they have ignored the losses suffered by the Kandha community. His affidavit re-narratives each incident of violence as instances of victimisation of members of the Kandha community. The cause of the communal attacks, according to the President of the Kui Sanskruthik Parishad, can be traced back to several decades ago when Christian missionaries unlawfully encroached on land belonging to the Kandha community and built churches on it.

‘Contra-allegations’ are a common feature in cases of communal violence where members of a minority community have been persecuted. In *Mohd. Haroon v UoI*, filed after the

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187 An organisation registered in 2002 stated for the welfare of members of the Kui tribe (a language spoken by certain scheduled tribes in Odisha, including the Kandha’s)
Muslim community came under serious communal attack from the dominant Jat Hindu community in Western Uttar Pradesh, the Supreme Court admitted a Writ Petition filed by an association representing the Hindu Jat community, where the main assertion was that innocent persons from their community were being implicated in riot cases and that the State Government’s actions were partisan and violative of the dominant communities rights.188

**N. Conclusion:**

The counter-affidavits filed on behalf of the State of Odisha in response to the two Writ Petitions extensively dispute the assertions made in the Writ Petition, including the numbers of persons who have been killed, the numbers of persons injured, the number of houses destroyed and the loss incurred from damage to churches and Christian institutions. In a similar vein, the State of Odisha refutes the Petitioner’s contention that 96% of the victims of communal violence were Dalit Christians and attempts to portray the targeted attacks against the Christian community as a conflagration between two ethnic communities.

In fact, the running theme through each of the submissions of the State of Odisha was the projection of the communal attacks as having its genesis in an “age old” ethnic divide and discord between the Kandha Adivasi community and the Panna Dalit community, as opposed to the violence being part of a communal attack, engineered through polarization and having been made possible due to alienation and mobilisation on the basis of religion.

Further, on the important aspect of the need for guidelines to be issued to prevent communal attacks and violence in future, the State of Odisha has maintained a stony

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188 Mohd. Haroon v Union of India supra n. 2 at Para 5, 6
silence. It is worth noting that in each and every situation of targeted violence and mass crimes, it is only when the hapless victims have approached the Court, that the Court has passed directives urging the State to take remedial measures. This is a glaring gap in law and policy and one that emboldens the State to act arbitrarily, if not vindictively against the victim community, in gross breach of the constitutional mandate. It cannot be forgotten that the State’s duty to provide reparations stems from the constitutional obligation to protect the life and liberty of the people, which envisions a life with dignity and not a mere animal existence.  

Similarly there is no law or policy to enumerate the State’s obligations towards Internally Displaced Persons (IDPs). The large number of conflict induced IDPs of Kandhamal were abandoned by the state to their fate. Here it would be useful to refer to the United Nation’s ‘Guiding Principles on Internal Displacement’. These Guidelines are not part of any international convention that requires ratification by countries. While the Guiding Principles on Internal Displacement do not constitute a binding legal document, they “reflect and are consistent with international human rights law and international humanitarian law,” and have become widely accepted at the international, regional and State levels. They are intended to guide governments and international humanitarian agencies in providing assistance to and protecting the rights of persons affected by internal displacement, through a human rights-based approach. The Guiding Principles address all phases of displacement – protection from displacement, protection and assistance during displacement, and guarantees for return,

189 Francis Coralie Mullin vs. Administrator, Union Territory of Delhi AIR 1981 SC 746
resettlement or reintegration with safety and dignity. Yet, so far no principles or standard policy has been laid down for either the prevention or an effective response and redressal mechanism in situations of communal violence.

**U.N. Guiding Principles for Internally Displaced Persons (IDPs)**

The Guiding Principles on Internal Displacement make it clear that authorities must provide internally displaced persons with, and ensure safe access to, basic shelter and housing. Special efforts should be made to ensure the full participation of women in the planning and distribution of these basic supplies. The Guiding Principles also require that internally displaced persons be protected against direct or indiscriminate attacks or other acts of violence, and attacks against their camps or settlements.

Principle 1(1) of the Guiding Principles also states “Internally displaced persons shall enjoy, in full equality, the same rights and freedoms under international and domestic law as do other persons in their country. They shall not be discriminated against in the enjoyment of any rights and freedoms on the ground that they are internally displaced”. The principle of non-discrimination against IDPs can also be found in General Comment 20 of the Committee on Economic, Social and Cultural Rights, which said “The exercise of Covenant rights should not be conditional on, or determined by, a person’s current or former place of residence; e.g. whether an individual lives or is registered in an urban or a rural area, in a formal or an informal settlement, is internally displaced or leads a nomadic lifestyle”. This implies that in international law, IDPs are entitled to the full enjoyment of all their human rights, including the rights to life, liberty, and housing. And when these rights are violated, they have the right to accountability and remedy.

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191 Principle 18(2)(a) of Guiding Principles
192 Principle 10(2)(a) of Guiding Principles
193 Principle 10(2)(d) of Guiding Principles
It must be underscored that the targeted violence against Christians in Kandhamal occurred in 2008, and even 7 years later, the cases relating to grave losses and urgent needs of a targeted and vulnerable community, are still pending before the Supreme Court. An inclusive jurisprudence, legislation and policy articulating the State’s obligations to provide reparative justice in mass crimes is still awaited.

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195 Both Archbishop Raphael Cheenath v Union of India and Catholic Bishops Conference v. Union of India are currently pending before the Supreme Court. In January 2014 the Supreme Court observed that despite directions that the NHRC investigate and submit a report on the situation in Kandhamal almost 5 years prior, no report has been submitted and hence directed that the NHRC Report on the issue be filed immediately. On 13th March 2014 the Court directed that the Report of the NHRC be supplied to the Petitioners, and that they be allowed to file their written submissions. On 10th March 2015 counsels for the Respondent sought 6 weeks presumably to file their written submissions. Thereafter the matter was listed on 30th April 2015 and 14th July 2015, but no final judgment has been passed as yet.
A. Introduction

Following the communal violence against the Christian community in Kandhamal in December 2007 and August 2008, the victims made more than 3,000 complaints to the police of crimes committed against them. However the police registered First Information Reports (hereinafter FIRs) in only about 832 complaints of the victims.\textsuperscript{196} Figures of the number of people killed in this communal violence in Kandhamal remain contested. While the State of Odisha in its submissions before the Supreme Court of India in January 2010 stated that 38 people were killed and around 87 persons injured,\textsuperscript{197} fact-finding teams place the figure of number of persons who lost their life

\textsuperscript{196} Derived from replies to RTI applications on record with the Authors.
\textsuperscript{197} Counter-Affidavit submitted to the Supreme Court on behalf of State of Odisha in WP(Crl) No.404/2008
between 75-123 persons.\textsuperscript{198}

By 2013, more than five years after the communal attack, trials in around 727 cases had concluded in the two designated Fast Track Courts at Phulbani. The two Fast Track Courts (hereinafter referred to as FTC) were set up at Phulbani to exclusively and expeditiously conduct trials in the cases emerging from the communal violence in Kandhamal in 2008. Of these 727 cases\textsuperscript{199} a majority relate to arson\textsuperscript{200}, theft\textsuperscript{201}, dacoity and trespassing. Section 153A IPC and S. 295 IPC, which refer to the offence of promoting enmity on the grounds of religion were invoked in only 245 of the 727 charge sheets filed in the court. 38 of the 727 cases were murder or attempt to murder cases\textsuperscript{202}, and the offence of destruction of evidence\textsuperscript{203} was invoked in 8 cases.

In sharp contrast to the modest statistics of crimes perpetrated against the Christian community, available in judicial and government records, the narratives of victims and independent fact-finding reports speak of much greater harm caused to the targeted community, in terms of loss of life, property, dispossession and destruction of places of worship.

\textsuperscript{198} Kandhamal: The Law Must Change its Course, New Delhi, MARG 2010.

Janvikas calculates that about 86 killings took place, in Kandhamal in Chaos: An Account of Facts, Ahmedabad, Janvikas 2009, at p. 15.

A list of 75 persons killed during the violence was submitted to the Supreme Court by Petitioner Archbishop Raphael Cheenath of Bhubaneswar in February 2009. The Archbishop stated that the total killings would be approximately 100, but a compilation of the complete list was impossible as many villages were very sensitive, hostile and inaccessible. The Global Council of Indian Christians says between 75 and 123 killings took place. Discussed in Anto Akkara, Kandhamal: A Blot on Indian Secularism (Delhi: Media House, 2009) at pp. 29-31.

\textsuperscript{199} Sec. 142, 146, 147, 148, 153 IPC

\textsuperscript{200} 594 cases registered under Sec. 435, 436 IPC

\textsuperscript{201} 646 cases registered under Sec. 379, 380, 426, 427, 428, 429, 437, 438, 440 IPC

\textsuperscript{202} Sec. 302, 307 IPC

\textsuperscript{203} Sec. 201 IPC
The scale and intensity of the communal attack stood minimized from the start, with the legal system taking cognizance of barely a fraction of crimes that were committed.

**Nature of Offences: Trials in 727 cases concluded in the two Fast Track Courts by 2013**

### Provisions of the IPC | Offence | No. of cases (Total=2583)
--- | --- | ---
S. 142, 146, 147, 148, 153 | Rioting | 727 (28.14%)  
S. 435, 436 | Mischief by fire | 594 (22.99%)
<table>
<thead>
<tr>
<th>Section(s)</th>
<th>Crime Description</th>
<th>Number (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>S. 379, 380, 426, 427, 428, 429, 437, 438, 440 and 646</td>
<td>Theft and mischief</td>
<td>(25%)</td>
</tr>
<tr>
<td>S. 153 (A), 295</td>
<td>Promoting enmity between different groups/ injuring/ defiling places of worship</td>
<td>245 (9.48%)</td>
</tr>
<tr>
<td>S. 307, 302</td>
<td>Murder/ Attempt to murder</td>
<td>38 (1.47%)</td>
</tr>
<tr>
<td>S. 201</td>
<td>Destruction of evidence</td>
<td>8 (0.30%)</td>
</tr>
<tr>
<td>S. 325</td>
<td>Grievous hurt</td>
<td>325 (12.58%)</td>
</tr>
</tbody>
</table>

### Number of deaths reported

<table>
<thead>
<tr>
<th>Source of Reports</th>
<th>Number Of Deaths</th>
</tr>
</thead>
<tbody>
<tr>
<td>State of Orissa in its submission to the SC</td>
<td>38</td>
</tr>
<tr>
<td>Independent fact-finding teams</td>
<td>75-123</td>
</tr>
</tbody>
</table>

### A.1 Threat to Life and Property of Christian Community

Following the breakdown of law and order in Kandhamal and the failure of the State government to take measures that would restore the confidence of the minority Christian community, Petitioner Archbishop Raphael Cheenath approached the Supreme Court through a Writ Petition seeking interalia, to direct the CBI to investigate and prosecute all the criminal offences committed during the communal attacks, the NHRC to also investigate and report to the Supreme Court...
regarding the identity of the groups and leaders responsible for planning and carrying out the communal attacks so that they can be prosecuted in accordance with law. 204

In response to the contention that the State government had failed to prevent and control communal attacks against Christians, the State of Orissa filed a detailed list of the number of platoons of CRPF, RAF, Orissa Armed Police etc. that were deployed, the number of senior police officials posted in Kandhamal, and other steps it took, including the setting up of 352 ‘Peace Committees’. 205

The State of Orissa expressed its helplessness in protecting the lives and properties of Christians living in interior villages, stating that the police could not access certain remote areas of Kandhamal district, as groups protesting against the assassination of Swami Lakshmanand had blockaded several important roads leading to the interior regions by placing large tree trunks across them, which could not be cleared by the security forces in time. Petitioner Raphael Cheenath also stated that while he, the Archbishop, was restrained from entering Kandhamal District and threatened with criminal prosecution by the District Magistrate if he did, the accused were roaming freely, including those in the relief camps. 206 In January 2009 the State of Orissa submitted that in order to maintain law and order, the deployment of the CRPF in Kandhamal District was extended. 207

The State of Orissa also submitted that several accused have

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204 Archbishop Raphael Cheenath S.V.D v. Union of India. W.P(C) No. 404/2008 filed in the Supreme Court of India dated 02.09.2008, see Prayer E, F
205 Counter-Affidavit dated 10th September 2008 filed on behalf of State of Odisha in W.P(C) No. 404/2008, para 5.
206 Archbishop Raphael Cheenath S.V.D v. Union of India. W.P(C) No. 404/2008 filed in the Supreme Court of India dated 02.09.2008, Para 20,
207 Additional affidavit dated 15th January 2009 filed on behalf of the State of Orissa in W.P(C) No. 404/2008, para 3
been arrested, and provided details of around 20 cases in which FIR’s were registered and the accused arrested. It also stated that as of September 2008, in Bamunigam, Phulbani, Daringbadi, G.Udaygiri, Tikabali, Raikia, Sarangada Police Stations of Kandhamal District, 78 cases had been registered in connection with communal attacks from December 2007 to January 2008. Significantly, the State of Orissa’s counter-affidavit before the Supreme Court, did not restrict itself to defending the actions of the State and the Police, but went further to provide a list of instances of communal incidents to dispute the allegation that the communal attacks on the Christian community were pre-planned and argued that in fact it was Swami Lakshmananda who was “attacked by miscreants from the minority community” and that a FIR had been registered and 13 accused arrested for his murder.

The plea taken by the State of Orissa that it could not perform its foremost constitutional duty to protect, not only the life, liberty and property of its citizens but also the secular fabric of the country, lacks conviction. Can a state with all the forces at its command truly be held to ransom by mobs who were out to target the Christian community? From the facts on record it appears at best to be a case of State indifference or apathy and at worst, overt or covert State complicity in the crimes perpetrated against the Christian community in Kandhamal. In the eyes of the law, an act of omission or commission would equally attract criminal liability.

In the context of the communal violence in Muzaffarnagar

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208 Archbishop Raphael Cheenath S.V.D v. Union of India. W.P.(C) No. 404/2008 filed in the Supreme Court of India dated 02.09.2008, see pg. 11
209 Counter-Affidavit dated 10th September, 2008 filed by the State of Odisha in W.P.(C) No. 404/2008 Para 40
210 Ibid at Para 26
211 Case No-83/07, PS Daringbadi, dated 24.12.07 u/sections 147, 148, 353, 323, 324 307, 426, 149 IPC.
in 2013, a similar plea was taken by the State of U.P before the Supreme Court, to explain its failure to enforce the rule of law in Western Uttar Pradesh. Rejecting the State’s lament of helplessness the Supreme Court held that,

“Further, inasmuch as thousands of people gathered at a particular place in order to take revenge or retaliation, it is expected by the State intelligence agencies to apprise the State Government and the District Administration in particular, to prevent such communal violence...Thus prima facie, the State Government is held responsible for being negligent at the initial stage and not anticipating the communal violence and for not taking necessary steps for its prevention”. ...“It is made clear that the officers responsible for maintaining law and order, of found negligent, should be brought under the ambit of the law irrespective of their status.”

Apart from general directions with regard to maintaining law and order, the Supreme Court also issued specific directions to the State of U.P. to take effective steps for cancellations of bail granted to accused arrested for heinous crimes such as murder; and directed the Special Investigation Cell constituted by the State of U.P to look into cases arising from the communal attacks and to arrest and produce all the accused before the Court within a time bound manner.

B. Fast Track Courts and Access to Justice

In the aftermath of the violence, two Fast Track courts were established in Phulbani, the district headquarters of Kandhamal, purportedly to ensure speedy justice to victim-survivors of the attack in 2008. However as indicated by data and analysis, most trials failed to affix accountability on the perpetrators. Expressing its concerns and anxieties, the Association of Victims of Kandhamal Violence observed that the Fast Track

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212 Mohd Haroon v Union of India (2014) 5 SCC 252 at Para 2, 114, and 129.
214 Mohd Haroon arrest of accused in rape cases- at Para 126
courts were perhaps working too fast in trying to dispose off the cases without looking closely at the evidence.  

The hostile atmosphere and climate of fear which shrouded these trials made it difficult for victims and witnesses to depose fearlessly, leading to a situation where the Fast Track Courts simply ensured the speedy disposal of cases, as opposed to actually delivering justice to the victims and bringing the perpetrators to book. Alarmed by these developments, in 2010 the Association of Victims of Communal Violence in Kandhamal wrote a letter to the Chief Minister of Orissa, Mr. Naveen Patnaik, stating that,

“We are not satisfied with the legal procedures undertaken in the two Fast Track courts established in Phulbani, which seem to be in a hurry to dispose of the cases without proper trial and witness examination… In most cases the cases finalised in the Fast Track Courts at Phulbani, the accused are acquitted. The quality of the police charge sheets is doubtful; and therefore we demand a CBI inquiry into the cases for proper delivery of justice to the innocent people.”

In another letter to the Chief Justice of the Orissa High Court, the Association wrote,

“Around 20 to 25 advocates are arguing for the defence, and the Public Prosecutors are not able to cope with the volume of work everyday. While we do not want to cast any aspersions on the PP’s, their actions have left us in great doubt. We also have strong doubts in the quality of the police investigation which are making it easy for the guilty to go scot free… We seek the urgent actions from Your Honour in the interest of justice such as

shifting the sensitive cases related to Manoj Pradhan to outside, to Cuttack or Bhubaneswar, transferring the judges and changing public prosecutors, providing special protection to witnesses.”

Of the 727 cases that were tried in the two Fast Track Courts, only 46 of the 895 accused were convicted and 793 acquitted. All the accused put on trial were men. This study is based on an analysis of a sample of judgments of Fast Track Court 1 and Fast Track Court II of Phulbani District. The list of judgments studied is provided in Annexure 1.

Number of convictions and acquittals in the two Fast Track Courts in Phulbani

<table>
<thead>
<tr>
<th></th>
<th>Total no. of accused persons</th>
<th>895</th>
</tr>
</thead>
<tbody>
<tr>
<td>Absconded Persons</td>
<td>56 (6.25%)</td>
<td></td>
</tr>
<tr>
<td>Convicted Persons</td>
<td>46 (5.13%)</td>
<td></td>
</tr>
<tr>
<td>Acquitted Persons</td>
<td>793 (88.60%)</td>
<td></td>
</tr>
</tbody>
</table>

The study and analysis indicates that a host of factors contributed to the overwhelming number of acquittals by the Fast Track Courts.

C. First Information Report

C.1 Non registration of FIR

In the aftermath of the violence against the Christian community in Kandhamal, not only were the victims/complainants reeling under grievous loss of life and property, but they had to battle the hostility and prejudice of the State machinery, even in exercising their basic right to lodge a criminal complaint and register a FIR. Section 154 of the Code of Criminal Procedure, 1973 (CrPC) creates a statutory obligation on the police to register information given in relation to the commission of a cognizable offence.218

In Kandhamal, the police turned away many victims who came forward to register their complaints. Interviews conducted by MARG for its study recorded victims detail several instances of refusal by the police to register the crimes suffered by them as a FIR to ensure that the legal process of investigation could not be initiated.219 The findings of the MARG study were presented before the National People’s Tribunal on Kandhamal (hereinafter referred to as NPT), which after due deliberation noted the systemic nature of the failure of police to register FIRs.220

The NPT report documents that in one instance, the police refused to lodge the complaint of Jacob Pradhan’s wife with

218 Lalita Kumari v Govt. of U.P and others (2014) 2 SCC 1, Para 120.1
219 ‘Kandhamal: The law must change its course’ by Saumya Uma, edited by Vrinda Grover, New Delhi, MARG 2010, see pages 97, 170.
220 ‘Waiting for justice’, A report on Kandhamal by National People’s Tribunal, Chapter: Role of the State and Democratic institutions, see pg. 125
regard to attempted rape of their daughter.  

221 Paul Pradhan, Gajana Digal, Pratap Chandra Digal, Deobhanja Pradhan and Premasheela Digal in their statements before the NPT all spoke of inaction by the police in registering their FIRs and also spoke of the implicit protection that the accused received from state officials, while they themselves lived under a cloud of fear and intimidation.  

222 Testimonies presented before the NPT highlighted a multitude of cases where the police brazenly abdicated its statutory duty and turned victims away or refused to receive their complaints and register FIRs, even for grave cognizable crimes.

Victims narrate difficulties faced in registration of FIR

In an interview with ‘BD’, a 40 year old married woman, Christian by birth, belonging to SC, a victim-survivor, the following was observed:

“The attackers were from her village, and she had to silently watch while they destroyed her house and looted her lifelong savings. She and her family members fled to the forest, stayed there for one week, before reaching the nearest camp. She is sure that women would have been raped by the mob if they had been caught. She knows the attackers and can identify them. Three persons from her village had forced her to convert. She had complained about this to the authorities but no action was taken. She lodged a complaint with the police about the attack 3 months after the incident. When she tried to lodge the complaint earlier, it was not registered by the police. She does not know the present status of her complaint…”

In another interview with ‘SN’, 45 year old married man, Christian by birth, belonging to SC, a victim-survivor, -

“…his shop and home were attacked by a mob of 400-600 people armed with weapons, which included local VHP members. They shouted “Burn the sinner”, “Kill the bastard Christian… At the time of the

221 Ibid.

222 Ibid.
attack, he and his family members fled to the forest, stayed there for 4 days, went to a relief camp. He lodged a complaint with the police nearly 3 months after the attack, as they had refused to register the same earlier...”

In another interview with ‘HD’, 47 year old married man, Christian by birth, belonging to SC, a victim-survivor, -

“He said that a large mob of 2000 people attacked his village shouting slogans, he and others like him were asked to abandon their homes or else they would be killed... He lodged a complaint with the police about destruction of property 5 months after the violence as the police had refused to register the complaint earlier...”

In another interview with ‘FGD 4 - MDD, AD, BD, LD, KN, AN, RN, HD’, 6 men, 2 women. The members of this group did varied work such as labour, coolie, cultivation, retail and service, all Christians, victim-survivors, -

“They spoke of how they were not allowed to celebrate their festivals openly even before the violence of August 2008. When the mob consisting of VHP members attacked their villages, they shouted “Kill the bastard Christian”. They fled to the forest to save their lives, on the suggestion of Hindu neighbours, and returned to the village only after 7 days. Meanwhile their houses had been burnt down by the mob and their lifetime savings and personal belongings stolen... All of them attempted to lodge complaints with the police for destruction of property soon after the incident, but the police refused to register FIRs, saying that there was no evidence against the perpetrators accused; instead, they only wrote the complaint in the diary...”
In many cases, although the written complaints of the victims were stamped at the police station, no FIRs were lodged and no details entered in the official police records. Thus from the very start, victims, who were not conversant with the law, were misled by the police. Not surprisingly, therefore, few secured justice for the egregious violations they suffered.

The Writ Petition filed by Archbishop Raphael Cheenath in the Supreme Court states that in several cases, the police refused to register the complaints submitted by victim-survivors. While some victims were able to travel to the Magistrate’s Court and submit their complaint before the Court, most did not have the material resources required to initiate the legal process. Law provides for redressal in cases of police refusal to register an FIR, complain to superior police officers, petition Magistrate to direct the police to register an FIR and investigate or choose to prosecute a private complaint by filing a private complaint

Source: Interviews from ‘Kandhamal: The law must change its course’  

223 ‘Kandhamal: The law must change its course’ by Saumya Uma, edited by Vrinda Grover, New Delhi, MARG 2010, see pg. 170, 171, 172, 175

directly before the Magistrate’s court. Thus the burden of accessing justice was placed on an already targeted victim community.

The Criminal Law Amendment Act 2013, enacted in response to protests by women’s groups in the aftermath of the 16th December 2012 gang rape in Delhi, introduced a new offence under Section 166A IPC which criminalises the refusal of a police officer to register a FIR in cases of sexual

Section 154(3), Code of Criminal Procedure, 1973, Information in cognizable cases:

“Any person aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in subsection (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence.”

Section 190(1), Code of Criminal Procedure, 1973, Cognizance of offences by Magistrate:

“Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub- section (2), may take cognizance of any offence—

(a) upon receiving a complaint of facts which constitute such offence;
(b) upon a police report of such facts;
(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.”
Section 166A IPC marks the first legal inroad into the impunity of the police, and needs to be enlarged to include other circumstances, such as communal attacks where the victims suffer marginalisation, discrimination and vulnerability.

Number of Complaints filed and FIRs registered in December 2007 and August 2008 attacks

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226 Section 166A, IPC, Public servant disobeying direction under law:

“Whoever, being a public servant,--

Knowingly disobeys any direction of the law which prohibits him from requiring the attendance at any place of any person for the purpose of investigation into an offence or any other matter, or

Knowingly disobeys, to the prejudice of any person, any other direction of the law regulating the manner in which he shall conduct such investigation, or

Fails to record any information given to him under sub-section (1) of section 154 of the Code of Criminal Procedure, 1973, in relation to cognizable offence punishable under section 326A, section 326B, section 354, section 354B, section 370, section 370A, section 376,Section 376A, section 376B, section 376C, section 376D, section 376E or section 509,

Shall be punished with rigorous imprisonment for a term which shall not be less than six months but which may extend to two years, and shall also be liable to fine.”
No. of FIRs registered 832 (27.73%)
No. of complaints not registered 2168 (72.26%)

C.2 Flawed FIR’s

In Kandhamal even when victims was able to register a FIR, there are several instances where the police did not record all the relevant facts stated by the informant, or intentionally omitted the name of the accused and instead recorded it as a FIR against a faceless armed mob, thereby weakening the victim/complainant’s case. Non-inclusion of the names of the accused in the FIR, contributed to the acquittal of the accused. Since a FIR is the starting point of criminal proceedings, an error or omission in the recording of the FIR can cast a shadow on the veracity of the prosecution case. While noting the deficiencies, omissions, and irregularities in the FIR, the Court did not pause to consider or question whether these may have been a consequence of an unwilling, indifferent, biased or compromised investigation by the police, who may have intentionally omitted details such as names of accused in the FIR.

Pertinently, often when eyewitnesses have named the accused in their statement and FIR to the police, and also identified the accused during the trial, the court has still acquitted the accused, holding that in situations of ‘mob-violence’ it is not possible to identify the perpetrators and hence the eyewitness testimony could not be relied upon. In these cases, the Court seems to have overlooked the fact that many of the accused / perpetrators were known to the victim’s prior to the communal attack as they belonged to the same or neighbouring village, and in a few cases the accused was a prominent politician, Manoj Pradhan a former BJP MLA (BJP), who the people of the area could easily identify.
C.3 Dilution of offences

Another machination used by the police was to dilute the offences with which the accused were charged, by manipulating the statements of the victims and the witnesses. Even in heinous crimes, including in the case of a nun who was sexually assaulted, the police initially tried to dissuade her from registering a FIR for gang rape and assault. Subsequently the nun was prevented from narrating the details of the crime, including the names of the police officials who tried to obstruct her from accessing justice.

The testimony of Deobhanja Pradhan before the NPT describes how the OIC of Tikabali police station did not allow the recording of individual FIRs of the villagers but instead made them write an omnibus FIR on a single paper. Thus the seeds of acquittal were sown at the very beginning of the investigation. Omnibus FIRs, as seen even in the 1984 anti Sikh massacre, serve to shield the accused, as no one individual is identified as being responsible for the crimes under the cover of the anonymous mob.

In some cases, the police deliberately chargesheeted the accused under an offence entailing a lesser punishment, as in the case of Sunil Kumar Naik, where the police charge sheeted the

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227 This case has been discussed in detail later.
228 ‘Kandhamal: The law must change its course’ by Saumya Uma, edited by Vrinda Grover, New Delhi, MARG 2010, Chapter ‘The contours of law and justice’, See Pg. 99
229 ‘Waiting for justice’, A report on Kandhamal by National People’s Tribunal, Chapter: Processes of Justice & Accountability, See pg. 135
accused under Section 435 IPC instead of Section 436 IPC.  

D. Defective Investigation

The victim’s’ right to justice was defeated through defective or malafide investigation, or investigation that was deliberately designed to shield the accused.

In State v Manoj Pradhan, the FIR lodged by Butia Digal (2 months after the occurrence) revealed that on 27.08.08 around 500 persons armed with various dangerous weapons caused mischief by setting fire to his house and also committed theft. The FTC in its judgment observed,

[“the investigation in this case appears to be erroneous. Both the IOs examined as P.W's 7 and 8 admitted during cross examination that they had examined one person named Butia Digal, who is the informant, is aged 35 years at the time of examination. But during course of trial it was found that the informant is an aged person of 60 years. It is doubtful whether the...”]

230 ‘Kandhamal: The law must change its course’ by Saumya Uma, edited by Vrinda Grover, New Delhi, MARG 2010, see Pg. 115.

S.435. Mischief by fire or explosive substance with intent to cause damage to amount of one hundred or (in case of agricultural produce) ten rupees.—Whoever commits mischief by fire or any explosive substance intending to cause, or knowing it to be likely that he will thereby cause, damage to any property to the amount of one hundred rupees or upwards [or (where the property is agricultural produce) ten rupees or upwards], shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

S.436. Mischief by fire or explosive substance with intent to destroy house, etc.—Whoever commits mischief by fire or any explosive substance, intending to cause, or knowing it to be likely that he will thereby cause, the destruction of any building which is ordinarily used as a place of worship or as a human dwelling or as a place for the custody of property, shall be punished with [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

investigating agency has correctly examined the right person in connection with the present case. Not only that the evidence of P.W.6 Prasanta Digal, who is the son of informant, was cited as an eye-witness to the occurrence. But he claimed in the court that he has not seen any occurrence... In view of the discussions made above the prosecution has miserably failed to establish any charge against the present accused and he is entitled for a benefit of doubt.”

In a number of cases the FTCs explicitly pointed out that they have been unable to pass an order of conviction due to the defective manner in which the FIR’s were recorded, the failure of the prosecution to place relevant documents on record, or the failure to bring on record the testimonies of important witnesses.

However, a perusal of the judicial verdicts shows that the FTCs refrained from making any observations regarding the role of the investigating agency, and whether the investigation was rigorous, professional, prompt and impartial or whether it was conducted in a manner that the intended or unintended consequence was to shield the accused and suppress material evidence. Even in cases where the investigation is clearly partisan and shoddy, the Court has not passed any strictures against police officers responsible for the negligent investigation.

The Supreme Court has in a catena of judgments emphasized that Courts must guard against the victim’s right to justice being defeated through defective or malafide investigation, or investigation that is deliberately designed to shield the accused, or is patently collusive in nature. The Supreme Court in Zabira Habibulla H. Sheikh v. State of Gujarat observed,

“In the case of a defective investigation the court has to be circumspect in evaluating the evidence and may have to adopt an active and analytical role to ensure that truth is found... instead of throwing hands in the air in despair. It would not be right in acquitting an accused person solely on
account of the defect; to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective.”

E. Trial

E.1 Delay in Lodging FIR

In *State v. Manoj Pradhan* the accused were charged with being part of a mob which damaged and looted the house of Butia Digal. The Court viewed the delay of 2 months in filing FIR suspiciously and concluded, “all Christian persons of the village of the informant had taken shelter at one place, (Raikia relief camp) hence there was possibility of designing a colourful story in consultation with each other” (Para 13). In view of the discrepancies regarding time of incident as stated in statements of different witnesses, the apparent unreliability of eyewitness testimonies of the PWs, lack of credibility of testimonies of witnesses who owned the house and property, due to the fact that they are Christians and hence interested parties, the Court concluded that it was a false case.

In another case of *State v. Manoj Pradhan* the accused were charged under Section 147, 148, 149, 436 380 and 506 IPC for the offence of rioting, forming unlawful assembly, committing mischief by setting fire to the house of the informant, committing trespass, having made preparations to cause hurt to the informant, criminally intimidating the informant and committing theft on 1 August, 2008. A case was registered against the accused on receipt of a written FIR of the informant.

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232 AIR 2004 SC 3114 at Para 61
233 FTC-I, Justice Sovan Kumar Dash, S.T. Case No. 48/16/2009, Judgment dated 28.8.09, accused charged under Sections 147, 148, 436/149, 427/149, 380/149, 455/149, IPC
dated 6th August, 2008 (5 days after the offence), which was then received through dak on 28th August, 2008.

The FTC noted that the case of the prosecution creates suspicion because the informant dropped the FIR in a letter box 200 cubits away from the relief camp even though he could have lodged his complaint personally at the police station nearby.\textsuperscript{235} The FTC held that the prosecution was unsuccessful in explaining the cause of the “inordinate delay” of 27 days in lodging FIR. Despite acknowledging the tension and curfew in the area in the aftermath of the violence, and the fact that “normal life was paralysed due to widespread violence at the locality”, the FTC held that the informant could have lodged his complaint earlier on account of the senior police officials visiting the relief camp and the near proximity of the police station to the relief camp.\textsuperscript{236}

The FTC’s presumption that the presence of police officers at the camp should have been an enabling factor for the complainant to lodge an FIR stands in sharp contrast to the documentation of pervasive hostile environment by fact finding reports. The law requires that in the case of delay in lodging the FIR, the same must be satisfactorily explained. The FTC omits to consider that the delay and action of the informant in dropping the FIR in a letterbox instead of lodging it personally could well be explained on account of fear.

In another case against the same accused, the FTC observed “\textit{Circumstance of initiation of this case after a period of two month, which is not explained, compelled this court to arrive at a conclusion that the FIR was designed with some improvement and the delay in lodging the FIR is

\textsuperscript{235} Ibid.
\textsuperscript{236} Ibid at Para 10
fatal to the entire prosecution case in view of discussions made earlier”.  

Similarly, in *State v. Tidinja Pradhan, Umesh Pradhan, Senapati Pradhan*, the Court doubted the prosecution’s case as there was a delay of twenty days in lodging FIR.  

While acquitting the accused in all these cases, the FTCs appear to have not taken into consideration the atmosphere of fear and further violence that determined the conduct of the victims and the palpable complicity of State machinery in preventing access to the criminal justice system. 

However, in certain cases of communal violence, courts have considered the circumstances of the case as extraordinary and accounted for delay due to fear and unruly mobs. 

In the case of *State v Pappu Pradhan and 4 others* the Grama Rakhi lodged a complaint with regard to the murder of Pastor Samuel Naik and his aged mother Janmati Naik, and for rioting and house trespass by an unlawful assembly.  

The Court, holding that a delay of 4-6 days in lodging the FIR is not fatal to the case of the prosecution, observed 

“the incident is the outcome of a riot which broke out on the killing of a Hindu saint Swami Lakshmanananda Saraswati and the communal violence erupted at the behest of Hindu fundamentalist and the persons from the Christian community could not but to hide themselves for fear of their lives. In such an eventuality expecting the lodging of the FIR with promptitude appears improbable. Consequently even though no plausible explanation is forthcoming from the prosecution side justifying the delay I do 

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238 FTC-I, Justice Sovan Kumar Dash, S.T. Case No- 60/19/2009 judgment dated 16.9.09, FIR dated 10.10.2008 u/s, 147, 148, 436/149 and 380/149 IPC  
not consider the same in itself to be in any manner fatal for the prosecution to further its case unless the circumstance otherwise make the contents thereof unacceptable.”

These observations of the Court are significant, as firstly the Judge acknowledges the communally fraught situation and its implications for lodging a FIR promptly. Secondly, it also underscores that the Prosecution, which ought to have placed on record the reasons for the 4-6 days delay in registration of the FIR failed to do so.

In *State v Kartik Pramanik* the FTC convicted the accused for being a member of an unlawful assembly, burning down the house and murder of one Ramesh Digal while armed with deadly weapons, even though there was an unexplained delay of one day in lodging the FIR. The FTC relied on judgments of the Supreme Court which hold that while a delay in lodging an FIR may give rise to suspicion, if the delay can be explained, it cannot by itself be a reason for rejecting evidence which is otherwise trustworthy and credible. The FTC held that a delay of merely 1 day in lodging the FIR did not weaken the prosecution’s case, especially in light of evidence on record that in the aftermath of the killing of Lakshmananada Saraswati, riots had commenced in the locality, and, “It was very natural that after seeing the occurrence the informant and his family members must be

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See- Ashok Kumar Choudhary v State of Bihar (2008)

Ravinder Kumar and anr v State of Punjab AIR (2001) SC 3570
under shock and panic. They would not have dared to go outside during the night of occurrence to lodge the FIR at the police station.”

The FTC also excused the absence of any explanation for delay in the FIR observing, “...but the circumstances of the case explain why there was delay in lodging the FIR. Such delay was inevitable. Non-mentioning of any cause in the body of the FIR for delayed lodging of the same cannot be considered as fatal in the facts and circumstances of the present case...Due to delayed lodging of the FIR the convincing, credible and satisfactory evidence of the witnesses cannot be thrown away. There is lot of difference between normal situation and riot situation. During riot period the affected persons must have given preference to save their lives instead of taking legal action against the culprits. So also police machinery must have given preference to calm down the situation.”

In State v Susantu Sahu and Anr as well, the FTC Judge convicted the accused for murder, arson and rioting while rejecting the defence’s claim that a delay of 7 days in lodging the FIR without any explanation for delay in the FIR, ought to create a suspicion with regard to the credibility of the prosecution’s story. The Court held that while judicial precedent has laid down that an FIR lodged after an inordinate delay, without sufficient explanation for the same should be viewed cautiously, in this particular case, an explanation is not necessary as the reason for the delay is evident from the facts of the FIR. The FTC, held that in the communally tense atmosphere it would have been extremely difficult for the family of the deceased to lodge an FIR promptly, hence the yardstick for evaluating whether an FIR is credible or not during normal times cannot

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243 Ibid at Para 25
be applied to a communally volatile situation. Based on the same reasons, the Court also condoned the delay on the part of the police in sending the Rukka to the Magistrate’s Court as provided under S.157.

The Supreme Court has held in a catena of decisions that in determining the effect of a delayed FIR, the relevant factor to be considered is whether or not there exists a satisfactory explanation for the delay.

In Ravindar Kumar and Anr. v. State of Punjab, the Supreme Court held, “The attack on prosecution cases on the ground of delay in lodging FIR has almost bogged down as a stereotyped redundancy in criminal cases. It is a recurring feature in most of the criminal cases that there would be some delay in furnishing the first information to the police. It has to be remembered that law has not fixed any time for lodging the FIR. Hence a delayed FIR is not illegal...It cannot be overlooked that even a promptly lodged FIR is not an unreserved guarantee for the genuineness of the version incorporated therein....When there is criticism on the ground that FIR in a case was delayed the court has to look at the reason why there was such a delay.

There can be a variety of genuine causes for FIR lodgment to get delayed. Rural people might be ignorant of the need for informing the police of a crime without any lapse of time. This kind of unconversantness is not too uncommon among urban people also. They might not immediately think of going to the police station. Another possibility is due to lack of adequate transport facilities for the informers to reach the police station. The third, which is a quite common bearing, is that the kith and kin of the deceased might take some appreciable time to regain a certain level of tranquillity of mind or sedativeness of temper for moving to the police station for the purpose of furnishing the requisite information. Yet another cause is, the persons who are supposed to give such information themselves could be

so physically impaired that the police had to reach them on getting some nebulous information about the incident.

We are not providing an exhausting catalogue of instances which could cause delay in lodging the FIR. Our effort is to try to point out that the stale demand made in the criminal courts to treat the FIR vitiated merely on the ground of delay in its lodging cannot be approved as a legal corollary. In any case, where there is delay in making the FIR the court is to look at the causes for it and if such causes are not attributable to any effort to concoct a version no consequence shall be attached to the mere delay in lodging the FIR.” 246

Again in Ashok Kumar Choudhury and Ors.v. State of Bihar, the Supreme Court has held that,

“It is trite that mere delay in lodging the first information report is not by itself fatal to the case of the prosecution. Nevertheless, it is a relevant factor of which the Court is obliged to take notice and examine whether any explanation for the delay has been offered and if offered, whether it is satisfactory or not. If no satisfactory explanation is forthcoming, an adverse inference may be drawn against the prosecution. However, in the event, the delay is properly and satisfactorily explained; the prosecution case cannot be thrown out merely on the ground of delay in lodging the F.I.R. Obviously, the explanation has to be considered in the light of the totality of the facts and circumstances of the case.” 247

E.2 Failure to Name Accused in FIR:

In several cases, the FTC acquitted the accused on the ground that the accused were not named by the complainant in the FIR or in statements to the police and were only named in the subsequent statements of the complainants and witnesses before the Court.

In the case of State v. Singiraj Pradhan, the FTC held that

246 AIR 2001 SC 3570 at para 13 and 14
247 (2008) 40 OCR (SC) 572
witness testimonies are not sufficient to prove involvement of accused in unlawful assembly or in causing death, as the witness did not name the accused in their statements and the names of accused were only brought up during testimonies.\(^{248}\) In this case, the accused, Singiraj Pradhan, was charged with forming an unlawful assembly, and in prosecution of a common object committing rioting, being armed with deadly weapons, setting fire to dwelling houses of the informant Christadas Naik and others, and intentionally causing the death of Ramani Naik, wife of the informant Christadas and Lalaji Naik, causing grievous and simple hurt to Gopal Pradhan and other offences. After a detailed examination of medical evidence, including testimonies of the doctors who conducted the post-mortems of the two bodies, constables who identified the bodies etc., the Court concluded that the deaths of both Ramani Naik and Lalaji Naik were homicidal in nature and caused due to “brutal assault by deadly weapons by some human external force”.\(^{249}\)

During the trial, the husband/informant and the daughters of the deceased Ramani Naik (PW 1 to PW 3) were examined, and their testimonies implicated the accused in the assault and murder of the two deceased and in the unlawful assembly and rioting. However, the defence counsel’s contention that the eyewitness testimony was ‘doubtful’ was accepted by the Court on the grounds that PW 1 to PW3 did not mention the name of the accused in their Section 161 statements to the police and only introduced the name of the accused at the stage of evidence during trial\(^ {250}\), in the previous case bearing ST 39-

\(^{248}\) FTC-I, Justice Sovan Kumar Dash, S.T. Case No- 90/31/2009 Date of judgment- 27.11.10, accused charged under S.147, 148, 302, 307, 379, 436, 341 r/w S 149 IPC, u/s. 25 (1-B) (a) and 27, Arms Act, S.4, ES Act

\(^{249}\) State v Singiraj Pradhan, FTC-I, Justice Sovan Kumar Dash, S.T. Case No- 90/31/2009 Date of judgment- 27.11.10, accused charged under S.147, 148, 302, 307, 379, 436, 341 r/w S 149 IPC, u/s. 25 (1-B) (a) and 27, Arms Act, S.4, ES Act, Para 8.9.

\(^{250}\) Ibid at Para 10.
48/2009 against the others accused in the killing of Ramani Naik and Lalaji Naik where PW 1 to PW3 were also witnesses, they did not mention the name of the present accused Singiraj Pradhan in their statements and did not name him as being part of the mob that killed the two deceased. The FTC observed that during evidence stage, the name of the accused seems to have been introduced by improvement and hence cannot be trusted. The FTC thus concluded that this created suspicion about the credibility of eyewitness testimonies and acquitted the accused persons.

In State v Pappu Pradhan and 4 others one of the reasons given for the acquittal of 5 persons of charges of murder of Pastor Samuel Nayak and Janmati Nayak, house-trespass and unlawful assembly, was that the FIR lodged on a complaint received from Gram Rakhi, on the instruction of the wife of the deceased, did not contain the name of the accused, despite the fact that the wife of the deceased was an eyewitness to the offence and identified the accused in Court. Prosecution has left it unclear whether the wife of the deceased disclosed the names of the accused and the police did not record it in the FIR, or whether the wife of the deceased was too scared to disclose the names of the accused, The Prosecution did not fearing for her safety as the accused were still on a rampage attacking people at that point. The Court also fails to consider these possibilities.

Similarly in State v Prafulla Mallik and Anr where the accused were charged with criminal conspiracy, murder of Sibina Pradhan, unlawful assembly and causing disappearance of evidence, the FTC acquitted the accused men as their names were not mentioned in the FIR which was filed by the wife

251 Ibid at Para 12
of the deceased. The Court relied on the judgment of the Supreme Court in *Juwarsingh v. State of Madhya Pradesh* which held that in cases where there is no explanation in the FIR for the non-inclusion of the names of the accused, the accused should be granted the benefit of doubt.

In *State v Raneswar Malik* where the accused was charged with the murder of Yubaraj Dihal, causing injury to Bidyadhar Digal, dacoity, and disappearance of evidence among other offences, the Court held that the involvement of the accused “appears to be a clear concoction of fact” due to the fact that the complainant, the son of the deceased, did not name the accused persons in the FIR or in his statement before the police (u/s.161 CrPC), despite having known the accused as admitted in his evidence before the Court.

In *State v Batu Sambhu Arjali* the Court acquitted the accused who was charged with the murder of Mathew Nayak, due to the failure of the informant, the father of the deceased, to disclose the name of the accused in the FIR or in his statement to the Magistrate recorded under S.164 CrPC, although the informant later named and identified the accused during the trial. The Court held the witness to be unreliable and inconsistent and granted the benefit of doubt to the accused.

However in contrast, the FTC in *State v Suin Abhinash Pradhan*, where the accused was charged with the murder of

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254 Juwarsingh v State of Madhya Pradesh, AIR 1981 SC 373, Para 15
257 Ibid at Para 13, 14
one Ramesh Digal, being part of an unlawful assembly and arson the Court held that the failure to mention the name of the accused in the FIR does not automatically grant the accused the benefit of doubt and went on to convict the accused for the abovementioned offences.\textsuperscript{258} In response to the defense counsel’s argument that the accused could not have been present at the spot of the crime as the informant had not stated his name in the FIR registered by him, the FTC held that “By seeing the destruction of the dwelling house by fire and killing of the brother of the informant due to brutal assault by a group of persons with deadly weapons in his presence, his mental condition must have been affected and there must be some instability in his mind. In such a state of mind, it was very natural to omit the name of all the accused in the report. Such possibility cannot be ruled out in the facts and circumstances of the case.”\textsuperscript{259}

Relying on judgments of the Supreme Court the FTC took into consideration the fact that at the time of filing of the FIR the informant was likely to have been psychologically so traumatised by the brutal killing of his brother and the burning down of their home, that he may have omitted to mention the names of the accused.\textsuperscript{260} The Supreme Court has also held that the FIR is not an encyclopedia and it is not imperative for all the accused to be named in the FIR.\textsuperscript{261}

In convicting BJP MLA Manoj Pradhan and one Prafulla Mallik for the murder of the husband of Kanak Rekha Naik, the FTC, while assessing the evidence of the wife of the deceased,

\begin{thebibliography}{9}
\bibitem{259} Ibid at Para 9
\end{thebibliography}
astutely takes note of the panic and fear that gripped the Christian community when it was targeted and hunted.262 The FTC notes,

“What human nature is very complex. Different persons react differently under pressure or in times of sudden bereavement or grief of a close person or seeing any serious crime and their behavior and conduct would, therefore be different. The shock suffered by PW6, having seen dastardly killing of her husband by some miscreants, possibility of losing mental balance cannot be ruled out. Forgetting the name of assailants in such mental condition can not be said unnatural. Her evidence is to be tested or evaluated taking into consideration of the suffering and shock she passed after killing of her husband before her eyesight. It is to be kept in mind that incorporating the names of all the assailants in the FIR is not the requirement of law.”263

In Kirender Sarkar & Ors vs State Of Assam, the Supreme Court has held that, “The law is fairly well settled that FIR is not supposed to be an encyclopaedia of the entire events and cannot contain the minutest details of the events. When essentially material facts are disclosed in the FIR that is sufficient. FIR is not substantive evidence and cannot be used for contradicting testimony of the eyewitnesses except that it may be used for the purpose of contradicting maker of the report. Though the importance of naming the accused persons in the FIR cannot be ignored, but names of the accused persons have to be named at the earliest possible opportunity.”264

The FTC thus held that,

“there is no universal rule that whenever the names of the accused persons are omitted in the FIR, the prosecution case is to be viewed suspiciously and the same is to be thrown away. In this case the deceased was dastardly and mercilessly killed by some miscreants, who had no fault, in

262 State v. Manoj Pradhan and Anr, FTC-I, Justice Sovan Kumar Dash, S.T. Case No.174/64 of 2009 Judgment dated 29.06.2010. FIR dated 28.08.2008 u/s. 147, 148, 341, 342, 302 and 201 r/w. S.149 IPC.
263 Ibid at Para 12
264 (2009) 12 SCC 342, Para 11
presence of his wife PW6. She must have frightened and shocked by seeing the occurrence taken place before her eyesight. She must have given preference to save the life of her minor daughters, aged 6 and 3 years, who were with her at the time of occurrence. The explanation rendered by her that she could not recollect the name of the assailants at the time of the recording of her statement on 28.08.2008 i.e. one day after the occurrence cannot be said to be unnatural. Further nondisclosure of the name of the accused persons by PW6 on the day of recording of her statement has no significance as the other independent eye witness to the occurrence examined in this case P.W. 4 had already disclosed the name of present accused person during recording of his statement under section 161 Cr.P.C. by the investigating officer on 31.08.2008, the investigation agency already knew their involvement from other witnesses. Hence, in such premises, the delayed disclosure of the name of the accused persons by P.W. 6, cannot be considered as fatal to the prosecution case.265

In this case, the FTC took note of the fact that even prior to the present incident, due to the earlier attack on their village in which three Christians were killed and the complainant’s house torched, the deceased and his family members must have been in the state of panic. The Investigating Officer also told the Court that on 28.08.2008, P.W. 6, the wife of the deceased, had stated before him that her mind was not functioning properly and that she was not able to remember properly the names of the assailants. She had stated that she would narrate the facts of the incident after she regained some mental stability.

A study of the FTC judgments thus reveals that the accused were convicted only in cases where the FTC has acknowledged and considered the vulnerabilities that marked the process, namely, the extraordinary hostile environment in which the victims were approaching the police and that victims and

witnesses were overwhelmed by fear, insecurity and trauma.

F. Witnesses

F.1 Hostile Witnesses

A perusal of the FTC judgments shows that in a number of cases the accused is acquitted because the witnesses turn hostile and do not support the prosecution case during the trial before the Court. While the Court must strictly adhere to the principle that conviction can only be pronounced if the guilt of the accused has been proven beyond reasonable doubt, what is worrisome is that the judicial system is not questioning why in cases of communal violence there is such a high rate of attrition. Could the absence of a victim-witness protection mechanism have caused witnesses to resile from their statements and not testify in support of the prosecution? Nor can we lose sight of the fact that most of the witnesses belong to the targeted community which is socio-economically marginalised and politically disadvantaged. In many of the judgments analysed here, the Prosecution Witnesses who are neighbours, distant relatives, or inhabitants of the same village as the deceased, did a volte face in the Court.

Often, it was the immediate family members who alone testified against the accused, and they had to contest the charge of being labelled as “interested witness”. Despite so many prosecution witnesses abandoning the prosecution case, neither the prosecution, nor the Court, nor the administration, sought answers for the spate of acquittals. The fact that a brutal attack on the minority community was going unpunished was not seen as an issue that could permanently scar peace and amity in Kandhamal.

In State v Pappu Pradhan and 4 Ors, the accused were
charged with the murder of Pastor Samuel Naik and his aged paralysed mother Janmati Naik, and destruction of evidence through burning of the bodies.266 Five prosecution witnesses, who according to the prosecution were eye-witnesses to the incident, all turned hostile with respect to their testimonies of the killing of the two above named persons. These five prosecution witnesses did however state in Court that after the killing of Swami Lakshmananada Saraswati, there was an outbreak of a riot where a mob of about 400-500 persons armed with weapons damaged the church and attacked and ransacked the homes of the Christians in the village.

The burden of proving the incident thus fell entirely on the wife of the deceased (PW 1). After examining her evidence the FTC acquitted all the accused, as it relied on the legal principle that the conviction cannot be based on the testimony of a single eye witness unless the sole testimony was found to be reliable and free of any blemish or suspicion.267 The FTC was reluctant to rely on the sole testimony of the wife of the deceased due to inconsistencies in her testimony and because, in the Court’s opinion, she could not have identified the accused in the dark. With all other witnesses turning hostile, the accused were able to secure an acquittal. Thus the targeted murder of a Christian Pastor and a helpless paralysed old woman in Kandhamal went unpunished.

In **State v. Manoj Pradhan** dated 30th October 2009, the accused, a Member of Legislative Assembly from G. Udaygiri constituency, was charged with rioting, rioting armed with dangerous weapons in pursuance of common object of unlawful assembly, causing mischief by fire to dwelling houses

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267 Ibid at Para 12
and committing theft of movable properties.\textsuperscript{268} Prosecution was launched on the receipt of a written complaint from one Suryakant Digal whose property had been stolen and house set on fire by the accused amongst others. The prosecution examined 9 witnesses, including eyewitnesses who were still living in the Raikia relief camp. PW1 and PW2 were declared hostile by the prosecution because they did not support the prosecution case. PW4 the informant and PW6 wife of the informant, deposed before the Court as eyewitnesses.

The Court held that the evidence adduced from these eye-witnesses “appears to be unnatural and exaggerated which cannot be believable as trustworthy”. This untrustworthiness was compounded by the fact that the Investigating officer testified that the said eyewitnesses did not state the same facts in their statements under Section 161 CrPC, enabling the Court to conclude that “all the prosecution witnesses examined in this case have developed some new story against the present accused to prove their case which is not at all credible and convincing”\textsuperscript{269}

Should this spate of prosecution witnesses turning hostile, not have set alarm bells ringing across the legal system? A more extensive discussion of witness protection, both in the context of the Kandhamal communal attacks and domestic and international jurisprudence can be found in Chapter V.

\textbf{F.2 Police Witnesses turn Hostile}

The judgment of acquittal in \textbf{State v Kirenge Kanhar and 15 others} has far-reaching implications.\textsuperscript{270} In this case an armed

\begin{itemize}
\item \textsuperscript{269} Ibid at Para 9
\end{itemize}
mob of a 1000 people attacked the Gochhapada Police Station on 15th September, 2008 at around 11 P.M. at night. The mob, raising slogans of “Jai Sri Ram” and “Jai Bajrangbali”, attacked the police station in retaliation of the arrest of 7 persons of the village during the rioting in Kandhamal. The mob set the police station on fire, as well as ransacked and damaged the building, the properties and vehicles of the police and exploded a bomb at the site. The armed mob fired at the police, leading to the death of a police constable, Bhibhudendra Biswal, who was on duty.

The Prosecution put forth 16 witnesses, out of whom 12 were police personnel who were on duty at the police station on that day. The forensic and other evidence conclusively established that the constable had been killed by a fire arm injury. It is noteworthy that of the 12 police witnesses, 11 police personnel turned hostile in court and failed to identify any of the accused persons present in court as culprits.271 The police witnesses only supported the prosecution’s case with respect to the incident of arson and consequent death of their colleague, but did not identify anyone as being responsible for these grave crimes.

This acquittal raises serious concerns. Firstly, the fact that the police station was caught unaware and had not made adequate preparation to deal with the mob implies that there was a total failure of local intelligence to forewarn the police of the impending attack. A mob of this size could obviously not have assembled within minutes. Further, this unlawful assembly was dangerously armed with weapons and bombs, again showing that the local police had either turned a blind eye to the spawning of criminal activity in the area or were complicit with the mob. The plea of the police at the Gochhapada Police Station that

271 Ibid at Para 7
they were caught off guard rings hollow as after the killing of Lakshmananda Saraswati on the 23rd August, 2008, communal violence had broken out in many parts of Kandhamal district so the police could reasonably have been expected to make adequate arrangements to protect the Christian community, arrest the accused and protect its own personnel and properties.

Secondly, the attack by the mob on the police station was a direct challenge to the authority of the rule of law and an explicit assertion by the Hindutva mob that their writ would run in the area. Thirdly, with all the 11 police witnesses turning hostile in the trial court, not only did they betray their fellow colleague who lost his life in the murderous assault but also signalled the undermining of the authority of the police and the duty of the agents of the secular state to protect all its citizens, including the religious minorities.

Fourthly, during the investigation the police had failed to conduct any Test Identification Parade (TIP) which may have strengthened the case of the prosecution in the trial. The inference that may be drawn from this is that either the police was so incompetent that by force of habit it conducted a casual and shoddy investigation even when one of its own was killed and the police station attacked, or that the police was sympathetic to the cause of the unlawful assembly and hence did not collect evidence that would stand scrutiny during the trial, or a combination of both which allowed the crimes to be perpetrated with impunity.

Fifthly, post this acquittal judgment dated 31st July, 2009, the message received by the already hounded and distressed Christian community would be that, when the police could not protect themselves or seek justice for the killing of a police constable, they could not depend upon or turn to the police for their protection.
F.3. Related Witnesses: Independent or Interested Witnesses

In a majority of the cases before the two FTC’s, the Prosecution Witnesses invariably were immediate family members of the deceased. Since most of the members of the Christian community were hiding in their homes, or in forests along with their families, it is only natural that the immediate family members were the prime witnesses to the murder of their loved ones and to the looting, attacking and arson of their homes and properties. Yet in each of these cases the defence counsels have argued that a witness who is related to the deceased or the witnesses whose homes and properties have been looted and set on fire should not to be relied upon, as these persons are ‘interested witness’ and cannot be treated as ‘independent witnesses’ and therefore their evidence should be viewed with suspicion and discarded.

In *State v Kartik Pramanik*, the court, relying upon the judgments of the the Supreme Court, held that the evidence of the brother of the deceased (P.W 1), sister-in-law of the deceased (P.W.2), sister of the deceased (P.W.4), the nephew of the deceased (P.W.5) and the wife of the deceased (P.W.6), is wholly reliable to hold that the accused was part of the unlawful assembly which committed mischief by fire, and that this evidence cannot be discarded merely on account of the fact that the witnesses were related to the deceased.272

Adopting a similar approach the FTC, in a case where 14 persons including MLA Manoj Pradhan were charged with attacking a house and the owners and inhabitants of the house, a married couple and their son were the prosecution witnesses

who deposed about the offence and identified the accused in Court.\textsuperscript{273} The FTC held,

“Law is well settled that testimony of interested and partisan witnesses cannot per se be held unworthy, what is required in assessing their evidence is to put them to close scrutiny and circumspection. Once the testimony is found to be consistent and truthful the same can be relied upon to base a conviction. In the instant case, P.W’s. 4, 5 and 7 are admittedly the husband, wife and son but having regard to the time, place, nature and circumstance of the incident they are held to be competent and natural witnesses.”\textsuperscript{274}

Given the fraught and vitiated socio-political environment that prevailed during and after the communal attack in Kandhamal, the grim reality is that except for those who were directly impacted or whose family members were killed or harmed in the violence, no one else stepped forward to give evidence before the Court.

Decisions of the Supreme Court have held that in situations where a related witness is the only ‘natural witness’, his or her testimony should not be treated on par with that of an ‘interested witness’. In \textit{State Of Rajasthan vs Smt. Kalki \& Anrit}, was held that,

“As mentioned above the High Court has declined to rely on the evidence of P.W.1 on two grounds: (1) she was a “highly interested” witness because she “is the wife of the deceased”, and (2) there were discrepancies in her evidence. With respect, in our opinion, both the grounds are invalid. For, in the circumstances of the case, she was the only and most natural witness; she was the only person present in the hut with the deceased at the time of the occurrence, and the only person who saw the occurrence. True, it is she is the wife of the deceased, but she cannot be called an ‘interested’ witness. She is


\textsuperscript{274} Ibid at Para 10
related to the deceased. ‘Related’ is not equivalent to ‘interested’. A witness may be called ‘interested’ only when he or she derives some benefit from the result of litigation, in the decree in a civil case, or in seeing an accused person punished. A witness who is a natural one and is the only possible eye witness in the circumstances of a case cannot be said to be ‘interested’. The instant case P.W.1 had no interest in protecting the real culprit, and falsely implicating the respondents.”

This judgment was further relied on in State Of U.P vs Kishanpal & Ors to reiterate,

“From the above it is clear that “related” is not equivalent to “interested”. The witness may be called “interested” only when he or she has derived some benefit from the result of litigation in the decree in a civil case, or in seeing an accused person punished. A witness, who is a natural one and is the only possible eyewitness in the circumstances of a case cannot be said to be ‘interested’.”

G. Appreciation of Evidence

G.1 Acquittal in a Cases of Circumstantial Evidence and Compromised Investigation

In State v. Manoj Pradhan and Mantu Ganda Naik, 10 persons were accused with having committed the murder of Kantheswar Digal by kidnapping him upon wrongful restraint, mischief by setting his dwelling house on fire and looting properties as well as disappearance of evidence subsequent to murdering him on 24th August 2008. Manoj Pradhan (former BJP MLA) and another accused were prosecuted while eight accused were declared absconders. The Prosecution examined eight

275 1981 SCC (2) 752 at Para 5
276 (2008) 16 SCC 73, Para 9
277 State vs. Manoj Pradhan and Anr., FTC-II, Justice C.R Dash, S.T.Case No. 23/70 of 2009 date of judgment-24.9.09, accused charged under Sections. 436, 302, 201 r/w S. 149, IPC
witnesses. The Court held that the evidence established that the death was homicidal. The Court, after a detailed discussion, concluded that there was no direct ocular evidence of the accused committing murder, and that two witnesses stated that they saw the mob, which the accused was a part of, dragging the deceased out of the bus and assaulting him.

The skeletal remains of the deceased were recovered after 14 days. Citing precedent, the Court held that direct ocular evidence is not necessary in all cases for a crime to be proved as having been committed and that the offence can be proved by circumstantial evidence as well. However in deciding a case on the basis of circumstantial evidence, the FTC held that it was bound by the principle laid down by the Supreme Court *Sharad Birdhichand Sarda v. State of Maharashtra* that for a conviction to be based on circumstantial evidence, guilt of the accused must be conclusively proven and must not be a mere possibility, leaving reasonable ground for indicating that the accused may be innocent.

Appreciating the evidence the trial Court held that, “...On a conspectus of the prosecution evidence therefore while it is proved beyond reasonable doubt that the deceased met a homicidal death in course of the riot that triggered aftermath the assassination of Swami Laxmananda Saraswati, the prosecution having failed to prove the identity of the accused-persons as well as their participation being members of the mob and that the deceased was last seen in the company of the accused-persons before his dead body is traced, a benefit of doubt accrues in their favour. The accused-persons having extended the benefit of doubt are found not guilty on any of the charges alleged against them and are acquitted therefrom u/s 325 (1), Cr.P.C. Accused Manoj Pradhan be set at liberty in case his presence is not

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279  AIR 1984 SC 1622
required in any other case. The other accused be set at liberty forthwith."  

G.2 Destruction of Evidence

A pattern that can be discerned from different episodes of communal violence is that the attack is premeditated and planned in such a manner as to leave behind little or no trace of the assault and crimes. In Kandhamal, the aggressors either threw the bodies of the targeted victims into the river or forest to decompose, burnt them to ashes, or chopped the corpse into small and unidentifiable pieces. This gruesome disposal of the corpse echoed the horror of earlier mass crimes. In Delhi in 1984, the bodies of Sikh men were charred beyond recognition as burning tyres were flung over their bodies; in 1987 the 40 Muslim men of Hashimpura were killed in custody by the PAC and their corpses thrown in the Ganga and Hindon canal in Uttar Pradesh, and again in the Gujarat genocidal carnage of Muslims in 2002, bodies were burnt or thrown in pits with sacks of salt to accelerate their decomposition.

In a majority of cases in Kandhamal, the mob had intentionally and deliberately erased the evidence of the crime. Destruction of evidence is a distinct offence under Section 201 of the Indian Penal Code. In some cases, the accused were able to take advantage of this missing evidence as the FTC’s held that the accused cannot be convicted in the absence of material evidence, including the corpus delicti, to establish that it was indeed a homicide.

In *State v Pappu Pradhan and Ors.*, the accused were charged with committing the murder of Pastor Samuel Nayak and his paralysed mother Janmati Nayak, as well as with burning their

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280 State vs. Manoj Pradhan and Anr., FTC-II, Justice C.R Dash, S.T. Case No. 23/70 of 2009 date of judgment-24.09.09, accused charged under Sections 436, 302, 201, r/w S.149, IPC, Para 29
dead bodies to such an extent that only some bones remained.\textsuperscript{281}

The Court held,

“\textit{According to the prosecution case the accused-persons did cause disappearance of evidence by putting the dead bodies to fire as such no autopsy has been conducted. Some human bones, however has been seized by the Investigating Officer from the spot house but the same could not be proved to be of human being and if the same belong to the male or female by any evidence and despite the bone being put to Chemical examination as reported vide Ext.7. No anti-mortem injury could also be proved in the bone. There is thus no medical or scientific evidence that the death of the deceased was homicidal in nature.”}\textsuperscript{282}

The Court thus held that,

“\textit{The evidence of the I.O. who simply proved the seizure of some bone and ashes alleged to have been made from the spot house is of no consequence... Since the identity of the accused-persons could not be proved to its hilt no criminal liability can also be attributed embroiling the accused-persons to be the members of an unlawful assembly. No evidence except of an omnibus nature has been brought from the side of the prosecution connecting the accused to prove commission of mischief by setting into fire the house of Samuel Naik and other villagers at village Bakingia.”}\textsuperscript{283}

Basing its judgment on the principle that in cases where the dead body of the deceased is not found, other cogent and satisfactory proof of the homicidal death of the deceased must exist, the Court acquitted the accused on the grounds that the fact that Samuel and Janmati Nayak were done to death nor the fact that the accused are responsible for the same has been


\textsuperscript{283} Ibid at Para 15
proven by the Prosecution. The absence of the corpus delecti thus further weakened the case of the Prosecution.

In State v Raneswar Malik, the accused were charged with the murder of Yubaraj Digal and causing disappearance of evidence. The dead body was set on fire and completely burnt and charred, making it impossible to even prove through chemical examination that these were human remains. The FTC held that in the absence of medical/chemical evidence the remains cannot be held to be that of Yubaraj Digal’s. In such circumstances, the FTC, looking at the totality of evidence, held that the Prosecution had failed to conclusively prove the homicide.

The settled legal position of the Supreme Court is that to hold a person guilty in a case of murder, “It is not necessary or essential to establish corpus delicti. It was held that the fact of death must be established like any other fact. It was held that in some cases it may not be possible to trace or recover corpus delicti. It was held that a conviction for murder could, even in absence of corpus delicti, be based on reliable and acceptable evidence.”

So diabolical was the nature of the attack on the Christian community in Kandhamal that even the mortal remains of the deceased could not be gathered either for purposes of investigation or to perform the last rites.

H. Culpability in Cases of Mob Violence

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284 Ibid at Para 14-17
286 Ibid.
To attribute vicarious liability to an accused as a member of an unlawful assembly, the law requires that each member of the unlawful assembly must share a common intention to commit the crimes. Most of the attacks in Kandhamal were by an unlawful assembly comprising of 50 to 500 persons. The law is well settled that the mere presence of a person cannot lead to the conclusion that he is a member of an unlawful assembly or that he shared any common object of the assembly. In such a case, to determine whether the said persons entertained one or more of the common object specified in Section 141 IPC, the conduct of each of the members of the unlawful assembly, before, at the time of attack and thereafter, the motive of the crime, must be considered and examined.288

In *State v. Suin Abhinash Pradhan* the accused, Suin Abhinash Pradhan, was charged for rioting as a member of an unlawful assembly, causing mischief by setting a house on fire, murder and destruction of evidence.289 The FTC judgment notes that the investigating officer made attempts to arrest the others named by the witnesses in their statements to the police, however he did not succeed and hence the trial was being proceeded with against the accused Suin who was already in police custody in relation to another case.290 The accused, Suin, pleaded complete innocence and alleged that his position as a Scheduled Tribe teacher and leader of the Kui Samaj has resulted in false cases being registered against him by Christian people due to previous enmity.


290 Ibid at Para 3
According to P.W.1, the brother of the deceased, the accused along with about a 100 other persons armed with axes, sticks and other weapons, came to their house in village Dakarpanga on 25th August 2008, and raised slogans of ‘Jai Bajrangbali ki jai’. They destroyed and set their house on fire, for which reason P.W.1, along with his mother, sister (P.W.2) and her son (P.W.3), fled from there. The mob chased them and on the way nabbed his brother. Kartik Pramanik assaulted his brother on the leg with an axe while other members of the mob assaulted him with various weapons, and As a result of these injuries, his brother succumbed at the spot. The mob then dragged the dead body towards a village. Further, P.W.1, P.W.2 and P.W.3 all testified before the court that accused, Suin Abhinash Pradhan was present in the mob that set their house on fire and that he along with the mob participated in the killing of the deceased. After considering the evidence, the court concluded that the fact that the unlawful assembly that set the house of the deceased on fire did not attempt to assault any of the P.Ws showed that that unlawful assembly did not share the common object of committing homicide, otherwise they would have assaulted and murdered the deceasedin his native village itself and would not have allowed the deceased and his other family members to escape from the spot. However, the deceased was assaulted by some persons at a place which was about 3 K.M. away from their native village. This implies that the common intention to commit murder of the deceased was developed subsequently. Upon examining the evidence the FTC further held that none of the P.Ws had specifically stated that the accused was present at the second place where the deceased was brutally assaulted and that he participated in the assault and therefore, The FTC thus convicted the present accused for being part of the armed unlawful assembly which committed mischief by fire.

291 Ibid at Para 13
to the dwelling house of the deceased, and sentenced him to 5 years of rigorous imprisonment and fine, but acquitted him of the charge of murder, holding that the, “Commission of murder of the deceased and carrying his dead body to another place for disappearance of the evidence of murder by burning the dead body were the individual acts of some members of unlawful assembly. For their act vicarious liability cannot be fixed on the other members of the unlawful assembly”.

I. Procedural and Evidentiary Standards in the Context of Communal Violence

In the criminal justice system, State agencies are responsible for both investigating and prosecuting a crime. In situations of communal violence, there is evidence to show that many in the State machinery may be bear prejudiced against the victim minority community and may also endorse motivations and attacks by the dominant group. The rules of criminal procedure and evidence presume the existence of a legal apparatus whose institutions, such as police stations and hospitals, function in an objective, unbiased manner.

This presumption may not hold true in situations of communal violence, where communal tension and prejudice impinges on the functionaries in the State agencies. Basic elements of criminal investigation such as the prompt registration of FIR’s, diligent collection of all material evidence, conducting a TIP, arrest of accused persons, comprehensive medical examination for bodily injuries and conduct of inquest and post-mortems without delay, are systematically subverted.

The acquittal of MLA Manoj Pradhan by Fast Track Court I of Kandhamal in case no.48/16 of 2009, on the ground that the informants age was shown as 35 years by the Investigating Officer (IO), while he was found to be 60 years at the time of trial, is an example where dereliction of duty by the IO,
intentional or unintentional, resulted in denial of justice to the victim-survivors. 292

Significantly, the Supreme Court has emphasised the need to take cognizance of socio-political realities whilst examining if the existing procedures and evidentiary standards are being upheld.

“...the arguments with regard to the delay in the FIR or some minor contradictions in the statements under section 161, vis-a-vis the statements in Court or a flaw in the recording of the post-mortem or the inquest reports or the non-recovery of murder weapons etc., are a matter of little concern as these issues would be relevant and in normal circumstances and to a situation where the civil administration was functioning effectively, but in a case of a complete breakdown of the civil administration, these broad arguments are wholly inapplicable.”293

The law assumes that the interests of the victim are synonymous with that of the prosecution. Hence the premise of the criminal justice system that the State represents the victim. But this assumption cannot apply in situations of communal violence, which is orchestrated with the overt or covert support of the state and its functionaries. A state that has in any myriad ways been complicit in the violence, is unlikely to pursue rigorous prosecution against the accused.

J. Sentencing

Irregularities and delays in lodging FIRs, caused by incompetent or partisan investigation by the State or other parties, were naturally exploited by the accused to secure


293 Harendra Sarkar v. State of Assam (2008) 9 SCC 204, Para 75
acquittal.\textsuperscript{294} Even the few cases where a conviction was secured, at times the sentence awarded

“The first conviction for the violence took place in June 2009, for the act of the accused – Chakradhar Mallik of Dampidhia village – in burning down the house of a co-villager – Loknath Digal. Mallick, a Tribal leader, was also accused of instigating other people in the village to set fire to houses of Christians in the village. Yet he was awarded only two years’ punishment.\textsuperscript{295} On 30 January 2010, Fast Track Court I convicted 11 people and acquitted 17 others for burning the house of Gugula Das of Sorangada village on 18 September 2008. In addition to awarding a punishment of 5 years imprisonment, only Rs. 2000/- was imposed on each of the convicted persons as fine.\textsuperscript{296}

Similarly, Fast Track Court II sentenced 12 persons to concurrent jail terms of four years and one year, and Rs. 2000/- fine after convicting them of arson and unlawful assembly under S. 436 and S. 148 of the IPC respectively. They had torched the house and rice mill and looted household articles of Dubraj Digal of Karpiguda village under Balliguda police station on 25 August 2008.\textsuperscript{297} On 24 December 2009, two persons were convicted by Fast Track Court I and awarded five years imprisonment and Rs. 2000/- fine for torching the house of Subhash Digal and Kuli Digal of Pradhanpat village on 26 August 2008. In another case, a person was awarded four years imprisonment and Rs. 2000/- fine in connection with arson in

\textsuperscript{294} Gujarat: The making of a tragedy, Chapter 11 “The elusive Quest for Justice: Delhi 1984 to Gujarat 2002” by Vrinda Grover
\textsuperscript{296} ‘11 Convicted, 17 Acquitted in Kandhamal Riot Case’, Indo Asian News Service, 30 January 2010
\textsuperscript{297} ‘12 Convicted, Two Let Off in Kandhamal Riot Case’, The Times of India, 28 November 2009
Penela village on 27 August 2008. 298

It appears that in these cases Rs. 2000/- fine was routinely imposed on all convicted persons without taking into consideration the gravity of the crime committed and the value of the property damaged. Pertinently the FTC’s did not invoke S. 357 and Sec. 357A of the Code of Criminal Procedure, which provide for the victims to be paid compensation for the injury and loss suffered by them and impose a higher amount of fine, which, when recovered, could have been paid to the victim-survivor as compensation.

In *State v. Jaya Pradhan and14 Ors*, in an incident where more than 100 rioters armed with deadly weapons attacked the house of the deceased and set him on fire, the FTC acquitted all the 15 accused of murder and convicted3 accused for offences of causing hurt with weapons (S.324 IPC), mischief by fire with intent to cause damage (S.435 as opposed to S.436 which is mischief by fire with intent to destroy house) and house-trespass (S.452). 299 Moreover, even for these offences, those convicted were not sentenced to the maximum period prescribed. The maximum punishment prescribed for an offence committed under S.435 is 7 years, but the FTC while the awarded a sentenced of 4 years. Similarly the maximum punishment u/s. 324 is 3 years, but the FTC sentenced the accused for 2 years.

**K.An Unusual Conviction: the Conviction of Manoj Pradhan (former BJP-MLA)**

*State v. Manoj Kumar Pradhan s/o Sami Pradhan and Kali @*


Prafulla Mallick Pradhan judgment of Fast Track Court No.1, Phulbani, dated 29th June 2010.

This judgment is important as it bucks the trend of acquittals analysed in the preceding chapter. Significantly, the main accused here is a former BJP MLA Manoj Kr. Pradhan, who was arraigned as an accused in at least 8 cases of rioting and murder, but was acquitted in most. An analysis of this judgment discloses, that a verdict of conviction is pronounced only where the trial Court identifies and appreciates the specific contours of communal and targeted violence, in which the crimes are committed. Where the evidence and testimonies of the witnesses are tested against the yardstick of ‘normal’ or ordinary” times, acquittals routinely follow. This judgment is also critical as it notes that the RSS and other affiliated Hindu right wing organisations were mobilized and it was their members who led the violent attack against the Christian community. The witness testimonies point towards a planned and premeditated targeted attack on the lives and property of the Christian community, in Kandhamal.

The main prosecution witness in this case is the wife of the deceased. It is on her statement that the FIR was lodged by the police. She deposed before the Court that after the assassination of Swami Lakshmananda on 23rd August 2008, members of the RSS began indulging in violence within the locality. They set fire to the houses of Christians and some Christians were brutally assaulted by the mob. Due to this, her family and other members of the Christian community were fearful and terrified. Further she states that on 25th August 2008, rioters belonging to the Hindu community burnt houses of Christians, including her house in the village.

300 Sessions Trial Case No.174/64 of 2009, arising out of Case No.58 dated 28.8.2008, G.R. Case No.210/2008 u/s. 147, 148, 341/149, 342/149, 302/149, 201/149 IPC. Fast Track Court no. 1, Phulbani, Additional Sessions Judge, Sri Sovan Kumar Dash, Date of hearing- 17.6.2010, Date of judgment- 29.6.2010
Terrorised by the targeted killing of three men of the Christian community and with their house charred, she along with her husband and two minor daughters aged about 6 and 3 years, fled their home and hid in the forest to save their lives. It was while fleeing on a bicycle at about 2.00 – 3.00 p.m. that the two accused, along with others, obstructed their path. The few household articles that the deceased and his wife, were carrying were thrown and broken. Through the mobile phone the two accused summoned other villagers to join the murderous mob.

In no time about 100 persons from the village of Tiangia-Budepipada arrived and assaulted her husband with deadly weapons, including axes. The mob dragged her husband and assaulted him. He sustained severe injuries and fell down on the spot. The mob then covered him with firewood and set him on fire. The wife of the deceased in her testimony specifically mentions that she saw accused Manoj Pradhan actively participate in the horrific assault and killing of her husband.

The facts of this case and testimonies of witnesses underline, that not only were members of Christian community marked, encircled, hunted and killed, but also that the killings, were carried out in an extremely brutal and ruthless manner. Importantly, the mob had meticulously planned the killings, so as to leave little or no evidence of the crime. Bodies were, therefore, either burnt, or thrown into the forest to rot, or else concealed, so that the evidence of the murder would not be available. While the absence of the corpse is not fatal to the case, the absence of corpus delicti during trial, places a greater burden on the prosecution to prove the homicide and the identity of the deceased.

In this case, while assessing the evidence of the wife of the deceased, the Court astutely takes note of the panic and fear that gripped the Christian community when it was targeted
and hunted. The Court observes, “Human nature is very complex. Different persons react differently under pressure or in times of sudden bereavement or grief of a close person or seeing any serious crime and their behavior and conduct would, therefore be different. The shock suffered by PW6, having seen dastardly killing of her husband by some miscreants, possibility of losing mental balance can not be ruled out. Forgetting the name of assailants in such mental condition can not be said unnatural. Her evidence is to be tested or evaluated taking into consideration of the suffering and shock she passed after killing of her husband before her eyesight. It is to be kept in mind that incorporating the names of all the assailants in the FIR is not the requirement of law.”

The Court goes up to say that it is settled law that “the FIR is not an encyclopedia” and it is not necessary that all the names of the accused persons must be disclosed and that the absence of the name of the accused is not fatal to the case. The Court therefore held,

“there is no universal rule that whenever the names of the accused persons are omitted in the FIR, the prosecution case is to be viewed suspiciously and the same is to be thrown away. In this case the deceased was dastardly and mercilessly killed by some miscreants, who had no fault, in presence of his wife PW6. She must have frightened and shocked by seeing the occurrence taken place before her eye sight. She must have given preference to save the life of her minor daughters, aged 6 and 3 years, who were with her at the time of occurrence. The explanation rendered by her that she could not recollect the name of the assailants at the time of the recording of her statement on 28.08.2008 i.e. one day after the occurrence cannot be said to be unnatural. Further nondisclosure of the name of the accused persons by PW6 on the day of recording of her statement has no significance as the other independent eye witness to the occurrence examined in this case P.W. 4 had already disclosed the name of present accused person during recording of his statement under section 161 Cr.P.C. by the investigating officer

301 State v. Manoj Pradhan and anr, S.T.Case No.174/64 of 2009 at Para 12
302 State v. Manoj Pradhan and anr, S.T.Case No.174/64 of 2009 at Para 12
on 31.08.2008, the investigation agency already knew their involvement from other witnesses. Hence, in such premises, the delayed disclosure of the name of the accused persons by P.W. 6, cannot be considered as fatal to the prosecution case.\textsuperscript{303}

The Court also recognized that due the rampage and killing of Christians that the deceased and his wife witnessed in their village, they must have been in a state of panic, even prior to the present incident and hence it was only upon reaching the safety of the relief camps with her minor daughters that the wife of the deceased informed the police about the killing of her husband. The Investigating Officer in his evidence before the Court stated, that on 28.08.2008 the wife of the deceased had said that she was in a disturbed condition and so was not able to remember the names of the assailants and that she would narrate the facts of the incident after regaining mental stability. Accordingly on 31st August 2008, she was again examined by the Investigating Officer and on that date she disclosed the name of the assailants including the name of the present accused persons, Manoj Pradhan and Kali Pradhan.

The minor daughter of the deceased also gave evidence before the Trial court and accurately identified Manoj Pradhan and other accused in the court. The 6-7 year old girl in her testimony poignantly narrates the attack on her family and the murder of her father. While there were some minor discrepancies in the evidence of the child witness, the court did not regard it as indicative of her being tutored. In fact the court held that answers given by her were rational, and hence her testimony was not motivated or influenced by anybody, but credible in nature.

The evidence of the wife of the deceased is corroborated by an independent witness who happened to be present at the site of occurrence and witnessed the killing and attack on the

\textsuperscript{303} State v. Manoj Pradhan and anr, S.T.Case No.174/64 of 2009 at Para 12
deceased husband. The defence attempted to impeach the credibility of the independent witness by suggesting that he was an interested witness, because he belonged to the Christian community. However, the court rejected this contention of the defence and accepted the testimony of the independent witness, holding that discarding such consistent and credible evidence may lead to failure of justice.

The defense argued that although there were many shops and houses at the place of occurrence, the police did not include any person from the locality as a witness who would independently authenticate the veracity of incident. The Court dealing with this argument noted that, “the occurrence had taken place at the peak stage of rioting. Even if any person of the said locality had seen the incident he would not come forward to narrate the incident truly as the occurrence was the result of the ethnic violence. Non-production of any evidence of the locality by the prosecution is not fatal in the facts and circumstances of the present case.”

The Court specifically notes that “After communal riot there was inimical or strained relationship among Hindu and Christian persons.” The Trial Court judgment thus also forms a record that documents the fractured relationship between the Hindus and the Christian communities in Kandhamal post the targeted violence of 2008. Thus the Court grasped the ruptured reality of post riot Kandhamal, where non-Christians would not offer testimony, even if they have witnessed the crimes. A breach had taken place in the social relations in Kandhamal, causing a divide along the lines of religious affiliation.

Locating the murder and burning in the context of the communal tension, the court states, “The motive of formation of the unlawful assembly was to retaliate against the assassination of the Hindu

304 State v. Manoj Pradhan and anr. S.T.Case No.174/64 of 2009 at Para 18
religious leader which has taken place four days before the occurrence i.e. 23.08.2008.”  

As in earlier situations of mass crimes, once again a singular incident was deployed to provide an excuse, a justification, an alibi, to unleash a violent attack on the minority community. The murder of Lakshmananda Saraswati was manipulated and used as an opportunity to direct an assault on the lives, property and religious places of Christians, in Kandhamal. Similarly, in 1984, the assassination of Indira Gandhi provided an occasion to unleash mob violence and kill Sikhs in Delhi and other parts of the country. Again the burning of the train coach S6 at Godhra was used to organize a genocidal attack on the Muslims of Gujarat in 2002.

The Trial Court however rejected the Prosecution’s argument that accused Manoj Pradhan and others had come together with a common object of forming an unlawful assembly and therefore, no vicarious or constructive liability was attracted against the accused persons. The Trial Court was also not convinced that there was satisfactory and convincing evidence to establish that the accused persons participated actively in assaulting the deceased or setting him on fire.

The court was of the view that as the deceased was found accidentally at the spot, he fell prey to the hands of miscreants, and hence the members of the unlawful assembly, who murdered the deceased and caused disappearance of the evidence are individually liable and can be held guilty by attracting Section 34 of the Indian Penal Code pertaining to common intention. Hence the Trial Court did not hold members of the unlawful assembly, including accused Manoj Pradhan, to be constructively or vicariously liable for the commission of the offense of murder or causing disappearance of evidence. The

306 State v. Manoj Pradhan and anr, S.T.Case No.174/64 of 2009 at Para 20
Trial Court convicted them only for sharing the common object of the unlawful assembly to cause grievous hurt with dangerous weapons to the deceased. (Secs. 147, 149 and 326 IPC).

At the stage of sentencing, the defense counsel for Manoj Pradhan argued that since the accused was a social worker and a MLA he should be treated with leniency. The Court responded that precisely because he was a responsible person of locality and a public representative therefore commission of riot by him can not be considered lightly. The court emphasized that the crime committed was not only against an individual victim but against society at large and therefore, the punishment awarded should be consistent with the intensity and brutality of the crime that was perpetrated. The court accordingly gave the highest sentence prescribed in law to Manoj Pradhan and other accused and sentenced them to undergo a rigorous imprisonment of 7 years and to pay fine of Rs. 5,000 under section 326/149 of IPC and also to undergo further 3 months of rigorous imprisonment and pay fine of Rs. 1000 under section 147 IPC.

An Appeal against conviction is pending before the High Court.

Details of acquittal and conviction in judgments delivered by the two FTC’s in cases against MLA Manoj Pradhan
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304 part-II r/w S.149, 
IPC  
(Sentence: R.I for 6 years + fine Rs.10,000, 
in default of which R.I for 6 months u/s 
304-part II/149, IPC; 
R.I for 3 years + Fine Rs.3000 in default of 
which R.I for 3 months u/s 435, 454/149; 
R.I for 2 years + Fine Rs.2000 in default 
of which R.I for 2 months u/s 427/149; 
R.I for 1 year + Fine Rs.500, in default of 
which R.I for 15 days u/s 148, IPC; to run 
concurrently)  
Acquitted u/s 302/436, IPC |

**Conclusion:**

The judgments of the FTCs are also an important resource to understand the nature, dynamics and scale of the communal violence that broke out in Kandhamal District in August 2008. Explaining the context of the crimes one judgment notes that the prosecution has established that the assassination of the Hindu saint Swami Laxmananda gave rise to an ethno communal violence in the whole District of Kandhamal and the people of Hindu community attributed the assassination of the saint to members of the Christian community resulting in an
attack and counter-attack between the two communities.

Further the judgment records, “This being the genesis of the incident there is absolutely no doubt that the participation of any person in a mob at the relevant time could be without having an intention, knowledge or object to cause violence of any kind and as such the participation of the accused persons as members in the unlawful assembly cannot be for any purpose except with the object to cause violence, damage and hence is amenable to the mischief of Section 149, I.P.C.” 307

A few judgments record that prosecution witnesses testified in court that, “a mob consisting of persons numbering about 200 being armed with lathi, kuradhi, tangia, cowbar, flame, shouting slogan Jai Bajrang Bali attacked their village.” 308 Another judgment quotes the deposition of a Prosecution Witness as, “the rioters being in a mob armed with deadly weapons raised slogans of “Jai Sri Ram, Bharat Mata ki Jai,” and incited the mob saying, “Ama Swamin jinku tume marila, Ame tumaku chhadibu nahin.” (You have killed our Swami, We will not spare you). 309

A reading of the judgments of the FTCs, also shows the very brutal and ruthless nature of the communal attack. The testimonies of the prosecution witnesses and the medical reports describe the vicious, ferocious almost barbaric assault. In State v Pisipatra Pradhan, the medical examiners and the police constables state, “...the mob cut the neck of her husband with the help of tangia and his head was separated from the body.” “...the dead body was completely decomposed and putrefied. There was only backbone and hip. Both lower extremities and right side upper extremities were


308 Ibid.

present. There was no head.”  In State v Singiraj Pradhan,[1] on since Ramani protested against the attack by the armed rioters, she was mercilessly quartered by the mob.[311] Accused “Sanjiv Pradhan assaulted her with one spear near her left ear resulting bleeding injury to her. Sustaining bleeding injury she fell down on the ground. At this juncture Bamadev Pradhan assaulted her head with one weapon “Katuri” (billhook) and one Netramani assaulted her back with one axe. Other members of the mob namely Mande Pradhan and Balaji Pradhan assaulted her with lathis”.  

The autopsy of her dead body revealed exposed bone at the mid line and several wounds all over the body. In State v Susanta Sahu, the unlawful assembly that set fire to the house of Rasananda Pradhan knew that he was suffering from paralysis and consequently, “Due to his physical incapability, he was unable to come outside from his house as a result of which he was burnt alive there.”[313] What is most disturbing is that in many cases this pitiless and violent attack was inflicted by neighbours and acquaintances.

In situations where the offenders and the investigating agency collude to deny justice to the victims, the Supreme Court has held that “If the lapse of omission is committed by the investigating agency designedly or because of negligence, the prosecution evidence is required to be examined dehors such omissions to find out whether the said evidence is

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310 State V. Pisipatra Pradhan, FCT-I, Justice Sovan Kumar Dash, S.T Case no. 201/76 of 2009, Judgment dated: 31/03/2010  
FIR dated: 05/09/2008, Accused charged u/s: 147, 148, 302/149 and 201/149, IPC, Para 6

311 State v. Singiraj Pradhan, FTC-I, Justice Sovan Kumar Dash, S.T. Case No-90/31/2009 Date of judgment- 27.11.10, accused charged under S.147, 148, 302, 307, 379, 436, 341 r/w S 149 IPC, u/s. 25 (1-B) (a) and 27, Arms Act, S.4, ES Act

312 Ibid at para 2

FIR dated 31.8.2008 u/s.147, 148, 294, 427, 436, 452, 302, 506, 153-A r/w 149,IPC, Para 2
reliable or not. The contaminated conduct of officials should not stand in the way of courts getting at the truth by having recourse to Sections 311, 391 of the Code and Section 165 of the Evidence Act at the appropriate and relevant stages and evaluating the entire evidence, otherwise the designed mischief would be perpetuated with a premium to the offenders and justice would not only be denied to the complaint party by also made an ultimate casualty.”

The Court observed that, “if primacy is given to such designed or negligent investigation, to the omission or lapses by perfunctory investigation or omissions the faith and confidence of the people would be shaken not only in the law-enforcing agency but also in the administration of justice in the hands of courts. In cases of this nature the Supreme Court has held that there was an obligation on the trial Court to secure accountability from officers, whether in service or retired “… (iv) If the dereliction of duty and omission to perform was deliberate, then is it obligatory upon the court to pass appropriate directions including directions in regard to taking of penal or other civil action against such officer/ witness.”

To break the unholy nexus between motivated investigators and accused the Hon’ble Supreme Court further directed the Trial Courts to act against such erring officials,

“We hold, declare and direct that it shall be appropriate exercise of jurisdiction as well as ensuring just an fair investigation and trial that courts return a specific finding in such cases, upon recording of reasons as to deliberate dereliction of duty, designedly defective investigation, intentional acts of omission and commission prejudicial to the case of the prosecution, in breach of professional standards and investigative requirements of law, during the course of the investigation by the investigating agency, expert witnesses and even the witnesses cited by the prosecution. Further, the courts would be fully justified in directing the disciplinary authorities to take

314 Paras Yadav vs. State of Bihar (1999) 2 SCC 126: 1999 SCC (Cri) 104 at para 8
316 Dayal Singh and Ors v. State of Uttaranchal (2012) 8 SCC 263 at Para 14
appropriate disciplinary or other action in accordance with law, whether such officer, expert or employee witness, is in service or has since retired.” 317

In not a single case accessed for purposes of this study, did the FTCs observe the directive of the Supreme Court and hold accountable the police, who through their partisan and derelict investigation had paved the way for the acquittal of the accused. With not even a judicial reproach or administrative reprimand, the complicity and collusion of state functionaries remains unfettered.

The common thread that runs between the 1983 Nellie massacre, 1984 anti-Sikh pogrom, 1992 anti-Muslim riots in Mumbai, 2002 genocidal attack on Muslims in Gujarat, and the 2008 attack on Christians in Kandhamal, Odisha, is impunity for mass crimes. On each occasion, the victims belonging to the minority community have approached the legal system with hope and faith. Almost without exception, justice has been delayed and mostly denied. In such situations the criminal justice system is not simply adjudicating individual cases and determining the guilt or innocence of accused persons. What is at stake here is the victim community’s right to justice, the constitutional guarantees of equality and non-discrimination to all citizens, the secular and plural nature of Indian polity.

L. Rape and other Sexual Offences

As in most other contexts of communal violence, in Kandhamal violence too, women and girls of all ages were targeted for rape and other sexual offences, predominantly because they were Christians but sometimes, because they were related to / associated with / protected / assisted members of the Christian community. This part of the book discusses rape and other sexual offences perpetrated during the Kandhamal

317 Ibid at Para 47.5
violence, and analyses the response of the criminal justice system to the same. It further discusses ways and means by which criminal justice processes could be strengthened to ensure a prompt and effective response, and facilitate accountability of the perpetrators and reparative justice for the victims / survivors.

M. Rape and Other Sexual Offences in the Context of the Kandhamal Violence

C1. An Overview

Human rights activists have suspected, since the time of the violence, that the scale of sexual and gender-based violence was perhaps larger than what met the eye, and that they were not isolated instances but were perpetrated on a large number of women in a concerted and planned manner to cripple / repress / shame and humiliate the targeted Christian community. The report of Human Rights Law Network, published in December 2008, had warned: “there are several other reports of sexual assault and molestation and it is highly likely that many other such cases have gone unreported due to the shame attached.”

Social workers who assisted and conversed with women survivors soon after the August 2008 violence, particularly in the relief camps, recall many instances of varied forms of sexual assault and harassment that the victims-survivors had narrated, after they overcame the initial trauma. As the immediate focus at that time was to provide relief material to meet the specific needs of women and girls, and to help them address the trauma that they experienced, attacks on women and girls could not

be documented.\textsuperscript{319} As a social worker, Sister Justin Senapati, narrated:

When I first met the women at the relief camp, they were howling, crying, unable to articulate, unable to share in words, they were terrified. It was only after some counseling that they were able to articulate their experiences in words. When the violent mobs entered the villages, most of the women and girls who were unable to flee from the place were sexually assaulted in one way or the other. Many did not want to talk about the experience due to social stigma…The CRPF, instead of protecting the girls and women, bas, on many instances, sexually abused young women and adolescent girls while accompanying them from one relief camp to another. Many girls shared such experiences with me, while many more were embarrassed, frightened and deterred by a lack of privacy in the relief camps.\textsuperscript{320}

The report of the WILPF / WISCOMP study on the Kandhamal violence, undertaken six months after the commencement of the violence, makes the following observation:

When talking to the DG and the Collector we asked if there had been incidents of sexual violence, and if so also rape. It seemed from those talks as well as the interviews with the victims that there had been such incidents... It is well known that many women are too traumatized to even mention let alone report a rape to the police. The shame and also stigmatizing from the society is a huge hindering, and the victims need to get help by trained people. We strongly recommend

\textsuperscript{319} Saumya Uma (2014), Breaking the Shackled Silence: Unheard Voices of Women from Kandhamal, Bhubaneswar: National Alliance for Women – Odisha chapter, hereinafter referred to as NAWO report, p. 31

\textsuperscript{320} Interview with Sr. Justin Senapati, 7 July 2013, transcript on file with the authors
that resources are allocated to this important purpose... 321

The Loyola College report and Nirmala Niketan College report, which were presented at the National People’s Tribunal on Kandhamal in Delhi in 2010, make references to instances of sexual and gender-based violence. Among 60 women respondents who were interviewed by the research team of Department of Outreach, Loyola College in Chennai, at least two women confirmed that they had been gangraped while 10 women indicated that they had been “sexually violated”. 322

A 2010 report by Nirmala Niketan College of Social Work, Mumbai, states that five women reported that they and/or their female family members had been subjected to sexual assaults, with two stating that there had been a rape and attempts to commit rape mentioned by three women. 323 The study further states that on enquiry about sexual violence on women and girls in their area that they had witnessed or heard about, 12 instances of rape of women, 16 instances of rape of girls, 13 instances of beating/molestation of girls in schools and 26 instances of beating/molestation of girls in communities were reported. 324 The study further states:

(There were) physical and sexual abuse of many women and young girls. A lack of security meant that they were beaten up, threatened and verbally abused by the men, they were harassed while filling water, younger

323 Nirmala Niketan College of Social Work, Study of the Conditions of Women Affected by Communal Violence in Kandhamal District, Orissa, (Mumbai: 2010) at p. 30; report on file with the authors
324 Ibid at p. 39
girls were sexually exploited by policemen while they were bathing and nuns were harassed. Two instances of rape of girls were mentioned. In one case the girl, currently in hospital, attempted suicide by burning herself and the other girl had become pregnant after being raped and the police were trying to take advantage of her.\textsuperscript{325}

In the National People’s Tribunal on Kandhamal, held in Delhi in 2010, the jury, headed by the erstwhile Chief Justice of the Delhi High Court - Justice A.P. Shah (retd.) – made the following observation, highlighting the need for strengthening justice and accountability initiatives for sexual attacks on women:

During the attacks, women and girls were targeted for sexual violence, humiliation, brutal physical assaults or threats thereof. The jury observes, with deep concern, the silence that prevail in matters of sexual assault, at various levels including documenting, reporting, investigating, charging and prosecuting cases. Though witness testimonies indicate that sexual violence was rampant during the attacks, there are very few reported cases, and an even smaller number that have been registered and are pending in the courts for prosecution. It is the duty of the State and members of civil society to document incidents of violence against women and seek legal redress for them. The threats of sexual violence against women and their daughters continue, heightening women’s sense of vulnerability. Both at the relief camps and outside, women, particularly young, unmarried and single women, were vulnerable to trafficking for commercial and sexual exploitation and for cheap labour.\textsuperscript{326}

The jury further recommended that unreported cases of sexual and gender-based violence should be identified and the offence of sexual assault included in FIRs, in cases where it has been ignored, and further to ensure that they are effectively

\textsuperscript{325} Ibid, p. 83
\textsuperscript{326} National Solidarity Forum, Waiting for Justice - Report of the National People’s Tribunal on Kandhamal (New Delhi: 2011), pp. 173-174
investigated and prosecuted. 327

A 2014 report, researched and written by one of the present authors, documents a total of 41 incidents of a range of sexual assault on women and girls, which too, is only indicative and not an exhaustive list. 328 12 out of 17 narratives of dissimilarly placed women, reproduced in the report, based on individual in depth interviews, refer to sexual assault, threat / fear of the same. 329 The common threads in the narratives are summarized in the report as follows:

... at the time of the attack, those who could not flee into the forests and were caught by mobs were sexually assaulted and subjected to humiliation and torture... Sometimes women were raped as a revenge for their family members’ refusal to convert to Hinduism... When the men were attacked to be killed, the mob would also search for their wives with the intention of raping them. Women social workers and activists were often threatened with rape, gang rape, rape in a public place and rape of their daughters if they assisted women victim-survivors of the violence or if they testified in court against the perpetrators... When convents and Christian institutions were attacked by mobs, they would specifically search for nuns, with the intention of sexually assaulting them... The perpetrators targeted nuns, who undertake an oath of virginity and a total dedication to god, for sexual brutality, as a way of desecrating and denigrating the entire religion, and to subjugate shame and instil fear among the believers of Christianity. Sexual assault of Christian women including nuns highlights the intersection between patriarchy and religious bigotry.

The report further notes that the fear of sexual assault was all-pervasive, due to a variety of reasons. The women had heard of such incidents in the context of the violence – such as the

327  Ibid at p. 180
328  Saumya Uma (2014), Breaking the Shackled Silence: Unheard Voices of Women from Kandhamal, Bhubaneswar: National Alliance of Women – Odisha Chapter, pp. 95-100
329  Ibid at pp. 12-28
gang rape of a nun; as women and girls, they knew that they were likely to be targets of sexual violence; additionally some had witnessed sexual assaults on other women and girls; some had heard mobs shouting “kill the priests and rape their women”. The fear was substantially lesser among elderly women, but was more pronounced among adolescent girls. \(^{330}\)

Collectively, the narratives and the information compiled in the report counter the claim that such incidents were isolated or occasional aberrations. They reiterate the deliberate and systematic use of rape, other sexual offences and threat of the same by the attackers to shame, terrorize and subjugate the Christian community, as well as to scuttle processes of justice.

**M2. Specific Incidents and Responses of the Criminal Justice System**

Details of many incidents of rape and other sexual offences in the context of communal violence in Kandhamal have been documented, highlighted and discussed in the reports mentioned above. For the purpose of the present report, which seeks to introspect justice and accountability initiatives, a few incidents are highlighted and discussed below, to illustrate the functioning and responsiveness of the criminal justice system.

**Sister AA, K.Nuagam Block**

Sister AA was a nun working in Dibyajyoti Pastoral Centre, K.Nuagam block, Kandhamal. On 25 August 2008, Sister AA, along with her colleague, Father Thomas Chellam, escaped from the Pastoral Centre and was in hiding at the house of Jasobanta Pradhan, as they feared that a violent mob would attack them. The subsequent day, the mob attacked Pastoral Centre and thereafter forcibly brought out Sr. AA and Fr. Chellam from the...
house, assaulted them, tore their clothes, molested the nun and thereafter took her to Jana Vikas Centre; the building of a non-governmental organization nearby, where she was stripped of all her clothes, thrown on the verandah which was full of glass pieces and ash, and gang-raped.

She was also molested by several others. Thereafter the mob paraded her in the local market along with Fr. Chellan in a half-naked condition, during which time they were physically assaulted and verbally abused. Thereafter they were taken to the Block office, where the Block Development Officer pacified the mob, taken to K.Nuagam outpost where they were provided medical treatment, and the same night, taken to Balliguda for medical examination. The next day, they were taken to the Balliguda police station for registration of FIR.

The sexual assault on Sr. AA resulted in a public outcry, not only within India but also internationally. The criminal justice processes that followed, also had substantial visibility in the print, visual and electronic media worldwide. However, a high media scrutiny did not guarantee that the processes of justice were followed in an efficient, unbiased and professional manner. There were various attempts made to scuttle justice, and multiple legal strategies employed to counter the same, as detailed below. Below is an attempt to reconstruct the various initiatives taken at ensuring justice in the case.

**Complicity and Callousness of the Police**

In her press statement, which she issued two months after the incident, she had this to say about the role of the police:

*When we reached the marketplace, about a dozen of Orissa State Armed Police policemen were there. I went to them asking to protect me and I sat between two policemen but they did not move… From there, along with the block officer the mob took us to police outpost Nuagaon… One*
of them who attacked me remained at the police outpost. Policemen then came to the police outpost. They were talking very friendly with the man who had attacked me and stayed back… The inspector incharge and other two government officers took me privately and asked whatever happened to me. I narrated everything in detail to the police, how I was attacked, raped, taken away from policemen, paraded half-naked and how the policemen did not help me when I asked for help while weeping bitterly. I saw the inspector writing down. The inspector asked me, “Are you interested in filing FIR? Do you know what will be the consequences?”… On 26/8/08 around 9 am, we were taken to Balliguda police station. When I was writing the FIR, the inspector in-charge asked me to hurry up and not to write in detail. When I started writing about the police the inspector told me this is not the way to write FIR, “Make it short.” So I rewrote it for the third time in one and a half page. I filed the FIR but I was not given a copy of it… At around 4 pm, the inspector-in-charge of Balliguda police station along with some other government officers put us in the OSRTC bus to Bhubaneswar along with other stranded passengers. Police were there till Rangamati where all passengers had their supper. After that I did not see the police.

The state police failed to stop the crime, failed to protect me from the attackers. They were friendly with the attackers and they tried their best that I did not register an FIR nor make complaints against police which did not take down my statement as I narrated in detail. They abandoned me half of the way. I was raped and now I don’t want to be victimised by the Orissa police. I want a CBI enquiry…

The statement of Sister AA, who was sexually assaulted and gang-raped by a mob, speaks volumes of the complicity of the police with the attacks against Christians. The so-called custodians of law committed a grave dereliction of their duty to protect Sr. AA, shielded the perpetrators and attempted to scuttle processes of justice by ensuring that she does not give

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a detailed complaint of the incident and omits details of the complicity of the police.

In response, five police officials were reportedly suspended in Sister AA’s case for ‘misconduct and negligence of duty’ on the basis of a joint report filed by the Kandhamal Collector Krishan Kumar and Superintendent of Police Pravin Kumar.\footnote{‘Five Cops Suspended in Orissa Nun’s Rape Case’, The Indian Express, 31 October 2008} It is not known if any disciplinary proceedings were initiated against them, or whether and when they were reinstated. A very public suspension of errant police officials, followed by their surreptitious reinstatement, is a routine strategy adopted by the government to assuage public outrage against police culpability and complicity in heinous offences.

**Delay in Arrests**

Although many of the perpetrators were known to the police and lived in the same area, there was a huge delay in arresting them. The first arrests took place about 38 days after the lodging of the FIR. As mentioned in the MARG report, delay in arresting the perpetrators not only facilitates multiple crimes by them, but also emboldens the offenders and has the potential to intimidate and silence victim-survivors.\footnote{Kandhamal: The Law Must Change its Course, researched and written by Saumya Uma, edited by Vrinda Grover, published by Multiple Action Research Group (MARG), New Delhi, 2010, hereinafter referred to as the MARG report, p. 99} True to these words, the perpetrators were, in reality, free to intimidate and silence the victim-survivor and the witnesses, in order that they turn hostile in court, which would result in acquittal of the accused persons.

**Attempt at Impartial Investigation**
The Balliguda police station commenced its investigation after registering an FIR. However Sister AA, justifiably, did not have faith in the investigation by the Odisha police, since she had witnessed the level of familiarity and the cordial relationship that officials at the Balliguda police station shared with the attackers. Through a petition filed in the Supreme Court, she sought a transfer of the investigation to the Central Bureau of Investigation (CBI).

The Orissa state vehemently opposed a transfer of the investigation to the CBI. In fact, it took 39 days after the incident for the Orissa government to admit that Sr. AA had been gang-raped and for Naveen Patnaik, the Chief Minister, to condemn the incident as “shameful”. It is widely believed that the opposition to investigation by the CBI arose from a fear that administrative failure, and collusion of public officials in the violence would be exposed.

The Supreme Court refused to direct a CBI investigation, and instead directed Sr. AA to cooperate with the Orissa state police. It observed: “At this stage, we do not think that handing over the investigation into the case from the State police to the CBI is in the interest of the victim as well as in the interest of justice. We think that the victim will cooperate with the state police.”

Test Identification Parade & the Mala Fide Action of the Magistrate

Pursuant to the Supreme Court’s order, Sister AA had no option but to cooperate with the Orissa state police despite her lack of trust and confidence in them. A Test Identification Parade was conducted on 22 October 2008 by the Orissa state police. However, Sister AA was not satisfied with the parade, as the police had presented the attackers with the parade. It is believed that the parade was conducted in a manner that was prejudicial to the investigation.

334 P.S. Case No.70 of 2008 at Balliguda police station, under Sections 147, 148, 324/149, 354/149, 355/149, 294/149, 506/149 and 376(2)(g) of the Indian Penal Code

335 Order of the Supreme Court dated 22 October 2008 in Crl(Appeal) No.2044/2013
Parade (TIP) was scheduled to be held in Balliguda, Kandhamal district, for Sr. AA to identify the attackers. In November 2008, while she was undergoing trauma counseling in Delhi, she moved an application before the sub-divisional judicial magistrate (SDJM) in Balliguda, for a transfer of the TIP outside the district of Kandhamal. Kandhamal still had a tense situation then, and the victim-survivor feared for her own safety as she had been threatened. The magistrate’s court passed an order on 19 November 2008, rejecting her plea, on the ground that he had no jurisdiction to consider the circumstances in brought to the notice of the court in order to decide holding TIP at a place conducive to fair investigation. Sr. AA appealed against the order in the High Court.  

On 5 December 2008, holding that the view taken by the Balliguda SDJM was not tenable and his order cannot withstand the scrutiny of law, Justice B.K. Patel of the Orissa High Court directed that the TIP be conducted in Cuttack instead of in Kandhamal. “Decisions as regards the manner in which TIP is conducted include decision to determine the place in which the TI Parade is conducted,” the judge observed. The High Court further observed that given the facts and circumstances of the case, the TIP proceedings were to be conducted promptly after taking necessary precaution to ensure its credibility.  

The TIP was conducted on 5 January 2009 by Shri Prasanta Kumar Das, Sub-divisional judicial magistrate, Cuttack. During the trial, he was a prosecution witness (PW 18). In the format of the TIP proceedings (Exhibit 8), the magistrate made no reference to any statement alleged to have been made by Sr. AA about the role of one of the accused persons identified by
her during the TIP. However, during examination-in-chief, the magistrate stated as follows: “Sister Mina Baruwa identified accused Santosh Patnaik as the said suspect gave her a slap, pulled her wearing Saree, squeezed her breasts and did not commit any other overt act.”

The Special Public Prosecutor failed to confront the magistrate on his deliberate misstatement, aimed at misleading and confusing the court, by stating that what he claimed orally was not reflected in Exhibit 8. Since the Special PP failed to confront the magistrate, Sr. AA moved an application before the trial judge on 1 May 2011 for recalling the magistrate to the witness box, to avoid any ambiguity. The sessions judge, through an order dated 16 May 2011, rejected the application filed by Sr. AA, on the technical ground that it should have been filed by the Special PP and not by her.

Thereafter, Sr. AA filed a petition in the High Court of Cuttack, appealing against the session judge’s order. The High Court took the view that the appellant, as an informant, had a very limited role to play so far as the trial is concerned, that she could not have filed the petition to recall certain witnesses and that such a step was beyond the authority granted to an informant or a private person under Section 301 Cr.P.C. The High Court proceeded further and stated that reposing confidence in the Trial Court that the learned Trial Judge would eschew any fact not found on record or irrelevant and just decision would be rendered and further observed that it would however be open for the appellant to file a written submission, in which event, the trial Court should accept such written submission and consider the same while passing the judgment.

Sr. AA thereafter appealed against the High Court’s order

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339 Criminal M.C. No. 1746 of 2011
340 High Court order dated 5 January 2012
in the Supreme Court.341 After considering the documentary and oral evidence, as well as the arguments advanced by the advocates of Sr. AA, the state and the accused, the Supreme Court stated as follows: 342

Having perused the said evidence with particular reference to the issue brought to the notice of this Court, we are of the firm view that the inability of the trial Court in failing to take appropriate action as and when it was brought to its notice about the fallacy in the oral version, would certainly cause a serious miscarriage of justice, if allowed to remain. Unfortunately, in our considered view, the High Court appears to have adopted a very casual approach instead of attempting to find out as to the appropriate procedure which the trial Court should have followed in a situation like this. The High Court also committed a serious illegality in merely stating that under Section 301 Cr.P.C. there is no scope for a victim as a private party to take any effective step to rectify a serious fallacy committed by a statutory witness who is supposed to maintain cent per cent neutrality while giving evidence before the Criminal Court. Where the said witness is a Judicial Officer whose version before the Court carries much weight, by virtue of his status as a Judicial Officer while acting as a statutory witness, namely, as an officer who was authorized to hold a test identification parade, it was incumbent upon such witness to maintain utmost truthfulness without giving any scope for any party to gain any advantage by making a blatantly wrong statement contrary to records. We, therefore, find serious irregularity in the orders impugned in this appeal. (para 17)

…the trial Court as well as the High Court instead of rejecting the application of the appellant by simply making a reference to Section 301 Cr.P.C. in a blind folded manner, ought to have examined as to how the oral evidence of PW-18 which did not tally with Exhibit-8, the author of whom was PW-18 himself, to be appropriately set right by either calling

341 Sister AA vs State of Orissa and others, Criminal Appeal No. 2044 of 2013, SLP (Crl.) 1103 of 2012
342 Order of Supreme Court dated 5 December 2013 in Criminal Appeal No. 2044 of 2013, SLP (Crl.) 1103 of 2012
upon the Special Public Prosecutor himself to take necessary steps or for that matter there was nothing lacking in the Court to have remedied the situation by recalling the said witness and by putting appropriate Court question. (para 18)

In criminal jurisprudence, while the offence is against the society, it is the unfortunate victim who is the actual sufferer and therefore, it is imperative for the State and the prosecution to ensure that no stone is left unturned. It is also the equal, if not more, the duty and responsibility of the Court to be alive and alert in the course of trial of a criminal case and ensure that the evidence recorded in accordance with law reflect every bit of vital information placed before it. It can also be said that in that process the Court should be conscious of its responsibility and at times when the prosecution either deliberately or inadvertently omit to bring forth a notable piece of evidence or a conspicuous statement of any witness with a view to either support or prejudice the case of any party, should not hesitate to interject and prompt the prosecution side to clarify the position or act on its own and get the record of proceedings straight. Neither the prosecution nor the Court should remain a silent spectator in such situations. Like in the present case where there is a wrong statement made by a witness contrary to his own record and the prosecution failed to note the situation at that moment or later when it was brought to light and whereafter also the prosecution remained silent, the Court should have acted promptly and taken necessary steps to rectify the situation appropriately. The whole scheme of the Code of Criminal Procedure envisages foolproof system in dealing with a crime alleged against the accused and thereby ensure that the guilty does not escape and innocent is not punished. (para 19) (emphasis added)

It required a petition to the Supreme Court, to set right the weakening of the prosecution’s case caused by the deliberate wrong statement of the magistrate who conducted the TIP. It is not in every case that the victim would have the time, energy, contacts or resources to petition the Supreme Court to set right such injustices caused during trial. The mechanical and callous approach of the trial court and the High Court on this
issue is illustrative of their approach in many cases related to Kandhamal violence.

**Hostile Atmosphere in Court and Transfer of the Trial**

The trial in Sr. AA’s case began before the sessions judge in Fast Track court I at Phulbani.\(^{343}\) She moved an application before the High Court for a transfer of the trial outside Kandhamal, under S. 407 of Criminal Procedure Code, citing the following grounds: \(^{344}\)

- a) petitioners were being threatened not to go to Balliguda or to participate in the trial, they apprehended a danger to their life, and hence were residing outside Kandhamal
- b) witnesses were also threatened with dire consequences and hence frightened to participate in the trial in Phulbani, they too are residing outside Kandhamal
- c) situation in Phulbani continued to be tense and communally volatile
- d) as the friends and relatives of the accused were residents of Phulbani, the petitioners apprehend danger to their lives
- e) in various instances, witnesses have turned hostile in court due to threats and intimidation
- f) there was also the possibility of hampering a free, fair and impartial trial
- g) the investigation was not being conducted in an impartial manner and

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343 Sessions Trial No. 1 of 2009, arising out of Balliguda P.S. Case No. 70 of 2008, corresponding to CID CB Case No. 39 of 2008 and G.R. Case No. 188 of 2008 of the court of S.D.J.M., Balliguda

344 Sister Mina Lalita Borwa vs. State of Orissa and others TRP (CRL) No. 15 of 2009 along with Thomas Chellan and others vs. State of Orissa and others TRP (CRL) No. 17 of 2009
h) the Public Prosecutor in the Fast Track Courts lacked the competence to handle the prosecution in a case of this nature.

The state government denied all the allegations made, and stated as follows:

a) situation in Kandhamal district is completely normal and peaceful
b) two Fast Track Courts have been set up for expeditious trial of all the cases arising out of communal violence;
c) trial of a number of cases are being conducted in a free and fair manner
d) since the Crime Branch has taken over the charge of investigation, there should not be any doubt for the impartiality of the said investigating agency
e) as Special Public Prosecutors have been appointed, their impartiality cannot be doubted
f) a substantially large number of trials have ended with conviction
h) if a witness turns hostile during trial, the state machinery has nothing to do with that, the Public Prosecutor, with permission of the court, can question such a witness under S. 154 of Indian Evidence Act
i) investigating agencies are providing all necessary assistance in cases where witnesses seek security or directions were issued by the trial and
j) the State government is willing to make all necessary assistance / security to the petitioners and the witnesses as may be required.
On 25 March 2010, the state government filed a memo in the High Court, stating as follows:

In view of the averments made in this application that the petitioner is undergoing physical, mental and traumatic stress, the Government, for the larger interest of justice and transparency, has no objection for transfer of this particular case. However, the allegations regarding the overall law and order situation in Kandhamal District and partiality of the Investigating Agency or the Public Prosecutor and the manner of trial is categorically denied… As such the concession for transferring the case should not be construed as acceptance of the allegation regarding over all law and order situation prevalent in Kandhamal District and/or the impartiality of the Investigating Agency or the Public Prosecutor or nonexistence of conducive atmosphere for free and fair trial in the district. Since the concession is made by taking into consideration the peculiar facts and circumstances of the case, this should not be treated as a precedent for other cases on same or similar grounds. 345

On 31st March 2010, the Orissa High Court ordered the transfer of the rape case of Sr. AA from the Phulbani fast track court to the Sessions Court in Cuttack, based on the stand taken by the state government, and to meet the ends of justice.

Trial proceeded in the Cuttack sessions court, and judgment was passed on 14 March 2014. If one studies the judgment, which discusses the testimonies of various witnesses, it is significant that some witnesses who had turned hostile in Phulbani, were able to support the prosecution case in Cuttack. For example, Surendra Digal (PW 6) had been declared hostile by the Fast Track court at Phulbani but supported the prosecution’s case in the Cuttack court. He explained that in the Phulbani court, he had “fear psychosis”. 346 Similarly, Sunil Kumar Naik (PW 9) – a

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345  Ibid at para 9
346  State vs Santosh Kumar Patnaik alias Mithu and 8 Others, S.T. Case No. 243/2010; judgment delivered by Shri Gyanaranjan Purohit, Sessions Judge, Cuttack, on 14 March 2014, at para 7
police constable attached to K.Nuagam outpost – was declared hostile in Phulbani court; he was able to testify and support the prosecution case in the Cuttack court, and stated that he had been under fear and hence was unable to deposite freely in Phulbani.\textsuperscript{347} This indicates that the transfer of proceedings to Cuttack helped some prosecution witnesses deposite freely.

\textbf{Threats to and Intimidation of Witnesses}

Despite the transfer of trial from the Fast Track court to sessions court in Cuttack, intimidation and threat to witnesses did not cease. Since this was a high profile case, concerted effort was taken by the perpetrators and their supporters to intimidate the witnesses into silence. As discussed under the topic of ‘Threats to Witnesses’, Kantia Naik – a key witness in the case as he was the only witness to have seen the rape – had been abducted and threatened not to deposite in court. Many other witnesses had also been threatened, apart from Sr. AA and Fr. Chellan, as stated in the petition for transfer of the proceedings to Cuttack, discussed above. During the trial in Cuttack, a number of witnesses turned hostile – for example, Chanchala Pradhan (PW 4) and Dhaneswar Mallick (PW 5).

Other prosecution witnesses sought to weaken the prosecution case through their testimonies, but were not declared hostile by the prosecution. For example, PW 17 stated that he was present when the police questioned Sr. AA at the Balliguda police station. Although Sr. AA had used the word ‘rape’, when asked by the IIC to narrate the sequence of rape, she had allegedly said that someone sat on her thigh.\textsuperscript{348} PW 18 – the magistrate who conducted the TIP, and the statement he made during trial has been discussed in detail above.

\begin{footnotes}
\item[347] Ibid at para 8
\item[348] Ibid at para 14
\end{footnotes}
The fact that Sr. AA continues to be in hiding six years after the incident is indicative of the level of threat that continues to exist against her.

The Judgment and Sentence

On 14 March 2014, three persons were convicted and six were acquitted by the Sessions court at Cuttack. On one hand, it might appear that after six years, justice has been rendered at last, as at least three out of nine persons have been convicted. However, on a closer analysis, it is pertinent to note that only one person – Santosh Patnaik alias Mithu - has been convicted of rape. Two others – Gajendra Digal and Saroj Badhai - have been convicted of lesser offences such as ...Prosecution is also pending against 24 more accused persons involved in the attack. Since the cases against all accused persons have not been clubbed, and different persons have been arrested and chargesheeted at different points in time, Sr. AA is repeatedly required to testify in court in the prosecution of each accused. While this applies to all witnesses, it is particularly traumatic for Sr. AA.

On the issue of sentence, Santosh Patnaik @ Mithu has been awarded 11 years rigorous imprisonment, while the other two convicted persons have been sentenced to two years’ rigorous imprisonment. In weighing the considerations for sentencing the three convicted persons, contrary to reports such as that

349 State vs Santosh Kumar Patnaik alias Mithu and 8 Others, S.T. Case No. 243/2010; judgment delivered by Shri Gyanaranjan Purohit, Sessions Judge, Cuttack. Santosh Patnaik alias Mithu, Gajendra Digal and Saroj Badhai were held guilty for the offences under S. 148, 354/149, 355/149, 294/149, 506(II)/149 IPC, and awarded two years rigorous imprisonment on each count; Santosh Patnaik was also convicted under S. 376(2)(g) IPC and awarded rigorous imprisonment of eleven years. Juria Pradhan, Kartika Pradhan, Biren Kumar Sahu, Tapas Kumar Patnaik, Muna Badhei and Jaharlal Behera who were prosecuted were given benefit of doubt and acquitted.
of the National Commission for Minorities, the judge has erroneously concluded that the violence in Kandhamal broke out suddenly and spontaneously after the killing of Swami Lakshmanananda. Considering the “nature of offence and the surrounding circumstances”, the court awarded two years of rigorous imprisonment on each of four counts of offences, and 2 months for a fifth offence (obscenity), and stated that these are to run concurrently (simultaneously).  

Similarly in considering the sentence to be awarded for Santosh Patnaik, convicted of rape, the court sought to balance between the circumstances in which Sr. AA was gang raped in the presence of a mob (which warranted a stringent sentence) with its own conclusion that the gang rape was committed on a sudden impulse. It awarded 11 years rigorous imprisonment + a fine of Rs. 10,000, which, if realized, would be given to Sr. AA as compensation under S. 357 Criminal Procedure Code.

Appeals have been filed in the High Court by Sr. AA and her team of lawyers against the acquittal and the sentence awarded; appeals have also been filed by the accused persons, challenging their convictions.

Two other aspects of Sr. AA’s case deserve to be highlighted, as they are intricately connected with engagement of victim-survivors of sexual violence with the criminal justice system:

**Character Assassination by the Media**

From the time soon after the incident of rape, a character assassination of Sr. AA was commenced by some sections of the media. Samaj, an Oriya daily, on 24 October 2008 and Dharitri, on 28 October 2008, indulged in vicious character assassination of
Sr. AA, alleged that she was in the habit of sexual intercourse.\textsuperscript{352} It appears that the strictures in law that prohibit introduction of evidence on the past sexual conduct of the victim-survivor of rape apply only to trials in court.

The tactical emotional intimidation and slanderous character assassination against women who speak out against sexual violence and seek legal redress ought to be strongly condemned. Such character assassination is bound to have a chilling effect on other victim-survivors of sexual offences, and deter them from seeking legal redress.\textsuperscript{353} The fact that there are at least 41 documented incidents of sexual assault, yet prosecution has been launched only with regard to two incidents, indicates the low confidence level and accessibility enjoyed by the criminal justice system in Kandhamal. Unless the culture of victim blaming is stamped out, justice for victim-survivors of sexual assault, particularly in contexts of communal violence, would remain remote and illusive.

\textbf{Time Delay}

Sr. AA’s rape trial has been protracted and spanned over a period of six years, as seen from the timeline below. A major reason for the same is that directions and orders had to be obtained from the higher judiciary on many aspects of injustice that the lower courts could have addressed, if they had not adopted a callous approach. Petitions in the High Court


\textsuperscript{353} S. 53A of the Indian Evidence Act states that evidence of the character of the victim or her previous sexual experience is irrelevant on the issue of such consent or the quality of such consent. Proviso to S. 146 of the Indian Evidence Act prohibits questions being asked to the victim of sexual assault, in cross examination, with regard to her general immoral character or previous sexual experience.
and Supreme Court take time to be heard, and till then, the proceedings before the lower court had to be stayed. At present, trial remains pending against 23 more accused persons. Appeals against the March 2014 judgment at the High Court are pending.

The time delay in conclusion of a rape trial can also deter other women from seeking legal redress for sexual assault, as the protracted legal proceedings prevent a victim-survivor from healing, coming to terms with the assault on her and moving ahead in life.

<table>
<thead>
<tr>
<th>Date</th>
<th>Incident / Legal Action</th>
</tr>
</thead>
<tbody>
<tr>
<td>25 Aug 2008</td>
<td>Gang rape of Sr. AA</td>
</tr>
<tr>
<td>25 Aug 2008 (night)</td>
<td>Medical examination of Sr. AA done</td>
</tr>
<tr>
<td>26 Aug 2008</td>
<td>Registration of FIR</td>
</tr>
<tr>
<td>Sep 2008</td>
<td>Arrests of perpetrators commence</td>
</tr>
<tr>
<td>Sep / Oct 2008</td>
<td>Sr. AA files petition in the Supreme Court, seeking transfer of investigation from Orissa state police to CBI</td>
</tr>
<tr>
<td>22 Oct 2008</td>
<td>Supreme Court rejects plea for transfer of investigation to CBI; directs Sr. AA to cooperate with the Orissa state police</td>
</tr>
<tr>
<td>Nov 2008</td>
<td>Sr. AA applies to Balliguda magistrate’s court for transfer of Test Identification Parade (TIP) outside the district of Kandhamal;</td>
</tr>
<tr>
<td>19 Nov 2008</td>
<td>The magistrate rejects the application</td>
</tr>
<tr>
<td>Thereafter</td>
<td>Appeal filed in the High Court against magistrate court’s order;</td>
</tr>
<tr>
<td>5 Dec 2008</td>
<td>High Court allows appeal and orders TIP to be conducted in Cuttack instead of Kandhamal</td>
</tr>
</tbody>
</table>
5 Jan 2009 | TIP conducted in Cuttack by Prasanta Kumar Das, sub-divisional magistrate, Cuttack
---|---
Thereafter | Chargesheet filed by police and trial commences before the Additional Sessions Judge, Fast Track Court 1, Phulbani
---|---
30 March 2010 | Petition filed in the High Court for transfer of the proceedings from Kandhamal district to Cuttack
---|---
Thereafter | High Court passes order transferring the proceedings from the Fast Track court in Phulbani to Sessions court in Cuttack
---|---
1 May 2011 | Sr AA moved an application for recalling to the witness box, the magistrate who had conducted the TIP
---|---
16 May 2011 | Application for recalling the magistrate rejected by the Trial court
---|---
Thereafter | Appeal filed against the Trial court’s order in the High Court, which the High court rejects
---|---
Thereafter | Appeal filed in the Supreme Court against the High court’s order, rejecting right of the victim-survivor to recall the magistrate to cross-examine him
---|---
5 Dec 2013 | Supreme court passed judgment, allowing recall of the magistrate as witness, directs Trial court to conduct the Trial in an expeditious manner
---|---
14 Mar 2014 | Trial court passes judgment, convicting 3 persons and acquitting 6 others.
Thereafter

| Appeal filed against acquittal and sentencing by Sr. AA, appeal filed against the conviction by the accused persons convicted by the Trial court, Trial is pending against many other accused persons. |

Ms.BB, Tikabali block

Manini Digal, Barakhama village, Balliguda block

Manini Digal was a teenaged girl living in Barakhama village, Balliguda block. In a video clip, she narrated the attack on her in the following words:

“On the 26th of August in the afternoon, 25-30 Hindu people came and attacked the Catholic church. They brought down some homes and then they came to our home. My father went out to talk to them. Then they started to beat my father and they were going to kill my father. He was able to run away from our home. Then they beat my grandfather and my mother on her leg. I was inside, being silent. They came and grabbed my hair and started yelling at me. They said I was getting proud. They then took me out of my home and started to beat me with sticks over and over with sticks all over my legs and hands. Someone took out a knife to kill me, and then he put it back. I was also beaten on my head. My hands and legs weren’t working.” 354

After she lost consciousness due to the beatings, she was reportedly raped but has no memory of it. 355 Indira Digal, an eye witnesses from Barakhama village and Chanchala Nayak, whose husband Prafulla Nayak was killed by a mob in the same village, corroborated the physical and sexual attack on Manini, they named 13 persons who perpetrated the violence, in the

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354 Available at http://vomcblog.blogspot.in/2012/05/maninis-overcoming-faith.html, accessed on 9 September 2014

355 Ibid
National People’s Tribunal on Kandhamal.\textsuperscript{356} In particular, they corroborated the fact that she had been stripped of her clothes in public by a violent mob.\textsuperscript{357} As per Manini, two of her attackers were fellow students from her school. She recognized two others from the village. The mob of boys and men ranged from the age of 15 to 30.

They poured kerosene on her and burnt her. Thereafter the mob left her. She got up with her clothes ablaze and ran to another house. She was hit by another man with a stick even as she was running with part of her body aflame. She doused the flames with water and was in excruciating pain. She went and hid in the house of a relative. Another man came and attacked her aunt, who was a Hindu, with a sword. He was looking for Manini but could not find her. Her aunt was unable to help her as she too had been attacked. Thereafter her father reached her and took her to the hospital.

The right side of her body had been severely burnt. Manini was admitted to a hospital in G. Udayagiri, Kandhamal district with 60\% burns. Manini states that some of the perpetrators reached the hospital and asked the doctors not to keep Manini at the hospital, threatening to kill them if they did. A day later, taken by government officials to the MKCG Medical College and Hospital in Berhampur, Ganjam district, where she was admitted and received treatment for about a month. Thereafter she moved out of the state of Odisha, to Indore, where she received further treatment and lives presently.

An FIR was registered in Berhampur.\textsuperscript{358} Adv. B.D. Das, who

\begin{itemize}
\item \textsuperscript{356} National Solidarity Forum, Waiting for Justice - Report of the National People’s Tribunal on Kandhamal (New Delhi: 2011), pp. 67-68 (hereinafter referred to as the NPT report)
\item \textsuperscript{357} Ibid
\item \textsuperscript{358} FIR No. 12/40 was filed with Boijnath Nagar police station, Berhampur, Ganjam district, under Sections 147, 452, 354 and 120 B of the Indian Penal Code
\end{itemize}
provided legal assistance to the victim-survivor’s family, states that there was an inordinate delay in the FIR being transferred from the concerned police station in Berhampur to Balliguda police station in Kandhamal, and that the investigation was shoddy.\textsuperscript{359} Some perpetrators were arrested and subsequently released on bail. It is shocking that the police at Berhampur failed to record the victim-survivor’s statement or get her medical examination done, even though she was admitted in the Berhampur hospital for a month.

This is a grave dereliction of duty of the police, as mandated by law. Statements of other witnesses have been reportedly recorded by the police, chargesheet has been filed. However, Manini’s evidence is crucial for conviction of the accused. The police does not seem to have taken the effort to contact her, record her statement or produce her in court as a prosecution witness, as per Adv. B.D.Das who has assisted the victim-survivor’s family. The perpetrators of the violent attack on Manini are still at large.

**CC, Kuntapalli village, Padampur, Bargah district**

Although violence was most intense in Kandhamal district, there were incidents reported from adjoining districts too. An instance of suspected sexual violence and murder of a young woman – CC was reported from Kuntapalli village, Padampur, Bargah district. CC was a 20-21 year old Hindu girl, who studied in Padampur Women’s College and worked at the Padampur orphanage in Bargah district to finance her education. The orphanage was set up by Fr. Edward Sequeira for children of leprosy patients. CC looked after about 22 Hindu orphan boys at the orphanage. A violent mob consisting of about 300 persons reportedly mistook her for a Christian girl and attacked her.\textsuperscript{360}

\textsuperscript{359} Interview with Adv. B.D.Das, 17 June 2014; transcript on file with the authors.
\textsuperscript{360} ‘Woman Burnt by the Mob was Hindu, Not Christian’, The Indian Express, 28 August 2008
Fr. Edward Sequeira, who had established the orphanage, had been attacked by a violent mob and locked into a room, where he lost consciousness due to suffocation from smoke. Before he became unconscious, he had heard the cries of CC. Nicholas Barla, an advocate and activist, quoted Fr. Edward Sequeira’s words before the National People’s Tribunal of Kandhamal as follows:

“Our others caught hold of Ms. CC (age 21) a Hindu Adivasi girl, who was a student of 2nd year B.A., an orphan herself, and residing at the orphanage and taking care of the children. As they were binding her hands with wire I heard her crying “Father, they are going to burn me alive”. Since I was already thoroughly beaten up, having deep head injury, continuous bleeding, and her cry was the last thing I could remember before I fell unconscious. Later on I learnt that CC was stripped naked, gang raped and thrown into the fire of centering materials.

Mind me, without clothes or petrol poured, can a naked body catch fire easily? Twice the hapless girl tried to escape. Third time when she tried to come out, someone picked up a log and hit her mercilessly on the head, as someone would kill a snake. How cruel people can be and the entire mob watching! They saw to it that the lower part of her body is completely burnt so as to destroy all evidence. CC haunts me till today, often seeking justice. The sad story is that no witness shall come forward to prove her case.”

Procurator of the Sambhalpur diocese, T.V. Peter, reportedly went to the spot soon after the violence and spoke to witnesses, and confirmed that CC had been gang raped before being burnt to death by the mob.361 He reportedly expressed his willingness to testify before any court of law.362

361 ‘She was Gang-raped Before Being Burnt Alive’, Daily News and Analysis, 4 October 2008
362 Ibid
The NHRC, which had maintained a stoic silence for over 5 years after the Kandhamal violence, thereafter released a report which served more as a public relations exercise on behalf of the state government and the police. Instead of condemning the gang rape and murder of CC and the destruction of evidence in no unequivocal terms, and recommending that the criminal justice system make the perpetrators accountable for the heinous crime, the NHRC stated this: “A twenty year-old late Ms. CC sacrificed her life to save the life of the children living in the orphanage …” 363

Although a photograph of her partially burnt face was reproduced in the media, and became one of the symbolic images of the violence, sexual assault could not be proven as the lower part of her body was completely burnt with the intention of deliberately destroying evidence of such assault. Christians in the vicinity fled for their lives and did not witness the attack,, those who had gathered were those who participated in the attack, actively or passively as onlookers. The few witnesses who had earlier spoken about the incident appear to have been threatened into silence. An FIR has been registered at the Padampur police station, investigation ongoing and at least 20 persons were reportedly arrested. 364 The legal provisions concerning rape have not been included in the FIR.

Ms. D Digal, Sankarakol village, Tikabali block


Narasingho Digal, a 24 year old man, son of Ms. D Digal, narrated to the People’s Tribunal on Kandhamal about the attack on his mother:

“On 25.09.2008, morning at around 6.00 a.m., the members of RSS, BJP, VHP, Bajrangdal, namely Dadhiya Mallick, Montu Naik, Sudbir Pradhan, Manoj Pradhan the present MLA, Sushil Kanhar etc. came from ............ Tikabali and Chakapado Blocks, along with 500-600 people... They were abusing Christians in vulgar language, kill Christians, rape Christians, destroy Christian property, chase them out from the district etc... The attackers pulled my father and started abusing, shouting in filthy language and dragged him. Also they dragged my mother. Later the criminals raped my mother and killed her in the forest and similarly they brutally killed my father also.”

A violent mob consisting of 500-600 persons had earlier attacked, ransacked, looted and destroyed his house, before dragging his parents into the forest. Narasingho also said that the night before the attack, there had been a preparatory meeting at Majagada village where the perpetrators were present.

The 45 year old Ms. D’s body was recovered from Majhipadar village, five kilometres away from where her husband’s body was found – in Barpada. One report mentioned that her body was found floating in a river. The doctor who conducted the post mortem examination of Ms. D’s body said that the body was “totally decomposed and putrified.” The doctor spoke about

365 NPT report, p. 68
366 ‘Couple Found Dead in Riot Hit Kandhamal’, IBN Live, 29 September 2008
367 The bodies of 3 Christians seen floating near the Bisipada ghat of the Badasalunki river were found to be that of Ms. D Digal, Meghanad Digal and Francis Digal - a man who worked as a gatekeeper at the Regional Marketing Committee at Sankarakhol – as reported in ‘Three Bodies Found in Kandhamal’, The Hindu, 29 September 2008
368 State vs. Biranchi Behera, Mantu @ Simanchal Nayak, Bijaya Kanhar and Manoj Pradhan Sessions Trial Case No. 19 of 2009, ST:58 of 2009, judgement of Fast Track Court II, Kandhamal, Phulbani dated 10 September 2009, paras 6 & 8
incised wounds about the left breast and below the right clavicle, as well as fracture of the skull. No mention was made of rape or any other sexual offence. The doctor opined that the cause of death was shock and haemorrhage of brain, likely to be due to blows by blunt weapons, and that the time of death was more than 72 hours at the time of his examination. It is significant that the couple was killed when the village where they were residing – Sankarakhol – was attacked almost a month after the commencement of violence in August 2008. Apart from the testimony of her son, Narasingho, only one other researcher states that she was gang-raped. 369

A case of murder was registered against Ms. D Digal but not that of rape. Six persons were accused of killing Ms. D and her husband Meghanath Digal. 370 The prosecution against accused persons was for having committed the murder of Ms. D Digal and her husband Meghanad Digal, mischief by putting their dwelling house to fire, damaging and looting the properties having trespassed into the house, and for disappearing the evidence of the murder by forming an unlawful assembly in the prosecution of their common object at village Sankarakhol on 25 September 2008. 371

During trial, Narasingho was unable to identify any of the accused as his family had moved to Sankarakhol village from Dudukagaon village only a few months prior to the attack. Although the court concluded that the deaths were homicidal in nature, the additional sessions judge of Fast Track court-II at Phulbani, Chitta Ranjan Dash, acquitted all the accused persons

369 Anto Akkara, Kandhamal Craves for Justice, New Delhi: Veritas India, pp.47-48

370 The persons chargesheeted and prosecuted were Budhdeb Kanhar, Purander Kanhar, Gadadhar Kanhar, Sudhir Pradhan, Ajibana Pradhan and Dadhi Mallick.

371 The accused persons were charged under S. 147/148/449/427/435/302/201 read with Section 149 of IPC.
on 24 November 2009 due to a failure of the prosecution in proving the participation of the accused persons for the offences committed.

**Mohini Nayak, Raikia block**

Mohini Nayak was the President of ‘Nari Mohol Mahila Samiti’ based in Hata Poda Sahi village, Raikia block. She was a women’s rights activist. She testified before the National People’s Tribunal on Kandhamal about the mental agony she suffers because of consistent threats and coercion by local BJP MLA Manoj Pradhan, the local Block Development Officer as well as other local government officials not to testify in court against Manoj Pradhan, a local Member of the Legislative Assembly from the BJP, wielding considerable political clout. She had been repeatedly warned that she and her 18-year old daughter would be raped in public and forced to leave their village if she did so. In August 2008, Mohini Nayak’s house was destroyed by a mob of 200-300 people led by Manoj Pradhan, and she had witnessed them destroying other houses in her village. Despite the threat to her personal security, she testified as a witness in some of the cases pending in court against Manoj Pradhan.\(^{372}\)

Mohini Nayak’s narration above illustrates the use of threat of sexual violence by perpetrators to silence women victim-survivors and scuttle processes of justice. However it is not an isolated instance. Premasila Digal, who testified in court against persons accused of killing her husband, told the Tribunal as follows:

*...People are angry with my husband because he protected so many people during the violence. Now my daughter and I continue to live with the threat of being raped and killed...* \(^{373}\)

\(^{372}\) National Solidarity Forum, Waiting for Justice - Report of the National People’s Tribunal on Kandhamal (New Delhi: 2011), p. 70

\(^{373}\) Ibid
These testimonies prompted the jury of the Tribunal to make the following observation:

*Victims and witnesses who have dared to lodge complaints and courageously given evidence in court have been threatened and intimidated and are unable to return to their homes. There is no guarantee of safe passage to and from the courts. .. Women witnesses face the additional danger of sexual violence against themselves and their daughters.*

Mohini Nayak continues to remain in hiding, away from Kandhamal, due to imminent threat to her life.

**N. The Use of Rape As a Weapon in Contexts of Communal Violence**

Kandhamal is not the first instance of communal violence where rape and sexual assault of various forms have been used to terrorize, subjugate and humiliate a religious community. Mass crimes against women were also committed in the context of the anti-Sikh massacre in Delhi in 1984. 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 Gujarat carnage 2002, gender-based violence, which was distinct in terms of its scale and brutality, emerged as the backbone of the communal violence and played a fundamental role as an engine

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374 Ibid at p. 177, para 23
for mobilizing hatred against and destruction of the minority community, sexual violence was not incidental to the carnage.\footnote{377 } 

The landmark judgment delivered by the Mumbai Sessions court in Bilkis Bano’s case\footnote{378 } is the first case in post-independent India of a sexual assault in a context of communal violence, resulting in a conviction. The conviction for rape in Sister AA’s case is the second such judgment. During the communal and targeted violence in Muzaffarnagar 2013, women once again came to be targeted for a range of sexual assault.

The institutional bias that exists in most democratic institutions gets exacerbated in times of communal violence, creating obstacles to legal redress for women who are sexually assaulted.

The attacks on women during the violence have ramifications on all the women and girls for several years thereafter. Apart from the physical and mental health concerns on the assaulted women, it further justifies restrictions on women’s and girls’ education, dressing, mobility and interactions in communities that are already entrenched in patriarchy and conservatism. With the State washing its hands off the responsibility of rehabilitation and reparative justice, the women are often forced to become dependant on religious organizations for their survival, which are bound to enforce strict patriarchal norms.

\footnote{377}{The report Threatened Existence: A Feminist Analysis of the Genocide in Gujarat speaks of the centrality of sexual violence to the Hindutva project, infra n. 9 at pp. 33-45}

\footnote{378}{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 14 members of her family, including her 3 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}
O. Reparative Justice for Sexual Offences

Justice traditionally, has been understood to involve prosecution, conviction and punishment of the guilty in order to restore public order, security and respect for rule of law. However, in recent years, there has been a paradigm shift in international jurisprudence on criminal law from the deterrent theory (with a focus on severe punishments) to rehabilitative justice (for the perpetrator) and reparative justice (that focuses on ‘repairing’ the harm caused to the victim-survivor).

Reparative justice is an important concept in the context of offences related to violence against women. It emphasizes that state responsibility, through and outside of the criminal justice system, does not end with punishing the accused, but extends to enabling healing of the victim-survivor and providing her with such forms of assistance as to enable her to lead a fuller life and overcome the impact and consequences of the offence. As stated by Vahida Nainar, reparation for violence against women means and includes restitution, compensation and rehabilitation of the victim/survivor. It also includes measures that have reparative effects such as reintegration, satisfaction and guarantees of non-repetition. It is a legal right of victims and survivors of all forms of crimes against their physical autonomy and integrity including and particularly, sexual assault.

As elaborated in the paper by Vahida Nainar, restitution involves restoring the survivors’ sense of dignity, privacy, safety and security. These could be achieved through a number of

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legal and non-legal measures such as respectful documentation of the crime, having gender-conscious and aware individuals drive the investigation/prosecution/trial/hearing as the case may be, non-intrusive protective measures for self, children and family, providing enabling environment for the victim/survivor to pursue justice and continue living her life with dignity. She opines that compensation is the widely, though not accurately understood form of reparation for sexual assault. It continues to be termed as ‘relief and rehabilitation’ i.e. charity instead of a legal right to reparation. The aspects that a victim/survivor of sexual assault needs to be compensated for include:

a) the attack on her dignity and sexual autonomy
b) the physical injury suffered
c) the mental pain and anguish experienced
d) the loss of educational and employment days
e) the loss of all forms of opportunities - economic, educational and social, in the present and the foreseeable future
f) all big and small expenses incurred towards engaging the justice system such as transport costs to and from police stations, courts, medical institutions, payments made for specialized services etc.

Nainar opines that while for the first three of the above list, the amount of compensation may be fixed and common for all victims/survivors of sexual assault, the rest is specific to each case, to be determined on the basis of the circumstances and needs of the victim/survivor and not the merits of the case.

Rehabilitation measures are measures based on a gender-

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381 Ibid, para 4
382 Ibid, para 5
383 Ibid, para 5
conscious and aware position that rape and other forms of sexual assault is NOT the worst thing that can happen to women.\textsuperscript{384} They acknowledge the importance of the survivor having survived the sexual assault, assists with the task of her complete recovery and to live her life to its fullest. They include medical treatment for any physical injury sustained by the assault until she is fully recovered, psycho-social support until she is free from mental anguish, trauma, guilt and depression, provision of sustainable livelihood alternatives if the assault makes it difficult for her to continue in her occupation prior to the assault, provision of educational or vocational skills necessary to prepare her for pursuing a source of livelihood, provision of safe and secure temporary shelter or housing alternative in the event it is unsafe to continue living in the same place, and provision of all of the above to a woman’s dependents in the event the victim did not survive.\textsuperscript{385}

While using the yardstick of international standards on reparative justice to victims / survivors of sexual violence, one finds that the Indian legal system is largely based on deterrence, which is not transformatory in nature – it neither restores the victim to a position of strength nor does it transform society through meaningful interventions. Out of the three major aspects of reparations, Indian jurisprudence is better developed on compensation. Section 357 of the Cr PC allows a court to direct the accused to pay compensation even in situations where fine is not imposed as part of its sentence. In addition, a victim may also approach a higher court under Section 482 of the Cr PC to claim compensation.\textsuperscript{386}

\textbf{Rape Compensation Schemes}

\textsuperscript{384} Ibid, para 6
\textsuperscript{385} Ibid
\textsuperscript{386} S. 482 Cr PC vests inherent powers in the higher judiciary in the interests of justice
In *Delhi Domestic Workers’ Forum vs. Union of India*, whereas six women working as domestic maids in Delhi were raped by eight army personnel on a moving train, the Supreme Court, in 1995, had directed the Central government in collaboration with the State governments, to set up a Criminal Injury Compensation Board. It also directed the National Commission for Women (NCW) to draw up a statutory scheme for rehabilitation of victims of sexual assault. NCW’s scheme, revised on 15 April 2010, provides guidance to states for drawing up state-specific schemes.  

In addition, Section 357A of the CrPC, inserted in the year 2009 also makes it mandatory for every State Government in coordination with the Central Government to draw up a scheme for providing compensation to the survivors of crime, or their dependents. In pursuance of this, various states have notified the Victim Compensation Scheme and set up relief funds for rape, acid attacks, trafficking and other forms of violence.

The West Bengal government announced in September 2012 that the state will provide monetary compensation for rape – Rs. 30,000 for a minor who is raped and Rs. 20,000 for an adult woman. In May 2012, the Delhi government announced a comprehensive compensation scheme for victims of various forms of violence against women - a rape survivor is entitled to a minimum of Rs. 2 lakhs and maximum of Rs. 3 lakhs within 2 months of the crime, in case the rape results in death, her family is entitled to a minimum of Rs. 3 lakhs and maximum of Rs. 5 lakhs compensation.

387 Revised Scheme for Relief and Rehabilitation of Victims of Rape, revised on 15 April 2010, available at http://ncw.nic.in/PDFFiles/Scheme_Rape_Victim.pdf, accessed on 1 March 2014
388 ‘Compensation for Victims of Crimes Against Women’, The Indian Express, September 6, 2012
389 Delhi Pegs Rape Compensation at Rs. 3 lakh, The Indian Express, May 14, 2012
Maharashtra’s *Manodhairya Yojana*, announced in September 2013, entitles a rape survivor for compensation of up to Rs. 2 lakhs and in exceptional cases, Rs. 3 lakhs from the government, after registering the FIR and without waiting for the trial or judgment. The notification issued by the Goa government entitles rape survivors to a maximum of Rs. 10 lakhs.

On one hand, these compensation schemes have the potential to help meet medical, counselling and other related expenses, and are an important first step towards comprehensive reparative justice for victim-survivors of violence against women. However, using the yardstick of international jurisprudence on reparations, these schemes suffer from certain flaws that are required to be addressed. These include:

- The compensation amount and the offences included in these schemes are not uniform, they vary greatly from state to state

- It is not clear if the schemes spell out the compensation as an inviolable right of the victim-survivors, and a duty of the state governments, rather than a charity or a dole

- There is no clear rationale by which the various schemes have arrived at the quantum of compensation for the offences against women named in those schemes, and hence the quantum arrived appears to have been decided upon in an ad hoc and arbitrary manner

- Almost all schemes quote a ceiling amount rather than a minimum amount. This violates the principles of reparative justice, as the amount for rehabilitation must cover medical expenses till the victim-survivor fully recovers

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390 ‘Activists Welcome Compensation Scheme in Rape Cases’, *The Times of India*, September 11, 2013

391 ‘Seven States Laggard on Giving Relief to Rape, Acid Attack Victims’, *The Deccan Herald*, September 24, 2013
The schemes do not spell out how the quantum of compensation awarded to any victim-survivor would be computed, hence leaving room for arbitrariness.

The schemes are restrictive as they do not include rehabilitative measures such as sustainable livelihood alternatives, provision of educational or vocational skills and the provision of a safe, alternative place of residence if it is unsafe / traumatic for the concerned woman to stay in her habitual place of residence.

One Stop Crisis Centres

On June 30, 2014, the Union Ministry of Women and Child Development (WCD) placed a copy of a concept note for establishing one-stop crisis centres for women, called Nirbhaya centres, in the public domain for feedback and comments.392 The proposal is based on the recommendations of Justice Usha Mehra Commission, which was established by the Union Ministry of Home Affairs on December 26, 2012 after the homicidal rape of a young woman on a bus, to inquire into various aspects of the brutal assault, and to improve the safety and security of women.393 WCD has mooted a plan to set up the centres in all 640 districts of the country and an additional 20 locations in six metros as a dedicated one stop location with necessary human resources to provide interventions and assistance to women affected by violence.

The centres are intended to provide medical assistance, assistance in registering complaints with the police, psychosocial counselling (referral services), legal aid, short stay home for temporary purpose, referral to shelter home for prolonged

stay, and video conferencing facility with the court and police. They are to be located initially in rented premises and subsequently in independent building, the district collector / district magistrate would also have the option of locating the same within the district hospital or within 5 km radius of such a hospital. The first one stop crisis centre has reportedly been launched in Bhopal.

Though the plan is very ambitious in its scale and budgetary requirement, several questions have been raised with regard to the feasibility and effectiveness of these centres. For example, Adv. Flavia Agnes opines that the government’s proposal was hasty and did not spell out details. “Why will the complainant travel all the way to a district centre in case she is based in a village; why will district centre register a FIR if the thana will not, and how will a retired police officer be equipped to do this? Even Protection Officers appointed in each districts under Protection of Women from Domestic Violence Act 2005 do not function in several states,” she says.

She further points to the fact that the scheme makes no reference to children’s needs despite an overwhelming number of cases of sexual assault, over 70 per cent, concern children. Adv. Albertina Almeida shared the experience of realisation of a similar unit which was proposed to be set up for children under the Goa Children’s Act which was called victim assistance unit, and the pitfalls it faces. She critiqued the WCD scheme as one that has “a complete lack of perspective of the quantum of time required for dispensing the services and the nature of services required to be dispensed”.

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394 ibid
395 ‘Aamir Khan Launches India’s First One Stop Crisis Centre in Bhopal’, The Times of India, 17 June 2014
396 Anumeha Yadav, ‘Are New Nirbhaya Centres the Way Forward?’, The Times of India, 27 July 2014
While the initiative to establish OSCCs is a positive one, their establishment should be undertaken after adequate thought, planning and consultation with important stakeholders including members of civil society. This will avoid pitfalls, replication of work, smooth coordination among the required agencies/departments/ministries and ensure that the centres meet the real needs of women survivors of violence, including those from marginalised and underprivileged communities.

P. Recent Law Reform Initiatives

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 civil society’s engagement with the Bill, there has been a considerable focus on sexual and gender-based violence. At a time when the definition of rape in the Indian Penal Code was limited to penile-vaginal penetration, the CV Bill campaign advocated for an expansion in the definition of rape, based partially on the reality of attacks on women in contexts of communal violence.

An attempt was made to introduce, as offences, various other forms of sexual and gender-based violence such as sexual slavery, forced pregnancy, enforced sterilization and other similar acts. At the same time, the campaign also advocated for new evidentiary and procedural standards to address sexual assault in contexts of communal and targeted violence.  

Despite various attempts to do so till April 2014, the Bill has not been passed in the Parliament.

**Criminal Law (Amendment) Act 2013:** Meanwhile, Criminal Law (Amendment) Act 2013 brought about wide-sweeping changes in the penal laws related to rape, in the wake of the homicidal attack on a young woman in a bus in Delhi in December 2012. For the first time, the 2013 amendment included commission of rape during communal or sectarian violence, as an aggravated circumstance, entailing more stringent punishment.\(^{399}\) The same law also dispensed with the need for sanction for prosecution of public officials, where it pertains to certain sexual and related offences.\(^{400}\) Further, a public servant’s act of disobeying direction under law has been specifically made an offence.\(^{401}\) These are significant amendments brought about through the concerted efforts of women’s rights activists and others for several decades, setting new normative standards in Indian law. The ground reality of entrenched institutional bias leading to failure of the police in applying these provisions in contexts of communal violence is a battle that has to be fought, both at the police station as well as in courts of law, as evidenced by the gang rape of seven women in Muzaffarnagar in 2013.

Seven women belonging to the Mulsim community were brutally gangraped by men belonging to the dominant Jat Hindu community on 8th September 2013 in Muzaffarnagar District of Western Uttar Pradesh. Subsequently 6 of these

399 S. 376 (2)(g) of the Indian Penal Code, inserted by the Criminal Law Amendment Act 2013. It states: the section states, “Whoever commits rape during communal or sectarian violence shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person’s natural life, and shall also be liable to fine.”

400 Explanation to S. 197(1) of the Criminal Procedure Code, inserted by the Criminal Law Amendment Act 2013

401 S. 166A of the Indian Penal Code, inserted by the Criminal Law Amendment Act 2013
women got FIR’s registered against the accused who were all from their village. One rape survivor sent a written complaint to the concerned Police authorities as the communally hostile atmosphere made it unsafe for her to travel to the police station, however her complaint was registered as an FIR only 4 months later after the intervention of the Supreme Court. The FIR’s of all seven women were however lodged under S.376(D) IPC, the provision on gang rape as opposed to S.376(2)(g) which has been introduced by the Criminal Law Amendment Act of 2013 and provides for a stand alone offence of ‘rape during communal or sectarian violence’. Acknowledging the practical and evidentiary impossibility of proving rape in cases of mass crimes of communal violence, this provision attracts S.114A of the Indian Evidence Act which shifts the onus of proof onto the accused who has committed gang rape during communal violence.

A Writ Petition filed on behalf of the seven women survivors of gang rape during communal violence brought to the notice of the Supreme Court, amongst other prayers, the fact that the local police authorities had been negligent in performing their duties by registering the FIR under S.376(D) IPCsuggesting bias on their behalf in attempting to enable acquittal in these cases. The Investigating Officer in charge of the investigation of these seven cases of gang rape during communal violence however only added S.376(2)(g) to the FIR’s after a Contempt Petition was filed against her and other public officials in charge of the investigation, in October 2014, more than a year after the FIR’s were lodged. No action however has been taken against the negligent police officials as provided for under S.166A of the IPC.
CHAPTER V
PROTECTION OF WITNESSES FROM THREAT & INTIMIDATION

Victims and witnesses related to the Kandhamal violence were, and continue to be subjected to, a range of threats, intimidation, coercion and other forms of interference with their testimonies, aimed at weakening the prosecution and scuttling processes of justice. Indeed, rampant witness intimidation is largely responsible for the high rate of acquittals in courts of law. A hostile atmosphere in court and Commissions of Inquiry has further exacerbated this phenomenon. This chapter / part highlights the threatening and intimidation of witnesses within and outside courts of law in Kandhamal, strategies in which the same have been addressed and the future prospects for protecting witnesses from threat and intimidation in contexts of communal violence.

A. Witness Protection in the Context of the Kandhamal Violence

A1. Threatening of Witnesses

Witnesses were threatened by perpetrators and their supporters from the time they lodged the police complaints. As explained by Adv. Rajkishore Pradhan, who assisted many
prosecution witnesses before the Fast Track courts, the activists from Hindutva groups were very organized and strategic in threatening witnesses. They would go to the police stations, pull out records of all the FIRs, note down the names and addresses of the informants and the witnesses, and two days before the hearing, they would start threatening them by phone calls and word of mouth, saying that they will not be able to return to their villages if they gave testimony against the accused. He opined that such threatening of witnesses was rampant from the time of victim-survivors registering complaints with the police, and intensified when the Fast Track courts were established and trials commenced.402

The MARG report on the Kandhamal violence, published in 2010, had observed as follows:

_Threatening of victim-survivors and witnesses has been rampant and has reached an unprecedented level in the context of Kandhamal violence. The sense of insecurity among witnesses is adding to the gross miscarriage of justice in the two Fast Track courts. Victims and witnesses are being coerced, threatened, cajoled and sought to be bribed by alleged murderers and arsonists facing trial. For example, the victim-survivors and eyewitnesses in the gang rape case of Sister AA were threatened with death while being asked not to participate in the trial. Hence they are afraid to attend the trial at the Fast Track court at Phulbani.53 Many witnesses are threatened in their homes, and even their distant relatives are being coerced.54 The accused Manoj Pradhan, BJP MLA, threatened one of the witnesses in the presence of the police personnel inside the Fast Track Court, and he also reportedly threatened the police, indicating the impunity with which perpetrators operate at scuttling justice._403

402 Interview of Adv. Rajkishore Pradhan, on 19 June 2014; transcript on file with the authors
403 Kandhamal: The Law Must Change its Course, researched and written by Saumya Uma, edited by Vrinda Grover, published by Multiple Action Research Group (MARG), New Delhi, 2010, hereinafter referred to as the MARG report, p. 110
The report of the National People’s Tribunal, published in 2011, expressed deep concern at the continued threat to and intimidation of witnesses, expressing the same in the following words:

*Victims and witnesses who have dared to lodge complaints and courageously given evidence in court have been threatened and intimidated and are unable to return to their homes. There is no guarantee of safe passage to and from the courts. Guidelines on witness protection, issued by the Supreme Court and various High Courts, are not followed by the Fast Track courts. Women witnesses face the additional danger of sexual violence against themselves and their daughters. The use of children as witnesses in criminal trials related to the Kandhamal violence has placed all such children under extremely vulnerable conditions exposing them to threats to their physical safety and psychological well-being. The police, investigating and prosecuting agencies do not deal with child witnesses in a sensitive manner nor with due regard to their age, situation and specific needs, and protect their rights.*

The National People’s Tribunal had called upon the Odisha government to provide protection to victims and witnesses before, during and after the trial process according to the guidelines provided in the judgments of the Delhi and Punjab and Haryana High Courts, to take pro-active measures to prevent threat of sexual and gender-based violence to women survivors and their daughters and pay attention to the needs of the child witnesses involved in various proceedings related to the Kandhamal violence. It further called upon the State Legal Services Authority lawyers to also ensure, that witnesses depose freely and without fear in the fast Track Courts and to bring any incident of intimidation to the notice of the concerned

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405 NPT report, para 14, p. 180
authorities including the Court.\footnote{ibid} The Tribunal recommended that the State Legal Service Authority could assist the victim-witnesses to initiate appropriate legal action in this regard.\footnote{ibid}

A report of the National Human Rights Commission in 2008 too had recommended witness protection measures. It said:

\textit{The state government should take steps to ensure the protection of witnesses. This is specially necessary considering the fact that once the witnesses move back to their villages they are likely to be threatened by the fundamentalist elements and pressurized to turn hostile during trial.} \footnote{Report of the National Human Rights Commission, available at http://www.nhrc.nic.in/Documents/Reports/report_of_nhrc_kandhamal_communal_violence_2008.pdf, accessed on 8 September 2014, para 5 of Recommendations}

However, no effort seems to have been taken to implement these recommendations, either by the State/District administration or by the State Legal Services Authority. Adv. Rajkishore stated that witnesses continued to be exposed to threat and intimidation at present as many cases are pending.\footnote{Interview with Adv. Rajkishore Pradhan, 19 June 2014; transcript on file with the authors} He opined that in some instances, when the witnesses entered the courtroom, they would have been subjected to threats and intimidation to such an extent that, upon taking oath, they would repeatedly say that they know nothing.\footnote{Ibid}

There are other indications that threatening of witnesses continues till the present day. For example, the house of Prafulla Digal – a witness - was broken down for the third time in 2014. He lives in Budrukia village, in Balliguda block. Fear and threat to witnesses continue, especially in remote areas. In Tikabali block, in May 2014, some of the victims informed EFI-OLAC – a civil society organization assisting witnesses - that the perpetrators
are having meetings in the villages to discuss ostracizing or ex-communicating Christians from the village for giving strong evidence against the accused. EFI-OLAC had helped the victims to lodge a police complaint. The police had apparently called both parties to the police station (for a compromise).

Human rights activists Prasanna Bishoyi and Pradeep Kumar Naik explained that in many cases, the perpetrators, after conviction, have obtained bail, released from jail and have threatened the witnesses pertaining to their cases. In one case, a complaint was lodged by the human rights activists, with the local police station, and the bail was cancelled in 2011. With the cancellation of bail in this case, the message spread to other perpetrators and to an extent, threatening of witnesses reduced, they stated. However, the fact remains that as of August 2014, only one convicted person (in Sr. AA’s gang rape case) is in jail, all others who have been convicted in all cases in the Fast Track courts have obtained bail after their conviction, such persons are the potential source for threat to and intimidation of witnesses.

In the case of Gopan Naik in Bodimunda village, he was murdered and his body burnt in front of the church. In addition to the informant – Sarah Naik, there were 17 witnesses. The accused had reportedly threatened to kill all the witnesses. Despite such a threat, all the witnesses reportedly gave truthful testimonies in court after lodging a complaint in the police station for threatening them. Although there have been such

411 EFI-OLAC is Evangelical Fellowship of India – Odisha Legal Aid Cell is a non-governmental organization, based in Phulbani, Kandhamal. It consists of a group of lawyers and human rights activists who assist victims and witnesses of the Kandhamal violence in courts of law.

412 Interview with human rights activists Prasanna Bishoyi and Pradeep Kumar Naik, 19 June 2014; transcript on file with the authors

413 State vs Basant Nayak and 22 others, ST 18/11 of 2011, G.R. No. 401/08, P.S. case No. 144/08. Informant Paul Nayak, in Dokaringia village in G. Udayagiri block.
cases, where the witnesses have withstood the threats and intimidation posed by the accused and their supporters, there have been many cases where the witnesses have succumbed to such threats and turned hostile in court, resulting in acquittals.

For example, in an arson case from Gunukupa-Guchapada village in Phiringia block, due to threats and intimidation, all the seven witnesses, whose houses had been completely burnt down, turned hostile in court, refused to identify the accused as having participated in the attack, resulting in an acquittal.\textsuperscript{414} In another arson case from Pikoradi village in Tikabali block, the informant Dev Kumar Naik turned hostile due to threats, resulting in acquittal of the accused.\textsuperscript{415} In the case of Bikram Nayak’s murder in Tiangia village, Raikia block, his wife, Ashalata Nayak, was the informant. She turned hostile in court, which resulted in an acquittal of all accused, despite the fact that other witnesses gave strong testimonies in court.

A witness in both Sister AA’s rape case and Jan Vikas arson case was openly threatened with death, and was threatened that her entire family would be “finished off”.\textsuperscript{416} She was testifying against a family member who was an accused in the rape case, and faced immense pressure from her family and relatives to refrain from testifying in court. When threats did not work, she was reportedly offered Rs. 50,000 and a two wheeler by the accused.\textsuperscript{417}

The need for an expeditious trial is essential to prevent witnesses from turning hostile in court due to threat or

\textsuperscript{414} ST 7/13 from Phiringia police station. The informant was Joleswar Digal, and the prosecution witnesses (whose houses were burnt down) were Sajukta Digal, Narendra Digal, Mrutunjay Digal, Ganda Digal, Sajani Digal and Madani Digal.

\textsuperscript{415} ST 63/11 from Pikoradi village, Tikabali police station

\textsuperscript{416} Interview with a witness (name suppressed), 26 June 2013; transcript on file with the authors

\textsuperscript{417} Ibid
intimidation, or other survival needs. As explained by Prasanna Bishoyi:

In some villages, reconciliation is slowly taking place. Earlier the victims did not dare to step into their villages. We had to provide them shelter in our office for 3-4 days. Many times, the witnesses would receive notice wherever they were – in Kerala, Bengaluru, Bhubaneswar, Cuttack etc. Now, for many witnesses, their anger against the perpetrators has subdued, they want to live amicably in the village and fear a revival of tension if they pursue their court cases. Due to these practical considerations linked to their survival in the village, the witnesses have tended to turn hostile... In some cases, we have provided moral and logistical support to witnesses, and they have assured us that they would say the truth in court, and still turn hostile. It is because the accused had threatened to kill them, or because of survival needs. We as lawyers and activists, cannot guarantee their security in the village or meet their need for housing, food, health, education and a dignified way of life.

The complementary nature of adequate and timely compensation / rehabilitation package to victim-survivors, with processes for justice, is also illustrated from the above quote.

While many witnesses were threatened that they would be killed or fatally injured, additionally, women witnesses were threatened with sexual violence. This was observed by the National People’s Tribunal, highlighted in the quote above. A woman who testified in court against an influential accused, narrated her experience in the following words:

Last year, when I returned to my village to meet my uncle, a shop owner called my uncle and said “Tell her that I will cut off her breasts, insert a sword in her vagina, cut her into pieces and pack her in a bag and throw her in the river. Where will she go?”

418 Interview with a woman witness (name suppressed) on 11 March 2013, transcript on file with one of the authors (Saumya Uma), reproduced from Saumya Uma (2014), Breaking the Shackled Silence: Unheard Voices of Women from Kandhamal, Bhubaneswar: National Alliance for Women – Odisha chapter, hereinafter referred to as NAWO report, p. 22
A2. Abductions of Witnesses

Not only were witnesses threatened outside the court, in the court premises and within the courtroom, in addition, key witnesses were abducted too, indicating the impunity with which efforts were undertaken to scuttle processes of justice.

Outside the Fast Track court, important witnesses have been abducted. For example, Basant Kanhar – an important witness in an arson case – was abducted. He was rescued with the intervention of Adv. Rajkishore and his team, with the assistance of the Superintendent of Police.

In the murder case of Gayadhar Digal, his wife Raimukti Digal – the prime eye witness - was reportedly abducted from the residence of the lawyer who was assisting her. She was threatened saying that her child will be killed if she gives a truthful testimony in court. She turned hostile in court, resulting in an acquittal.

In the incident of gang rape of a nun, Kantia Naik was a key witness as he hid and witnessed the entire attack on her, and gave a strong testimony in court. On 5 July 2009, he lodged an FIR under S. 506 read with S. 34 of IPC with Sarangada police station, alleging that he was threatened by some of the accused in the case on 3 July 2009 and apprehended danger to his life. He further filed an affidavit before the Fast Track Court 1, in order to bring to the notice of the court that he was being threatened and his life was in danger. However, no action was taken by the court. Thereafter he was reportedly abducted by accused persons. Reportedly, after he was released, he lodged a police complaint against the abduction, but subsequently turned hostile in his own case.
A3. Hostile Atmosphere in Court

Apart from threats and intimidation to the witnesses, a hostile atmosphere within and around the courtroom appears to have played a major role in intimidating the witnesses and deterring their truthful testimony.

One aspect that was narrated by many witnesses and advocates was the presence of Manoj Pradhan and Suresh Pujari – both influential and powerful persons associated with Hindutva groups - in court, which had the effect of intimidating the witnesses. Manoj Pradhan was reportedly seen very often sitting in the open space between the two courtrooms of the Fast Track Court, wearing a big red tikka on his forehead. His presence had reportedly intimidated many victims and witnesses, particularly those who had witnessed him leading mobs that committed murders and arson.

Witnesses also spoke of how the court room was often filled with hundreds of supporters of accused persons, but the witnesses were not allowed to be accompanied by a family member or friends. Indeed, in the crowded courtroom filled with hostile faces, the only sources of solace and support for the prosecution witness was the Public Prosecutor – who was rarely proactive – and the victims’ lawyers – who could only provide a silent support in court.

In fact, in the two gang rape cases of a nun and a Hindu woman, a transfer petition was filed in the Odisha High Court seeking a transfer of the proceedings from the Fast Track courts, due to a hostile court atmosphere. In both the cases, the proceedings were transferred – in the nun’s case, the trial is being conducted in the sessions court at Cuttack, while in the Hindu woman’s case, the trial has commenced in the sessions court at Berhampur. The transfer orders of the Odisha High Court are a vindication of the fact that the atmosphere in the Fast Track
courts was indeed hostile and prevented truthful testimonies of the witnesses.

*In camera* (closed door) trials, which are compulsory in rape trials, are intended to provide an enabling environment for truthful testimonies. Yet a witness to the nun’s in cameratrial narrated her experience:

*I went to court 3-4 times: Three times to Phulbani Fast Track court, and once to the sessions court at Cuttack. The Public Prosecutor (PP) would talk to me well before court proceedings began, but during the proceedings, he was not supportive at all. There were 25-30 advocates present from the defence team, while three of our lawyers stood silently with the PP.I was cross-examined for eight hours in Cuttack over two days. I felt exhausted. There was nobody to support me. Our advocates sat behind and kept quiet. So I felt no support at all. The judge was sometimes supportive, and sometimes threatening. I made a mistake in answering a question that I could not understand. The judge at the Cuttack court shouted at me. I was terribly frightened.*

Other witnesses, who were also victims, spoke of the harassment and intimidation caused to them during cross-examination, in the following words:

*The court was out to harass me. In court, the defence lawyer was trying to confuse me and threaten me, by asking the same question again and again. He tried to provoke me with questions like by “what is your mother’s husband’s name?” alluding that her character was bad. Other irrelevant questions he asked included: “Why are you Christian? From when are you a Christian?” The defence lawyer repeatedly accused me that being a witness was a “earning source and profession”. He also kept making statements about how*

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419 Interview with a witness (name suppressed), 26 June 2013; transcript on file with the authors
bad Christians were. The judge did not intervene.\textsuperscript{420}

One witness indicated the positive intervention of the presiding judge in the following manner:

\textit{When I went to court, I was very frightened as I am illiterate. Yet I wanted to have the accused persons punished for killing my husband. The defence lawyer asked me many questions in an aggressive manner, in a loud voice, so I started crying in court. The PP was very quiet. The judge stopped the lawyer from harassing and intimidating me.} \textsuperscript{421}

In another case, a woman witness said:

\textit{The court was filled with their people, and we had no one to support us. My husband was made to stay outside. There was only the PP but he did nothing to make me feelsupported. The court must have had at least 100 people. I was terrified especially because I could not see a single person in my support. Two lawyers who were supporting me left the courtroom. It was a frightening experience for me.} \textsuperscript{422}

Corroborating the witness, Adv. Dibyasingh Parichha observed as follows:

\textit{The trials were not conducted in a conducive atmosphere. The court hall was filled with 200-300 perpetrators and their supporters. The prosecution witnesses and their lawyers were only 3-4 persons. The witnesses frequently recd threats by phone, through word of mouth from other persons, through gestures in court while deposing. The court was unresponsive when witnesses complained that they were...}

\textsuperscript{420} Interview with a witness (name suppressed), 26 June 2013; transcript on file with the authors; reproduced from NAWO report, p. 48
\textsuperscript{421} Interview with a witness (name suppressed), 26 June 2013; transcript on file with the authors; quote reproduced from NAWO report, p. 48
\textsuperscript{422} Interview with a witness (name suppressed), 27 June 2013, transcript on file with the authors; quote reproduced from NAWO report, p. 49
The testimony given by a six-year old daughter of Kanakarekha Nayak against Manoj Pradhan, in an open court full of his supporters, is particularly heart-wrenching. The young girl testified in court that Manoj Pradhan was responsible for her father – Parikhita Nayak’s killing. Manoj Pradhan reportedly changed his shirt thrice during her testimony in court, and changed his appearance in other ways, and yet the girl steadfastly pointed to him as the killer of her father. The concern being raised here is whether or not a six year old child should be exposed to the hostility of the courtroom, jeopardizing her safety? Why did the judge not think of ways to protect her identity, and create a more enabling environment in court for her testimony? Surely he had heard of the Sakshi guidelines and could have thought of applying the same to this case, though the girl was not a victim-survivor of sexual assault? 

A further question that arises for consideration is whether the court has the discretion as well as the political will to regulate who enters the courtroom. If family members of the witnesses could be barred from entering the courtroom, surely, supporters of the accused could also have been restricted so that they do not flood the courtroom and create a hostile atmosphere? While an open trial is indeed desirable and warranted in most situations, does the judge not have the duty to ensure that this is not misused by the accused and his supporters as a way of intimidation and a show of his power and influence? This is particularly so as such a show of strength can potentially have an adverse impact on all officers of the court as well as the prosecution witnesses.

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423 Interview with Adv. Dibyasingh Parichha, 18 June 2014, transcript on file with the authors

424 In Sakshi vs. Union of India (2004) 6 SCALE 15 – the Supreme Court issued detailed directions for protection of child victims of sexual assault who testify in court.
A4. Role of State Agencies

Response of the Police

In most situations, proactive intervention by state agencies to provide witness protection appears to be conspicuous by its absence. There have been a few instances of positive initiatives. For example, PrasannaBishoyi recalls one or two cases where the Fast Track court (judge S C Das) had ordered police protection for witnesses. However, he was unable to recall further details.

In the case of the murder of Gopan Naik, described in A1 above, the police was vested with the responsibility of providing protection to 17 witnesses. It accompanied the witnesses from the court to Bodimunda village where they resided, however, instead of leaving them at their village, the police had abandoned them halfway on the road, and asked them to find their own means of transport for reaching their villages. The witnesses then contacted the non-governmental organization which was assisting them (EFI-OLAC), and they had to arrange the safe travel of the witnesses back to their village. This incident shows the callousness with which the police provided witness protection.

Kartik Nayak, a seizure witness in a complaint instituted for an attack on Barakhama village in December 2007, said that when he went to the Fast Track Court, he was threatened in the bus by the accused. He then went to Phulbani police station and complained against the accused for threatening him. He states that he was detained in the police station for one hour and sent back, after being threatened by the police, without registering any complaint or taking other action against the persons who threatened him.425

There have been rare incidents of police protection for the

425 Interview with Kartik Nayak, 19 June 2014, on file with the authors
witness, at the directions of the judge presiding over a Fast Track court. As narrated by a woman who was the key witness in the murder case of her husband:

> When I went to court as a witness, I was questioned for more than two hours. After I gave my testimony, I was retained in court the entire day because there was a threat to my life. My advocate and the judge discussed this. At the end of the day, the judge orally instructed the police to protect me, and told the police that if they let me go, they should ensure that I am safe. I used to appear in the court each time I was issued a notice. I used to travel each time from my plastic tent… I entered the court each time with police escort. In court, many RSS persons were sitting. Earlier, I was frightened but after some time, I felt more comfortable in court. There were no threats from advocates. I felt secure due to the support of the church and police escort.426

A woman witness had lodged a police complaint with Raikia police station, after a shop owner had conveyed a threat to her of sexual violence, through her uncle. She said:

> The police doubted me and asked “How do we know that you are telling us the truth?” I called my uncle to substantiate, after which the shop owner was called to the police station. He admitted threatening me, and made a written promise to the police, that he would not threaten me ever again, and that he should be punished if he did so.427

It is a matter of concern that the police did not consider the threat issued to the woman as serious enough, warranting the registration of FIR for an offence committed under S. 195A of

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426 Interview with the woman (name suppressed) on 11 March 2013, transcript on file with one of the authors (Saumya Uma), reproduced from NAWO report, p. 50

427 Interview with a woman witness (name suppressed) on 11 March 2013, transcript on file with one of the authors (Saumya Uma), reproduced from NAWO report, p. 22
the Indian Penal Code (threatening of witnesses), instead the police sought to “compromise” the issue. This indicates the soft approach of the police in apprehending accused persons who intervened with and scuttled processes of justice.

In the case of Gokula Digal, who was a witness in *State vs Manoj Pradhan and Others*,

> “…during the trial of the above case before the F.T.C. No. 2, Phulbani, the accused persons threatened me not to give the real statement before the Hon’ble court. That due to the threaten of the accused persons I could not adduce my evidence properly before the Hon’ble trial court…”

He sent the affidavit by post to I.I.C. police station in Daringbadi, Kandhamal. No response was received from the police.

Adv. B.D. Das opined that in several cases, to his personal knowledge, the erstwhile Superintendent of Police (SP), Mr. Kishen Kumar, had extended protection to threatened witnesses. The SP had further sent word to witnesses to contact him directly and he assured them of protection. In the opinion of Adv. B.D. Das, although some witnesses contacted the SP directly, as they had faith and confidence in him, they were unwilling to lodge complaints with or seek protection from the local police station. This was because they had witnessed the officials of local police stations participate in or complicit with the attacks against Christians.

The lawyer further narrated instances when he had dictated

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428 S.T. 23/09, before Fast Track court No. 2 of Kandhamal, Phulbani
429 Affidavit dated 16 November 2010, sent by post to I.I.C. police station, Daringbadi on 23 November 2010
430 Interview with Adv. B.D. Das on 17 June 2014, transcript on file with the authors
431 Ibid
the FIR to the threatened witness through a telephonic conversation, and encouraged the witnesses to lodge police complaints, yet, due to the level of threat and the consequent trauma that they faced, they would refuse to lodge police complaints.\textsuperscript{432} He further opined that many cases resulted in acquittal because the witnesses would fail to go to court when they had to give their testimonies, or if they went to court, they would turn hostile in court.

In an interview with the present Superintendent of Police, Mr. Jai Narayan Pankaj, when queried on the issue of witness protection, he was unable to recall any case in which the police had provided protection to the witnesses.\textsuperscript{433} He said that if the court directed or if the witness lodged a complaint at the investigation stage, the police would provide protection. However he was unable to cite any specific cases of either kind. He said that the investigations in most cases were completed by the time he had taken charge. To his knowledge, there has been no complaint lodged for threatening of witnesses since then.\textsuperscript{434}

**Response of the Judiciary**

Victim-survivors, as well as lawyers and activists have reported the rampant threatening of witnesses inside the courtroom, while the witnesses were giving their testimonies. Adv. Rajkishore stated that he has personally witnessed the supporters of Manoj Pradhan showing gestures within the courtroom, indicating that the neck of the witness could be slit,

\textsuperscript{432} Ibid
\textsuperscript{433} Interview with Kandhamal District’s Superintendent of Police, Mr. Jai Narayan Pankaj, on 26 June 2013; transcript on file with the authors
\textsuperscript{434} Ibid
or the body of the witness would be cut into pieces. This was confirmed by a witness who testified against Manoj Pradhan in court. She said:

*I must have gone to the court at least 20 times as I had to give testimony against so many of them, and for each one, I would be recalled. I was given no protection in court or from my place of residence to the court and back. In one instance, while I was deposing from the witness box, a supporter of Manoj Pradhan showed gestures in the courtroom with his hands, showing that my head would be cut off, that I would be cut into pieces. The judge could not see it but I could see it… As people were surrendering, I was called again and again to the Fast Track court for testimony. Some came and told me “Do you know that you cannot cross Tikabali from Phulbani, where will you go?” hinting that I would be killed. This was inside the court room. That evening, I went back home alone by the same road as I had no other choice… I did not know that I could complain to the judge. If I knew I would have definitely complained to him.*

Adv. Rajkishore narrated the case of Basant Kanhar – a key witness in an arson case – who complained to the judge that he was threatened. The witness had pointed to the accused who was present in the courtroom, who had issued the threats. The judge (S.K.Das) reportedly asked the witness: “What can I do? If you fear so much for your life, do you want to remain in jail and come here to give evidence?” Adv. Rajkishore, who witnessed the incident in court, said that no strictures were passed against the accused

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435 Manoj Pradhan is a Member of Legislative Assembly (MLA) belonging to Bharatiya Janata Party, accused in many cases of murder, rioting and arson. He has been convicted in some cases but has obtained bail. He enjoys political and financial clout.

436 The name of the witness has been suppressed from this report as she continues to perceive a danger to her and her family’s security, and remains in hiding till this date.

437 Interview of Adv. Rajkishore Pradhan on 19 June 2014, transcript on file with the authors
who threatened the witness, in fact the judge did not bother to inquire more into the allegation of threat to the witness.

In the murder case of Bikram Naik (from Tiangia village), his elder brother was reportedly threatened by the accused. When he complained to the court, the court had said “I am not the police. I cannot protect you. Protect yourself”. This shows the extreme insensitivity and callousness of the judges of the Fast Track Courts.

Adv. Sujata Jena, a lawyer practicing in the Odisha High Court, said that in a few cases, directions for witness protection were obtained from the Odisha High Court, upon filing of a writ petition on behalf of threatened witnesses.

By way of further victimizing the victims, some witnesses who turned hostile have been charged with perjury / contempt of court. For example, Ashalata Nayak was charged with contempt of court after she turned hostile in court, and failed to identify the accused who had killed her husband. Her case is reportedly pending before the sub-divisional judicial magistrate’s court at Phulbani.

It is absolutely unfair to lodge FIRs against witnesses who turned hostile during trial, if the state has not discharged its responsibility to protect them and ensure their well-being in the first place. Neither is there any known prosecution under S. 195A of the Indian Penal Code against any of the accused for threatening the witnesses. This situation seems to be a repeat of Zahira Sheikh’s case, related to the Gujarat carnage 2002.

438 Interview of Adv. Rajkishore Pradhan on 19 June 2014, transcript on file with the authors
Silencing the Witnesses from Complaining about Threats

Adv. Rajkishore opined that when witnesses complained of having been threatened, the police filed counter-cases against them. For example, in the case of a woman witness - Mohini Naik - who was threatened with rape and murder, a counter case was filed against her, falsely alleging her illegal occupation of land. Similarly when Meghanath Pradhan (from village Sisapanga, Raikia block) complained of having been threatened in his house burning case, the police reportedly arrested him saying that he had burnt down his own house and was filing a false complaint. He was also falsely alleged of murder. He was acquitted by Fast Track Court 2 in 2010. Thus it appears that filing counter cases was also used as an effective way of silencing all witnesses who were being threatened from seeking legal redress. The issue of counter cases is discussed in further later on in this book.

Witness Protection Room

In 2009, when the Fast Track Courts were established and began functioning, civil society groups assisting the witnesses started taking note of the intimidation and threat to witnesses. As this became more and more rampant, complaint was lodged with the erstwhile Superintendent of Police Praveen Kumar and the District Collector. After several months of advocacy, in 2010, a witness protection room / chamber was allotted within the premises of the Fast Track courts, and police officials were deployed there. The room was intended for witnesses to wait until they were called into the courtroom to testify. Though this was a positive gesture from the Government and District administration, the room was inadequate to prevent threat and intimidation to witnesses. This is because the room was situated in a distance of about 200 metres from both the courtrooms
of Fast Track Courts. Witnesses spoke of being harassed and threatened while walking from the witness room to the court room, when accused persons and their supporters would be standing along the passage.

Further, some lawyers and activists noted the presence of accused persons in the room, which defeated the purpose of allotment of the room in its entirety. Adv. Dibyasingh Parichha said that witnesses did not feel comfortable and confident sitting there. In the opinion of Adv. Rabin Sahu, who assisted many of the witnesses, the witness protection room helped about 40% of the witnesses, however, it was far from being a foolproof system.439

It appears from the various narratives of witnesses, lawyers and activists that though a semblance of witness protection existed, the mechanism was extremely ad hoc, arbitrary, not systematic, there was no accountability for failure to protect, and most of all, it was person-dependent (dependent on the sensitivity of the police official / judge concerned).

A5. Efforts Taken by Civil Society Groups

To a large extent, three civil society groups have been providing socio-legal support to the victim-survivors and witnesses of the Kandhamal violence – Justice and Peace Development Cell (JPDC) of the Archdiocese, Human Rights Law Network (HRLN) and Evangelical Fellowship of India – Odisha Legal Aid Cell (EFI-OLAC). All three groups have been working towards protecting witnesses related to the cases they have handled, particularly because the government failed to discharge its responsibility of doing so.

JPDC provided protection to 40-45 witnesses directly

439 Interview with Adv. Rabin Sahu, 19 June 2014; transcript on file with the authors
and permanently, and protected at least another 300 witnesses in their villages or in camps. EFI-OLAC has provided protection to witnesses in at least 100 cases, and is presently handling about 20 cases. In all instances, witness protection would be combined with providing moral support, encouragement, making the witness familiar with court processes, courtroom structure and guidance in deposing in court and facing questions in cross examination.

Prasanna Bishoyi outlined the efforts made by EFI-OLAC in protecting witnesses as follows:

_We would go to the village and directly speak with the concerned witness. We would provide a vehicle to bring the witness from the village to court, accompanied by an activist, and drop them back in their village. We have been engaging committed social activists, who would accompany the witness from the village to the court and back to the village. We have had to bring the witnesses by private vehicles as sometimes the accused would also travel to court by bus, and we wanted to avoid the witness coming into contact with the accused. Where the witness feared a threat to his / her life, we have provided shelter for the concerned witness for a few days up to the date of testimony in court. We have also helped lodge police complaints against threatening of witnesses by accused who were out on bail, and have obtained a cancellation of the bail on this ground._

JPDC provided protection to about 40-45 important witnesses directly, by moving them from Kandhamal to Bhubaneswar. They consisted of important male witnesses in arson, murder and rape cases, witnesses who were wives of men who were killed during the violence, as well as other women witnesses who were threatened with sexual violence for engaging with justice processes. They were accommodated in

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440 Interview with Prasanna Bishoyi, human rights activist with EFI-OLAC, on 19 June 2014; transcript on file with the authors
identified shelter homes or in the office complex of JPDC. They had to be kept in hiding to protect them from being threatened. The entire family of each witness had to be protected as threats were often directed at the witness as well as his/her immediate family members. Each of the witnesses and their families were provided with shelter, food, electricity, water and all other essentials.

In addition JPDC also supported about 300 witnesses in their villages or in the relief camps – by providing them travel expenses to and from court. It would facilitate 10-15 youths to accompany the witness from the village to court and back for protection, or arrange private vehicles. Where a sizeable number of family members were involved in a case as witnesses, JPDC sought to keep all the family members together to create comfort and security through numbers.

The presence of lawyers and activists in court to assist and provide moral support to the witnesses during the proceedings also acted as an added layer of protection for the witnesses.

**Challenges and Limitations**

Witness protection by civil society groups has the advantage of securing the confidence and trust of the witnesses concerned. However, it is a time and resource-intensive project, as the experience of EFI-OLAC and JPDC indicate.

Witness protection had to be provided from the time of lodging of police complaint till the completion of trial, pronouncement of judgment and awarding of sentence, sometimes even beyond this phase as convicted persons obtained bail and were released, and there was a potential risk of them threatening/attacking the witnesses. Thus, witness protection had to be provided for an average of 2-5 years.

Providing shelter, food, accommodation, electricity,
water, medical assistance, educational needs / hostel expenses of children and all other essentials for a witness and his / her entire family is a prolonged and expensive affair. Not less than Rs. 12000-15000 per family per month is required for witness protection. When 10-15 youth are mobilized to accompany one witness from the village to the court and back, the travel and food expenses of all of them has to be met. In short, witness protection could only be managed due to individual and institutional funding.

Although a need was felt for all prosecution witnesses to be protected, due to resource crunch, only the potential and key witnesses were selected for protection. Moreover protection was not foolproof – some were abducted (such as Basant Kanhar / Kanthia Naik / Raimukti Digal); some ‘disappeared’ from the protective arrangement due to threat and gave false testimony in court (such as Thakur Digal from Sankarakol village), others were anyway threatened or influenced into turning hostile in court. This was particularly so in cases where the accused was influential and wielded political clout.

Adv. Dibyasingh Parichha explained in detail the problems related to managing the expectations of the witnesses as they wanted more and more support, and their dependency on the group / lawyer increased. The violence had considerably reduced their social and financial status, and many had become paupers after the violence, understandably, when an organization provided them support and protection, they started using the same as a crutch.

Additionally, there was also a problem of managing dynamics between various witnesses, as women, men, children and youth were all kept together in one place. All faced different levels of stress and trauma, some visible and others not-so-visible. In some instances, rather than positively influencing
each other and providing moral support to depose truthfully in court, one witness would discourage another from deposing. This ran counter to the efforts of the organizational efforts in facilitating truthful testimonies of the witnesses.

In short, civil society groups are not duty-bound to provide witness protection, it is a responsibility vested with state agencies, as part of their obligation to investigate and prosecute with due diligence. However, due to the failure of the state to do so, in the interests of promoting justice and accountability, civil society groups take on this enormous responsibility despite the various challenges and limitations faced by them. Such efforts are essential for achieving justice, however they can only complement State efforts but cannot be a substitute for the same.

B. Witness Protection: The Law and Practice

B1. Indian Jurisprudence

Legislative Responses

The rampant threatening of witnesses related to the Kandhamal violence has reiterated the need for a legal regime on witness protection. India has no formal legal framework on victim and witness protection. However, in the history of independent India, legislative amendments have been made in order to address the growing need for protecting witnesses from intimidation and preventing them from turning hostile due to coercive tactics employed by perpetrators and their supporters.

Provision exists for the police officer, in his / her report upon completion of investigation, not to disclose the identity of the witness to the accused, if it is “not essential in the interests
of justice or is inexpedient in the public interest.”

Rules of evidence protect victims from being asked indecent, scandalous, offensive questions, and questions intended to annoy or insult them. Threatening or inducing any person to give false evidence is a punishable offence. Provisions also exist for addressing the phenomenon of witnesses turning hostile. Transfer of trials from one place to another, provided for under S. 406 of the Criminal Procedure Code, has been found crucial, particularly where perpetrators include public officials and in cases of mass crimes, as in Best Bakery case and Hashimpura case.

The procedural law also provides for holding an in camera (behind closed doors) trial, particularly for the offence of rape. This is a provision that is often useful as the testimony of the rape victim is often vitiated by a hostile / voyeuristic

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441 S. 173(6) of Cr PC and S. 21 of the Juvenile Justice (Care and Protection of Children) Act, 2000 respectively
442 S. 151 & 152, Indian Evidence Act, 1872
443 S. 195A of the Indian Penal Code, 1860 provides for a punishment of up to seven years imprisonment with or without fine.
444 S. 344A introduced by The Code of Criminal Procedure (Amendment) Act 2008. This section provides for a witness whose statement was recorded in respect of an offence, to be summarily tried and punished for a minimum of three months to a maximum of two years’ imprisonment and fine, if the witness subsequently retracts his / her statement in material particulars, and the Sessions / Magistrate’s court was satisfied that such a retraction / contradiction / change of version was for willfully giving false evidence or fabricating false evidence.
446 Hashimpura case involves communally motivated custodial killings of 42 Muslim youth by Provincial Armed Constabulary - a section of the police, in Meerut, U.P. in May 1987. The trial was commenced in Ghaziabad (U.P.), transferred to Delhi’s Tees Hazari (Sessions) court in September 2002 after petitioning the Supreme Court.
447 S.327(2) of Cr PC provides for in camera trials for offences involving rape under S. 376, S. 376A to S. 376D of the Indian Penal Code. S. 327(2) is formulated as an exception to the general rule of trial in the open court.
court atmosphere and a passive trial court that fails to regulate proceedings. The in camera trial is to be conducted by a female judge or magistrate as far as practicable.\textsuperscript{448} The identity of a victim-survivor of sexual violence should not be revealed or published, and punishment has been prescribed for such acts.\textsuperscript{449} Print and electronic media are prohibited from printing / publishing any matter in relation to the proceedings except with prior permission of the court.\textsuperscript{450} Such a prohibition may be lifted subject to maintaining confidentiality of name and address of the parties.\textsuperscript{451}

The Prevention of Child Sexual Offences (POCSO) 2012 incorporates provisions for the protection of child victim-witnesses of sexual offences. Protective measures have been prescribed at the time of investigation and trial. These include:

- During the investigation, the police is duty-bound to ensure that the child is not brought in direct contact with the accused.\textsuperscript{452}

- The police is duty-bound to protect the identity of the child from the public media, unless otherwise directed by the Sessions Court in the interests of the child\textsuperscript{453}.

- An in camera (closed door) trial, in the presence of child’s parents / guardians / other person that the child has confidence in, has been prescribed. A provision is also made for examination of the child in any place other than the Court\textsuperscript{454}.

- During examination-in-chief, cross examination and re-

\textsuperscript{448} proviso to S. 327 (2)(a) Cr PC
\textsuperscript{449} S. 228A, Indian Penal Code, 1860
\textsuperscript{450} S. 327(3) Cr PC
\textsuperscript{451} (proviso to S. 327(3)(b) Cr PC)
\textsuperscript{452} S. 24(3)
\textsuperscript{453} S. 24 (5)
\textsuperscript{454} S. 37
examination, the questions to be asked to the child have to be communicated to the Special Court, which would, in turn, ask the child. Additionally, the court is duty-bound, by a specific provision, to prevent aggressive questioning or character assassination of the child, and to ensure that the dignity of the child is maintained at all times.

- Frequent breaks can be permitted to the child, as the court finds necessary.

- The Special Court is duty-bound to ensure that it creates a child-friendly atmosphere, by permitting a parent / guardian / other person that the child has trust in to remain present during the trial.

- The Special Court is prohibited from repeatedly calling the child to court to testify.

- The Special Court is obliged to ensure that the child’s identity is not disclosed at any time during the investigation or trial, unless it permits such a disclosure in writing, in the interests of the child.

- The Special Court is called upon to ensure that the child is not exposed to the accused during the recording of evidence, at the same time, the right of the accused to hear the child’s statement and communicate with his advocate are recognized. For this purpose, the law contemplates the use of video conferencing, use of single visibility mirrors, curtains and other devices.

455 S. 33(2)
456 S. 33(6)
457 S. 33(3)
458 S. 33(4)
459 S. 33(5)
460 S. 33 (7)
461 Ss. 36(1) and (2)
Judicial Responses

Courts, on their part, have repeatedly emphasized the need for victim and witness protection, and directed protective measures during trial. In the absence of a definitive law and rules on victim and witness protection, protective measures are carried out by investigating authorities as well as the courts, albeit in an ad hoc manner. The Supreme Court recorded its deep concern for the difficulties faced by a witness in court and by the legal system, in *Swaransingh vs. State of Punjab*. In *Gurbachan Singh vs. State of Bombay*, the Supreme Court upheld a provision of the Bombay Police Act 1951 that denied permission to a detenue to cross-examine the witnesses who had deposed against him, based on threat to the security of the witness. The importance of maintaining anonymity of rape victims in trials involving the offence of rape, was reiterated in *Delhi Domestic Working Women’s Forum case* and *Gurmit Singh’s case*. In *Bimal Kaur Khalsa’s case*, a Full Bench of the Punjab & Haryana High Court reiterated the need for protection of witnesses from the media.

The need for protection of victims and witnesses came to be discussed intensely in the context of cases related to the Gujarat carnage 2002. In *Zahira Sheikh’s case*, while transferring the Best Bakery case from a Gujarat to a Maharashtra court, the Supreme Court directed both the states of Gujarat and Maharashtra to provide protection to witnesses so that “they can depose freely without any apprehension of threat or coercion from any person.” In *Neelam Katara’s case*, a Division Bench of the Delhi High Court issued witness protection guidelines in cases...

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462 Swaransingh vs. State of Punjab AIR 2000 SC 2017
463 Gurbachan Singh vs. State of Bombay AIR 1952 SC 221
464 Delhi Domestic Working Women’s Forum vs. Union of India (1995) 1 SCC 14
466 AIR 1988 P & H 95
punishable with life imprisonment or death.\textsuperscript{468}

It named the member secretary of the Delhi Legal Services as the competent authority to whom complaints of threats to witnesses in the specified cases would be made and protection sought, and further clarified that the guidelines would remain in force till Parliament enacted a suitable law for protection of witnesses. In September 2003, the Punjab and Haryana High Court recorded the desirability for both the Central and State governments to expeditiously adopt a program for the protection of witnesses.\textsuperscript{469} Subsequent to the decisions of the Supreme Court in \textit{State of Maharashtra vs. Dr. Praful B Desai}\textsuperscript{470} and \textit{Sakshi vs. Union of India}\textsuperscript{471}, evidence by video link is permissible.

The Supreme Court has opined that in rape trials, in camera proceedings are necessary, not only for the self-respect of the victim and in keeping with the legislative intent, but also because it is likely to improve the quality of evidence of the concerned woman. For this reason, it stated that in rape cases, in camera trial should be the rule and open trial an exception.\textsuperscript{472} In 2007, the Delhi High Court issued an elaborate set of guidelines for protection of child victims and witnesses. The guidelines related to conduct of the police, duties of the Investigating Officer, medical examination, recording of statement before

\textsuperscript{468} Neelam Katara vs. Union of India, Judgment delivered on 14 October 2003 in Criminal Writ Petition No. 247 of 2002; judgment delivered by Usha Mehra J & Pradeep Nandrajog J. In this case, Neelam Katara’s son was allegedly abducted and killed by the son of a Rajya Sabha Member of Parliament. The petitioner moved the Delhi High Court, inter alia, for guidelines for protection of witnesses as several prosecution witnesses turned hostile due to pressure from the accused and his sympathizers.

\textsuperscript{469} The Bench, comprised of Mr Justice Amar Dutt and Mr Justice Virender Singh; for further details, see ‘Mechanism Required for Protection of Witnesses, says High Court’, The Tribune, 9 September 2003

\textsuperscript{470} 2003 (4) SCC 601

\textsuperscript{471} 2004 (6) SCALE 15

\textsuperscript{472} The State Of Punjab v. Gurmit Singh & Ors 1996 SCC (2) 384
a magistrate, as well as duties of the trial court. Much of the principles laid down by the Delhi High Court have been incorporated in recent laws such as the Prevention of Child sexual Offences (POCSO) 2012, discussed above.

In their zest to dispose of cases, the Fast Track courts appear to have ignored the existing provisions of law and the guidelines issued by the judiciary on witness protection, as well as some of the best practices that the judiciary has followed to ensure that aspects of fair trial are not vitiated through a hostile court atmosphere and threatening of victims and witnesses. In addition, the Fast Track courts had adopted a callous and mechanical approach to the trials, without any sensitivity towards the threats faced by witnesses, or the manner in which the quality of evidence suffered as a result of such threats.

Interestingly, in a judgment of the Orissa High Court in the context of Kandhamal violence, the court has reiterated that protection of witnesses is the duty of the state. It said:

> It is now well settled principle of law that the State has a definite role to play in protecting the witnesses, especially in sensitive cases, involving those in power, who have political patronage and could wield muscle and money power in order to avoid the trial getting tainted and de-railed and truth becoming a casualty. The State as a protector of its citizens also has to ensure that during a trial in court, the witness could safely depose the truth without any fear of being hunted by those against whom he has deposed. This is a prime requirement of law and the criminal justice system, since the object of the criminal trial, is not only to mete out justice to accused, but also to protect the innocent. A criminal trial is in essence a search for truth. In our criminal justice system, which is substantially dependent on the oral testimony of witnesses, truth can only be arrived at, if

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473 Court On Its Own Motion v. State And Anr., judgment of Delhi High Court on 14 August, 2007
such witnesses, who are the eyes and ears of justice system can come fearlessly and depose the truth in Court. Therefore, witnesses need to be protected by the State (in appropriate cases) in order to ensure that the interests of justice are best served and to ensure that criminal proceedings do not become mere mock trials.\textsuperscript{474}

Recommendations of the Law Commission of India

In 2006, the Law Commission of India took the suo-motu initiative of studying witness protection laws, programs and practices across the world and prepared a comprehensive report and proposal for formulation of a law on witness protection for the consideration of the Indian government.\textsuperscript{475} The report acknowledges that victim and witness protection is essential for all serious offences. The report recommends procedures for witness identity protection during investigation, inquiry and trial, as well as witness protection programs which are applicable for the physical protection of witnesses outside the court.

At the investigation stage, the report envisages the prosecutor petitioning the magistrate to conduct a preliminary inquiry in camera. The prosecutor will place material before the magistrate indicating danger to the witness or the family / relatives / property of the witness. The magistrate may examine the witness before ordering anonymity, in which case, a pseudonym will be assigned to the witness in all records, and no authority except the magistrate and the prosecutor will know the identity of the witness. Such an anonymity order is applicable for the duration of the investigation.

\textsuperscript{474} Sister AA Lalita Borwa vs. State of Orissa and Others TRP (CRL) No. 15 of 2009 and Thomas Chellan and Others vs State of Orissa and Others TRP (CRL) No. 17 of 2009, judgment passed by the Orissa High Court on 30 March 2010, judgment delivered by Justice Indrajit Mahanty, at para 14

During inquiry and before recording evidence at trial, a fresh application has to be made by the prosecutor or witness, seeking anonymity. The magistrate or Court of Sessions will pass an order on such an application after an in-camera proceeding where the evidence related to danger to the witness is considered. The magistrate or Court of Sessions will also provide a reasonable opportunity to the accused in separate proceedings without the presence of the witness and without revealing the identity of the witness or any facts from which the identity can be discovered, but sharing the material related to the danger to witness. The anonymity order passed at this stage would apply to the time of inquiry, trial, appeal / revision and after the conclusion of the case.

For recording evidence during trial, it is envisaged that in one room, the judge, the stenographer, the public prosecutor, the threatened witness and technical persons who are employees of the court will be present, while the accused, the defence lawyer and technical persons will be present in another room. A two-way closed circuit television / video link / two-way audio link between two connecting rooms has been recommended. The identity of the witness will be protected while at the same time, allowing an opportunity for the accused to cross-examine the witness through the video link.

The witness protection program proposed by the Law Commission of India envisages signing of a Memorandum of Understanding (MOU) between the witness and the State, with an obligation on the part of the State to provide physical security to the witness outside the court. The witness may be assigned a new identity or be relocated along with his / her dependents for the period of trial. Breach of the MOU by the witness would lead to the witness being exited from the protection program.

The Law Commission’s report is a significant move towards
institutionalising and legislating on the issue of witness protection. It is imperative that the recommendations are vetted with officials involved with justice administration as well as lawyers to discuss the feasibility of implementing some of the measures, with or without a legislative framework.

B2. International Standards

A legal framework for India on witness protection can also benefit from international standards, practices and jurisprudence. In international law, victims and witnesses are considered an integral part of justice and accountability mechanisms. Participating in justice and accountability processes often involves a life threatening risk to the individual and his/her family. Victim and witness protection measures, which have been stated in international standards and institutionalized in practice, aim at substantially reducing the risk, while not guaranteeing their complete elimination.

Several countries have institutionalised victim and witness protection programs and/or have legislated on the issue.\textsuperscript{476} Such domestic laws and measures have been informed and influenced by international standards and good practices, adapted to the domestic needs and context. Specific provision has been made for victim and witness protection measures and programs in international conventions\textsuperscript{477} and the statutes and rules of procedure and evidence of the international and hybrid courts and tribunals. International and quasi-international justice mechanisms have also institutionalised victim and witness protection. They have established victim and witness

\textsuperscript{476} These include, inter alia, Argentina, Australia, Canada, Germany, Greece, Italy, Kenya, New Zealand, South Africa, Spain, the Netherlands and United States. See Paragraph 25-38, A/HRC/15/33

\textsuperscript{477} Such as the UN Convention against Transnational Organised Crime and the UN Convention Against Corruption
units and / or adopted a range of protection measures to reduce the risks faced by victims and witnesses when they engage with such mechanisms.478

The Human Rights Framework for Witness Protection

The human rights framework for witness protection places emphasis on two aspects: a) the human rights of victims and witnesses enshrined in all human rights instruments, and b) State obligation to provide witness protection as a part of its responsibility to investigate and prosecute human rights violations. A human rights approach to witness protection ensures that victim and witness protection measures and programs are designed and implemented in such a manner that

- the rights and best interests of victims and witnesses remain a central consideration,
- the dignity and privacy of a witness are respected, and
- sustained protection is given from threat / intimidation / coercion for the duration that such threat exists.

States’ obligation to provide victim and witness protection has been reaffirmed in a number of international principles and standards.479 The protection of victims and witnesses is

478 International and quasi-international justice mechanisms include, inter alia, the International Criminal Tribunal for the Former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), International Criminal Court (ICC), Special Court for Sierra Leone (SCSL), Extraordinary Chambers in the Courts of Cambodia (ECCC) and the Special Tribunal for Lebanon (STL).

479 For example, the updated Principles for Protection and Promotion of Human Rights through Action to Combat Impunity (Principle 10) and The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law emphasize on state obligation to protect witnesses.
also an integral part of the fight against impunity.\textsuperscript{480} It has been reiterated that states should ensure the safety of witnesses and others from intimidation and retaliation, before, during and after judicial, administrative or other proceedings.\textsuperscript{481}

The importance of witness protection for the successful investigation and prosecution of gross human rights violations has been repeatedly highlighted by international mechanisms.\textsuperscript{482} Additionally, the victim’s right to an effective remedy is a strong basis for states to provide protection to victims and witnesses.\textsuperscript{483}

While a viable legal framework for victim and witness protection is essential, as noted by the UN High Commissioner for Human Rights, states have an additional obligation towards vulnerable victims and witnesses, particularly victim-survivors of sexual and gender-based violence, due to the particular trauma and alienation that they may have suffered.\textsuperscript{484} In fact, international obligation of states to eliminate gender-based violence includes, inter alia, providing for victim and witness protection measures.\textsuperscript{485}

**Witness Protection in Prosecuting Human Rights Crimes**

International institutions have found witness protection to be critical, particularly in prosecuting human rights crimes. A distinction has been made between organized crimes (such as drug trafficking and human trafficking), where witnesses are

\textsuperscript{480} A/HRC/12/19 at para 35
\textsuperscript{481} General Assembly Resolution 60/147, annex, para 12(b)
\textsuperscript{482} See for example the report of the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions A/63/313 and The Working Group on Enforced or Involuntary Disappearances A/HRC/10/9/Add.1
\textsuperscript{483} The right to remedy is stated in Article 2 of the International Covenant for Civil and Political Rights
\textsuperscript{484} A/HRC/15/33
\textsuperscript{485} General Recommendation No. 19 of CEDAW Committee, para 24
usually “insiders”, and human rights crimes, where witnesses are usually victims, their families and relatives.

Secondly it has been recognized that in human rights prosecutions, the perpetrators are almost inevitably connected to State agencies or individuals with the power, influence and clout to intimidate witnesses and scuttle processes of justice. They may be State actors or individuals connected to present or past State actors. For these reasons, International law recognizes the increased difficulty in providing witness protection in contexts of prosecuting human rights crimes.\(^{486}\)

In principle, the responsibility for protecting witnesses vests in the State where the witnesses reside. In contexts of human rights crimes, various options have been proposed to move away from a State-centric and State-controlled model of witness protection. In 2009, the UN High Commissioner for Human Rights issued a statement on witness protection in which she emphasized that in the context of prosecuting human rights crimes, witness protection mechanisms should not be associated with State agencies such as the police, security agencies and the military. When these agencies have political and ideological allegiances to the accused implicated in the proceedings, and the capacity to influence the prosecution.\(^{487}\)

Instead, she recommended that “a system of witness protection independent from State mechanisms may be better suited to inspire the confidence and trust of all those concerned. Such a system could be funded by the State, but not closely controlled by the machinery of State organs.”\(^{488}\) Some options

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486 A/HRC/12/19 at para 41
488 ibid
are to create a mechanism for witness protection, which would be overseen directly by the Parliament or the Judiciary. Another approach is to create a witness protection agency as a separate body, funded by and ultimately responsible to the Government, but with decisions on inclusion and exclusion taken by the project director rather than with broader Governmental input on the matter, and with law enforcement agencies playing no direct role in the program.\textsuperscript{489}

**Witness Protection Measures and Programs**

International mechanisms make a distinction between witness protection measures and programs. Witness protection measures are a set of measures addressing the physical, psychological and psycho-social well-being of witnesses taken at any stage of the proceedings, aimed at protecting the witness from intimidation. Witness protection program is a comprehensive set of measures implemented by a witness protection agency in respect of witnesses and their family members / close relatives who have been admitted to the program.

Some of the witness protection measures implemented during the pre-trial and trial stages are outlined below:

**Protective Measures**

These are aimed at protecting the identity of the witness from the public, and in some situations, from the other party to the proceedings, and include

- Disclosure limitations between parties to the proceedings – limitations in disclosing the identity, identifying information or statements of witnesses

\textsuperscript{489} A/63/313 at para 33
• Specific instructions to increase confidentiality – such as on handling and storage of, and access to relevant documents

• Disclosure limitations to the public – such as removal of all information relating to identity of a witness from documents within the public domain.

• Protecting the identity of the witness during trial – such as by assigning a pseudonym, constructing a screen to prevent public view of the witness, in camera trials, image and voice distortion techniques, use of closed circuit / video link testimonies.

**Special Measures**

These are aimed at creating an enabling, emotionally safe environment where the witness will feel supported, reassured and respected while giving testimony. Such measures include

• Modifying the courtroom set up – so as to exclude public / limit the number of persons present in the courtroom, shielding the witness from the direct view of the accused, providing witnesses with a separate entry into / exit from the courtroom to avoid contact with the accused.

• Making the courtroom set up less formal, and hence less intimidating.

• Controlling methods of questioning and cross-examination.

• Providing practical assistance and support – such as familiarizing the witness with courtroom set up and court proceedings, assistance in reaching the court, providing counseling support and allowing a psychologist to accompany the witness when testifying.
Post-Trial Measures

These include providing information to the witness about the outcome of the trial, maintaining contact and providing an emergency response system for the witness in case of threat, and witness relocation as a last resort.

All interventions related to witness protection are based on principles including the best interests of the witness, informed consent, confidentiality, proportionality of the protection measure, threat and risk assessment and balancing the rights of the accused with the rights of the witness in the interests of a fair trial.

B3. The Challenge of Witness Protection in Contexts of Communal Violence

One of the biggest challenges to witness protection in contexts of communal violence is the complicity of government officials in the violence, and the consequent potential for a State-run witness protection program being manipulated / compromised and / or derailed. At the same time, ‘outsourcing’ witness protection entirely to communities and civil society groups may not be the answer, as they face severe challenges and limitations, and the responsibility of witness protection ultimately vests with the State. Further, witness protection, if done in a systematic manner, requires a specialized agency with skills for evaluating the nature and extent of threat, and determining the appropriate protection measure for each witness.

A private-public collaborative model can be considered, where the protection program is funded partially or wholly by the state, but an independent agency with specialized skills from the private and public sector administers the program. The agency could be made directly accountable to the judiciary,
to prevent manipulation or interventions by the executive. Alternatively the agency could develop broad guidelines for providing resources for witness protection at the community level, with defined roles for civil society groups.

Protective measures in court can be adopted even without a formal legal framework. There are advances made in Indian jurisprudence through recent legislations such as POCSO as well as judgments of the higher judiciary. However, concerted effort is required to make protective measures operational, more so in a communal context where state and democratic institutions stand compromised.

It is a myth to think that all aspects of witness protection are expensive and that a developing country such as India cannot afford it. Many in-court protective measures are less resource intensive, but require innovation, creativity, and above all, a political will to address the issue of witness protection in a comprehensive and effective manner. However, the best possible safeguard prevent / reduce the incidence of threatening of witnesses is to have prompt and effective trials that follow procedures established by law and do not compromise on fair trial principles.
CHAPTER VI
WHEN SURVIVORS BECOME
ACCUSED
FALSE COUNTER CASES
AGAINST VICTIM-SURVIVORS

A disturbing trend, present in the aftermath of the Kandhamal violence, is the misuse of the legal machinery to institute false / malicious / vexatious proceedings against victim-survivors. When witnesses complained of being threatened, or victim-survivors lodged a complaint with the police for the attack on persons and property, or questioned why they were meted with discriminatory treatment, the perpetrators, with the collusion / complicity of the police, lodged counter-cases against them.

The objective of instituting such counter cases is to intimidate them and other victim-survivors into silence, and deterring them from accessing legal redress for their genuine grievances and asserting their citizenship rights.

In the past six years, many counter-cases have been instituted against victim-survivors of the Kandhamal violence. Since these are criminal prosecutions and have grave import for the life and liberty of the victim-survivors who are falsely alleged of committing offences, they are forced to engage with the protracted prosecutions and defend themselves in court of law, despite limited resources – financial or otherwise, and in
addition to struggling for their and their families’ survival.

This part of the book highlights some such cases as representative samples to expose this abhorrent practice, and discusses the strategies used and hardship caused to the victim-survivors. The discussion is based on an interview of victim-survivors, lawyers who defended them as well as a study of court documents.

A. False Prosecutions Against Victim-Survivors

Prakash Naik (Barakhama village, Balliguda block)

Prakash Naik, aged about 50, works as the Secretary of the Church of North India (CNI) and is a leader of the Christian community in Barakhama village. In the December 2007 violence, the village was a target of attack for its sizeable Christian population. 322 houses were burnt down systematically, and the property of Christians looted and destroyed. Telephone lines were cut and the approach roads blocked to prevent access to assistance for the victim-survivors. When Prakash Naik, along with many others, was praying in the Barakhama church at 4 pm on 25 December 2007, violent mobs armed with deadly weapons attacked the church. All fled from the church.

According to Prakash Naik, Kageshwar Mallick – an adivasi Hindu – had climbed up the church to break it. While he was in the process of doing so, he fell down and was severely injured. While being taken to the hospital, he either died due to the injury or was either killed to provoke hatred against Christians among adivasi Hindus. Kageshwar Mallick’s death became a turning point and gained the support of Hindu adivasis who resided in Barakhama village, who had previously not supported any form of violence or targeting of Christians in their village.

On 26 December 2007, Prakash Naik went to the Balliguda
police station to lodge an FIR for the burning of / damages to Christian-owned houses, looting and burning of household articles of Christians and destruction of the church. The FIR was registered. Many others went individually to lodge complaints at the police station but they were reportedly threatened and sent away without the FIR being registered. While he was at the police station, police arrived at Barakhama village. Based on false allegations made by the perpetrators and their local supporters from the village, the police registered a case of murder of Kageshwar Mallick against Prakash Naik and other Christians. There are indications that the police acted in a partisan manner - it registered the FIR against Christians but did not take cognizance of the destruction of the church and the burning of the Christian houses. Two incidents took place in the same village – the police was keen on working only on one – which was against the Christians.

On 29 December 2007, Prakash Naik was arrested along with 13 others (all Christians) when he went to Balliguda camp to distribute relief supplies to victim-survivors. He was not informed of the grounds of arrest. He later came to know that for the death of Kageshwar Mallick, a false complaint of murder had been lodged against him and 13 other Christians from our village. All 14 persons were sent to Balliguda jail. Prakash Naik was released on bail on 17 April 2008.

The police delayed filing a chargesheet. Prakash Naik, through his advocate, lodged a complaint before the Panigrahi Commission regarding the extreme delay in preparing the chargesheet, and the consequent harassment to the accused persons. The Commission directed the Superintendent of Police to expedite the same, and thereafter, in April 2009, 16 months after the arrest of Prakash Naik and 13 others, the police filed

490 PS Case No. 220 of 2007 at Balliguda police station
the chargesheet.

Trial in this case commenced in 2009.\textsuperscript{491} It was alleged that the informant was going along with 250-300 Hindus in a rally that had been called by the Kui Samaj on 25 Dec 2007. During the rally, the informant’s father (Kageshwar Mallick) had been injured by Prakash Naik and 13 others by stone pelting, and that he died on the way when he was being taken to Balliguda hospital. Some witnesses of the prosecution deposed in court. There were several contradictions and inconsistencies in the testimony of the informant, who said in court that the rally had 2500-3500 persons, and not 250-300 persons as stated in his FIR. In the opinion of Adv. B.D.Das who was assisting and representing Prakash Naik and others in this case, the Public Prosecutor was keen to obtain a conviction in this false case, and use the same to weaken the genuine case of burning of houses and destruction of the church for which Prakash Naik had lodged a complaint in 2007. He obtained a stay on the proceedings, on the ground that the matter required further investigation (as to the number of persons in the rally and other details).

In the case of arson and rioting in Barakhama village, instituted through Prakash Naik’s complaint on 26 December 2007, the investigation was done after a huge delay and the chargesheet was filed on 31 July 2010 – 2.5 years after the incident.\textsuperscript{492} This, in itself, is an indication of the lack of due diligence shown by the police personnel in discharging their duties. The accused had been arrested and were released on bail. The trial commenced in 2012.\textsuperscript{493} As the informant, Prakash Naik went to court thrice to

\textsuperscript{491} State of Odisha vs. Prakash Nayak, Ranjan Nayak and others ST 02/2009 before the Sessions Judge, Phulbani
\textsuperscript{492} The chargesheet was filed on 31 July 2010 against 44 persons under S. 147, 148, 452, 427, 435, 436, 295 and 149 of the IPC.
\textsuperscript{493} State of Odisha vs Umakanta Patra & 43 others ST 9/2013 before the Additional District & Sessions Judge, Phulbani; the trial was conducted in Fast Track Court 2 at Phulbani.
give his evidence. On all those three dates, the accused did not remain present in court and hence he could not depose. On the fourth occasion, on 17 October 2013, Prakash Naik was unable to attend court. The judge issued a non-bailable warrant against him. He was arrested by the police from his home at 3 am and taken to Balliguda police station and kept in the verandah of the police station on a cold winter morning. Thereafter in the morning he was taken to Phulbani for remand. It is ironical that Prakash Naik, the informant and a victim-survivor of the violence, was treated as a criminal attempting to escape from the clutches of law, with utter disregard to the fact that he remained present in court on three previous occasions.

In the proceedings, the Additional Public Prosecutor (PP) examined 12 out of 82 witnesses. The 12 witnesses included residents of the village, seizure witnesses and one Investigating Officer of the case. Their evidence withstood cross examination and there were no material inconsistencies. Prakash Naik too was cross examined in court. The PP reportedly promised Prakash Naik that at least 10-15 persons would be convicted as the evidence was very strong. In an order of the court dated 6 September 2012, the Additional Public Prosecutor’s intention of examining all witnesses was noted. Subsequently he decided to close the evidence without examining the remaining witnesses. When Prakash Naik requested the PP to examine the remaining witnesses in court, he declined. Thereafter Prakash Naik sent a letter in this regard to the PP by registered post. Then too, there was no response. Prakash Naik, as the victim, is entitled to representation by a lawyer but such a lawyer is directed by law to assist the prosecution, and hence, cannot make independent arguments in court on behalf of the victims.494 In this situation,

494 The proviso to Section 24 (8) of the Code of Criminal Procedure reads: “Provided that the Court may permit the victim to engage an advocate of his choice to assist the prosecution under this sub-section.”
where the PP jeopardized the interests of the case and the victim-survivors, their advocate submitted written notes of arguments on behalf of the informant Prakash Naik, which were taken on record by the court. The sessions judge allowed the prosecution evidence to be closed without examining all the witnesses, which included investigating officers. No reasons are available on court records for the PP’s decision of doing so. Adv. B.D. Bas opines that intentionally evidence was withheld from the court by the PP in order to shield the perpetrators, and this majorly contributed to the acquittal of accused person. His opinion is substantiated by the judgment of the court, which observed as follows:

…the prosecution has failed to examine the persons affected by the crime. Therefore the above created a genuine doubt in the mind of the court…It is a fact that the prosecution has failed to examine the investigating officers those conducted major part of the investigation…Further, it is on the record that the accused persons damaged the houses of Pabitra Naik, Lima Digal, Paul Digal, Chitrasen Digal, Umesh Naik, Saula Digal, Sanatan Naik, Jayanand Naik and Khageswar Digal, but none of the above witnesses have been examined by the prosecution.495

After closing the evidence, on another date, the judge accepted, as evidence, documents related to the murder case pending against Prakash Naik. No notice was given to the informant Prakash Naik or his lawyer, hence they were not given an opportunity to explain the case. The court was swayed by these documents, resulting in an acquittal of all accused persons on 29 October 2013. It observed:

Learned advocate on behalf of the accused persons also wants to impress upon the Court that the case record indicate that one

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495 Judgment of the Court of Sessions Judge, Phulbani, dated 29 October 2013, para 9 (judgment on file with the authors)
Khageswar Mallick was murdered on 25.12.2007 … The present informant Prakash Naik is also one of the accused in the said case… and due to above prior dispute, the present case has been filed… Therefore the possibility of a mutual fight between the persons of Kui Samaj, Bajranga Dal and the Christian Community cannot be ruled out. No doubt prior enmity is a double edged weapon and in that situation, it is always advisable on the part of the court to look for more clarity in the prosecution case before recording a conviction. (para 9)

A Criminal Revision Petition has now been filed in the High Court against this judgment.496

Prakash Naik’s case illustrates four important aspects that contribute to acquittals in such cases:

a) Partisan attitude of the police and their failure to discharge their duties with due diligence

b) Collusion of the PP with the accused, and failure to discharge his duty of presenting the best evidence against the accused before the court

c) Judicial bias, and

d) The severe limitations posed by the legal provision for a victim’s lawyer, in contexts where the PP fails to conduct the prosecution in a diligent, professional and bona fide manner.

The false case lodged against Prakash Naik and 13 others was intended to intimidate them into silence and to deter them and other victim-survivors from pursuing justice for the targeted violence against Christians and Christian property in Barakhama village in December 2007. In the words of Prakash Naik,

496 Cri Rev No. 1127 of 2013, in the High Court of Orissa at Cuttack
With having to go frequently to court for two different cases, it has been difficult to do anything else. From 2009 to 2012, I have continuously received threats. 15-20 people came home and told me “what happened has happened, but if you say the truth in court, watch out, no one will be there to save you.” At times there were people following me, trying to kill me. There is no point in complaining about the threat in court as it may lead to another prolonged litigation or it may lead to another counter-case. I have no confidence in the police as the police had colluded in lodging the false case against me. Hence I continue to live with fear for my security and that of my family members. I have left it to god to protect us.

Kartik Kumar Nayak (Barakhama village, Balliguda block)

Kartik Nayak, aged about 28 years, lives in the same village as Prakash Naik whose case is discussed above. On 22 April 2008, members of the National Commission for Minorities (NCM) visited Barakhamavillage to assess the December 2007 violence and its aftermath. The NCM team called for a meeting with victim-survivors. Kartik Nayak, then aged 22, joined the meeting as a youth representative. He had completed his graduation some months prior to the meeting. The District Collector, Superintendent of Police and other senior government officials were present at the meeting. They had reportedly told the victim-survivors to remain silent during the meeting with NCM and not raise any issues / complaints. However Kartik did not remain silent.

The NCM team asked the survivors if they could put the past behind them and live together with the Hindus peacefully. Reportedly, all the victim-survivors remained silent as they were frightened of speaking out. Kartik states that he highlighted to the NCM members that the police had taken no action for the massive destruction caused to the houses and church in Barakhama village, and that this would encourage the
perpetrators to commit further offences in future. 322 houses had been burnt down systematically but the police had arrested no one. The Superintendent of Police reportedly countered this allegation by telling the NCM members that the police had arrested 38 persons. Kartik clarified to the NCM team that 38 persons had been arrested in relation to other incidents of violence, but none arrested for the attack in Barakhama village. Kartik further highlighted the problems faced by victim-survivors: they were not being allowed to re-construct their houses, they were being stopped from bringing firewood from the forests, they were not allowed to access water, their fundamental rights were being violated, the land actually allotted to each survivor family for reconstruction of their house was less than their entitlement as directed by the government. Six to seven other persons reportedly supported Kartik in raising these issues at the meeting.

Soon thereafter, Kartik’s name and the names of 6 others who had supported him at the meeting were added to the false murder case against Prakash Naik and others, in order to teach them a lesson for complaining to the NCM. Kartik absconded, but due to the continuous harassment of his family by the police, he surrendered in court on 16 September 2008. He was released on bail on 22 January 2009. Though the Odisha High Court has ordered a stay on the proceedings in this case, the impact of the false counter-case on Kartik has been irreparable, as stated by him:

*Due to being falsely implicated in the murder case, I am unable to do higher studies, as I am required to obtain a police clearance that I have no criminal records. I completed my B.A. with great difficulty soon after the December 2007 violence. My educational certificates were burnt by the violent mob and I obtained duplicates with a lot of difficulty. Some of my friends and classmates still have*
Manyabhar Nayak, aged about 30 years, is a victim-survivor of the August 2008 violence in Kandhamal. His village was attacked by a violent mob, Christian houses were destroyed and Christian owned property looted/burnt. Soon after the violence, he went to reside in the relief camp at K.Nuagam. At the relief camps, a leader was nominated for each panchayat. Manyabhar was nominated as a leader of the relief camp, assigned with the responsibility of ensuring the proper distribution of relief materials, and taking care of the well-being and discipline of inmates within the relief camp.

On the evening of 27 October 2008, a peace meeting was convened by the Block Development Officer in the Block Office of K.Nuagam. Manyabhar and several other youth and men playing a leadership role at the relief camp participated in the meeting. At the meeting, the Block Development Officer, Sub-collector, Tehsildar and other Government officials were present.

Members of the Hindu community reportedly opined that the relief camp should be dismantled and the survivors sent back to their respective villages, as they were draining the
government’s money. Manyabhar opposed the suggestion, and highlighted to the government officials the problems faced by the victim-survivors with regard to housing, water, food, sanitation, livelihood, education and other issues pertaining to their survival. Six other persons who were also leaders of the K.Nuagam relief camp supported what Manyabhar had said. Manyabhar further pointed out to Jayadev Pujari and Surendra Paika who was the panchayat secretary, both of whom were present in the meeting, and said that they were rioters and should be arrested.

On 2 November 2008, Surendra Paika lodged a false complaint against Manyabhar and the other six persons, alleging that on 27 October 2008, at 11.30 a.m., at the relief camp, they had obstructed his way and assaulted him when he went to the K.Nuagam relief camp to serve notice of the formation of the peace committee, in the capacity of panchayat secretary.\(^497\) It was further alleged that Manyabhar and others assaulted him, threatened to kill him and also uttered obscene words at the relief camp.\(^498\) Manyabhar was arrested on 22 January 2009, and released on bail after some days. The trial commenced in the court of the Sub-Divisional Magistrate, Balliguda in 2011.\(^499\) The court found material inconsistencies in the testimony of the informant and another main prosecution witness. The prosecution was unable to prove its case against Manyabhar and other accused persons. The court acquitted all the accused persons vide its judgment dated 19 June 2014.

\(^{497}\) FIR No. 141/2008 lodged at Balliguda police station on 2 November 2008; copy of FIR on file with the authors.

\(^{498}\) Manyabhar and four others were accused and prosecuted under the following sections of the Indian Penal Code: S. 341 (punishment for wrongful restraint), S. 294 (obscene acts and songs), S. 353 (assault or criminal force to deter public servant from discharge of his duty), and S. 506 (punishment for criminal intimidation) read with S. 34 (acts done by several persons in furtherance of common intention).

\(^{499}\) G.R. Case 318/2008, Trial case no. 71/2011
As pointed out by Adv. Ravin Chandra Sahu, the advocate for Manyabhar, the false complaint was lodged with the mala fide intention of intimidating and silencing Manyabhar and other victim-survivors who were vocal in highlighting issues of justice and accountability. He further stated: “Whenever any victim-survivor asserted their rights or questioned the government for malpractice towards them, they were slapped with false complaints leading to protracted prosecutions. This has been a general practice.”

Manyabhar narrates his experience as follows:

There were frequent summons in court, which caused immense physical and mental harassment to me. From the end of 2008 till June 2014, I was unable to carry on with my day-to-day life in a peaceful manner. I have aged parents, a wife and three children to support. I am a daily wage earner, earning Rs. 100-120 per day. Since I had to be frequently attending the court hearings, I lost many days of work and consequently the daily wages for those days. I find that court officials mostly collude with and support the perpetrators of Kandhamal violence, in my experience, the functioning of the legal system provides little support and more harassment to the victim-survivors. Now I am trying to provide support and assistance to other survivors engaging in justice processes.

In this case, it appears that the PP lost interest in the prosecution. The letter allegedly written by the Block Development Officer to Surendra Paika, which he purportedly took to the relief camp for service, was neither produced nor proved in court. This was a crucial piece of evidence in the case. Perhaps the objective was to harass the accused persons and teach them a lesson for being vociferous about the rights

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500 Interview with Adv. Ravin Chandra Sahu on 19 June 2014, transcript on file with the authors

501 Interview with Manyabhar Nayak on 27 August 2014, transcript on file with the authors
of victim-survivors, and such an objective was already served through a prolonged trial.

**Meghanatha Pradhan** (Shishupanga village, Raikia block)

When Meghanatha Pradhan (from village Shishupanga, Raikia block) complained of having been threatened in his house burning case, the police arrested him saying that he had burnt down his own house and was filing a false complaint. He was falsely alleged of murder. He has now been acquitted. The case was disposed of by the Fast Track Court 2 in 2010, as informed by Adv. Rajkishore who assisted him.

**Name suppressed**

In the case of a woman whose name is suppressed, and who stood as a witness against an influential accused, she was threatened with rape and murder. As narrated by her to the interviewers, she was further threatened that a counter case would be filed against her for illegal occupation of land, if she gave testimony in court. This did not deter her from giving her honest testimony in court.

- As narrated by Adv. Manas Singh to the authors, in one case, 3 Christian men who were living in a relief camp in Daringbadi were falsely alleged of having raped 3 elderly Hindu women. The FIR was lodged 20 days after the incident. HRLN through Manas handled the case, and it resulted in acquittal in 2010 in Fast Track Court 2.

- In another case, after the victims fled from the village of Baligada in Daringbadi block, they went back to their village to see their houses. Police raided the village and arrested the victims along with some Hindu perpetrators. Adv. Manas said that he had defended the accused and obtained an acquittal.
B. The Entitlement to Free Legal Aid: The Law & Reality

The state has an obligation to provide free legal aid to poor, indigent and marginalized persons. The right to a fair trial includes a right to legal representation / assistance. It is an established legal principle that free legal assistance at State cost is a fundamental right of the person accused of an offence, and that this fundamental right pre-supposes the requirement of a reasonable, fair and just procedure prescribed under Article 21 of the Constitution of India. The Supreme Court has repeatedly stated that the Magistrate or the Sessions Judge before whom an accused appears is duty-bound to inform the accused that if he / she is unable to engage the service of a lawyer on account of poverty or indigence, he / she is entitled to obtain free legal services at the cost of the State. Section 304 of the Code of Criminal Procedure states the provision for legal aid to the accused at State cost in certain cases. The Legal Services Authorities Act 1987 also provides for free legal aid to accused persons who cannot afford the services of a lawyer.

In contrast to these legal provisions, in reality, the victim-survivors of Kandhamal violence, who were implicated in false cases, had no access to free legal aid. They were not informed of their right to the same. In Kandhamal, the local Bar Association had an anti-Christian bias and made no offer to the accused victim-survivors to defend them. The State / District Legal Aid Committee too did not perform its duty of providing free legal aid services. The victim-survivors too did not have faith in those lawyers. As a result, defending the victim-survivors was a responsibility that fell entirely on Christian lawyers, despite the

502 M.H. Hoskot vs. State of Maharashtra, AIR 1978 SC 1548 and Hussainara Khatoon’s case, AIR 1979 SC 1369
503 Suk Das and another vs. Union Territory of Arunachal Pradesh 1986, Cri.L.J.1084; Khatri and Others vs. State of Bihar and Others, 1981 Cri.L.J. 470
fact that, in many instances, they and their families too were victim-survivors of the violence.

C. False Complaints, Counter Cases and their Larger Import

The cases highlighted above show that to a large extent, local leaders of the Christian community as well as those victim-survivors who asserted their rights vocally were at the receiving end of false allegations and counter-cases. The cases discussed above indicate the following:

a) Mala fide acts of the police in misusing their powers to lodge complaints and file false chargesheets before courts of law.

b) The complicity of the Public Prosecutor in conducting such prosecutions.

c) Although the accused are entitled to free legal aid from the State, with State agents being complicit in the institution of such false counter-cases, legal aid from the State becomes elusive, and

d) The judicial bias in some cases.

Kandhamal violence is not the first time that counter cases has been used to intimidate / silence the victim-survivors and deter them from their pursuit of justice and accountability. Nor is it the last. In the wake of the anti-Muslim carnage in Gujarat in 2002, more than a hundred Muslims were charged under the much-criticized Prevention of Terrorism Act (POTA) for allegedly attacking the train at Godhra, but no Hindus were charged under POTA for the post-Godhra violence against Muslims.\footnote{Human Rights Watch (2003), Compounding Injustice: The Government’s Failure to Address Massacres in Gujarat’, Vol. 15, No. 4 (c), July at p. 5} In the wake of communal violence in Mumbai in 1992-93, where an indiscriminate police firing in Hari Masjid
killed Muslim devotees praying at the mosque, false complaints had been lodged against Farooq Mhapkar and 23 other victim-survivors for unlawful assembly and rioting inside the Masjid. While the 23 accused persons were acquitted by the sessions court earlier, Farooq Mhapkar was acquitted nearly 16 years after the incident, in 2009.\textsuperscript{505}

By instituting false complaints and prosecutions against victim-survivors of violence, as in the context of Kandhamal, the state is clearly violative of its obligations under the Indian Constitution, to provide equality and equal protection of the law to all, and further to protect life, liberty and fundamental rights of all. Additionally, under international law, the state is obliged to respect, protect and fulfil human rights.\textsuperscript{506} In its obligation to respect, the State must abstain from any conduct or activity of its own that violates human rights. States have an obligation to provide victims of human rights violations with equal and effective access to justice, irrespective of who may ultimately be the bearer of responsibility for the violation.\textsuperscript{507} False complaints and instituting fabricated proceedings against victim-survivors deters them from accessing justice and infringes upon their human rights in many ways. Thus the State has violated its obligations under the UN Covenant on Civil and Political Rights as well as other international human rights treaties ratified by India. Collective strategies need to be chalked out to end this abhorrent practice of State agencies.

\textsuperscript{505} ‘Mhapkar Acquitted in Hari Masjid Case’, The Times of India, 18 February 2009


\textsuperscript{507} See S. 3(c) of Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by General Assembly Resolution 60/147 of 16 December 2005
ANNEXURE 1
JUDGMENTS OF FAST TRACK COURT I
AND FAST TRACK COURT II PHULBANI
STUDIED FOR THE PURPOSES OF THIS
REPORT (21 JUDGMENTS)

Fast Track Court I Phulbani (11 judgments):

1. **State V. Singiraj Pradhan**, FTC-I, Justice Sovan Kumar Dash,
   
   S.T Case no. 90/31 of 2009
   
   Judgment dated: 27/11/2010
   
   FIR date: 30.09.2008
   
   Accused charged under S.147, 148, 302, 307, 379, 436, 341
   r/w S 149 IPC, u/s. 25 (1-B) (a)
   
   and 27, Arms Act, S.4, ES Act

2. **State V. Pisipatra Pradhan**, FCT-I, Justice Sovan Kumar Dash,
   
   S.T Case no. 201/76 of 2009
   
   Judgment dated: 31/03/2010
FIR dated: 05/09/2008
Accused charged u/s: 147, 148, 302/149 and 201/149, IPC

3. **State v. Kartik Pramanik**, FTC-I, Justice Sovan Kumar Dash,
   Date of judgment: 24.3.2012.
   FIR dated 26.8.2008 u/s. 147, 148, 302, 436, 201 r/w. 149 IPC

4. **State v. Jaya Pradhan**, FTC-I, Justice Sovan Kumar Dash,
   S.T. Case No. 159/53 of 2009
   Date of Judgment: 07/05/2010
   FIR dated: 31/08/2008
   Accused charged u/s: 147, 148, 294, 427, 435, 452, 436/149, 506 and 302 r/w 149, IPC

5. **State v. Susantu Sahu and Anr**, FTC-I, Justice Sovan Kumar Dash,
   S.T. Case No. 198/75/2009.
   FIR dated 31.8.2008 u/s.147, 148, 294, 427, 436, 452, 302, 506, 153-A r/w 149, IPC

6. **State v. Suin@Abhinash Pradhan**, FTC-I, Justice Sovan Kumar Dash
   S.T. Case No. 213/78/2009.
   Judgment dated 14.5.2010,
   FIR dated 26.8.2008 u/s.147, 148, 436/149, 302/149, 201/149 IPC
7. **State v. Manoj Pradhan and Anr**, FTC-I, Justice Sovan Kumar Dash,

S.T. Case No. 174/64 of 2009

Judgment dated 29.06.2010.

FIR dated 28.08.2008 u/s. 147, 148, 341, 342, 302 and 201 r/w. S.149 IPC

8. **State v Manoj Pradhan**, FTC-I, Justice Sovan Kumar Dash

S.T. Case No. 95/33/2009,


FIR dated 28.10.2008 u/s. 147, 148, 455/149, 436/149, 380/149 and 506/149 IPC

9. **State v. Manoj Pradhan**, FTC-I, Justice Sovan Kumar Dash,

S.T. Case No. 48/16/2009,

Judgment dated 28.8.09,

FIR dated 29.10.2008

accused charged under Sections 147, 148, 436/149, 427/149, 380/149, 455/149, IPC

10. **State V. Manoj Pradhan**, FTC-I, Justice Sovan Kumar Dash

S.T Case No. 109/37 of 2009


FIR dated: 28.08.2008

Accused charged u/s: 147, 148, 302/149, IPC

11. **State v. Tidinjia Pradhan, Umesh Pradhan, Senapati**
Pradhan, FTC-I, Justice Sovan Kumar Dash, S.T. Case No-60/19/2009
judgment dated 16.9.09.
FIR dated 10.10.2008 u/s. 147, 148, 436/149 and 380/149 IPC

Fast Track Court II, Phulbani

1. State v Pappu Pradhan and 4 others, FTC-II, Justice C.R.Dash,
S.T. Case No.17/2009,
ST-43 of 2009.
Date of judgment 25.7.2009.
FIR date-30.8.2008 u/s. 147/148/455/436/302/201 r/w.149 IPC

2. State v Prafulla Mallik and Anr., FTC-II, Justice C.R.Dash,
Date of judgment 30.10.2010
FIR date-31.8.2008 u/s. 147, 148, 302, 201, 120(B) r/w S.149 IPC.

3. State v Raneswar Mallick, FTC-II, Justice C.R.Dash,
S.T. Case No.31/2009, ST-88/2009,
judgment dated 27.4.2010.
FIR dated 17.12.2008, u/s.147, 148, 341, 294, 323, 302, 395, 201 r/w 149 IPC

4. State v Pradeep Kanhar, FCT-II, Justice C.R Dash,
S.T Case No. 08/2009, S.T- 12 of 2009
Date of Judgment: 29.08.2009
FIR no. 85/2008
Accused u/s: 147/148/452/427/323/324/302 r/w Sec. 149

5. State v Batu@ Sambhu Arjali, FTC-II, Justice, Justice C.R.Dash,
   FIR dated 07.09.2008, u/s.147, 148, 452, 427, 302, 201, 295
   r/w S.149 IPC

6. State v Kirenge Kanhar and 15 others, FTC II, Justice C.R.Dash,
   judgment dated 31.7.2009,
   FIR dated 16.9.2008 u/s.147, 148, 449, 427, 435, 436, 302,
   307, 323, 395 r/w S.149, IPC.

7. State V. Bisikesan Sahu and 6 others, FCT-II, Justice C.R Dash,
   S.T. Case No. 76/2009, ST- 214 of 2009
   Judgment Dated: 12/05/2011
   FIR lodged: 27/08/2008
   Accused charged u/s: 147/148, 302/120-B/153-A r/w 149, IPC

8. State vs. Manoj Pradhan and Anr., FTC-II, Justice C.R Dash,
   S.T Case No. 23/2009. ST- 70/2009
   Judgement dated 24.09.2009,
FIR dated 29.09.2008 u/s. 436, 302, 201 r/w. S.149, IPC

9. **State v Manoj Pradhan and 3 others**, FTC-II, Justice C.R Dash,
   S.T Case No. 19 of 2009, ST- 58 of 2009

10. **State vs. Manoj Pradhan and 13 others**, FCT-II, Justice C.R. Dash,
    S.R No. 39 of 2009, ST- 112 of 2009
    Judgment dated 18.11.2009
    FIR dated 17.09.2008 u/s 147, 148, 455, 436 r/w Sec 149. IPC

11. **State V. Manoj Pradhan**, FCT-II, Justice C.R. Dash
    S.T Case No. 38 of 2009, ST- 108 of 2009
    Judgment dated: 09.09.2010
    FIR dated: 27.08.2008
    Accused charged u/s: 147/148/436/454/427/302 r/w S. 149, IPC
## GLOSSARY

### A

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ad hoc</td>
<td>Connotes a makeshift solution, inadequate /improper planning, or act of an arbitrary nature</td>
</tr>
<tr>
<td>Adivasi</td>
<td>Literally means “original dwellers / inhabitants” and refers to indigenous peoples. Legally, adivasis are counted among the groups collectively named Scheduled Tribes.</td>
</tr>
<tr>
<td>Anganwadi</td>
<td>Literally means “court yards”, anganwadi workers are employed by the Department of Social Welfare to distribute nutrition supplements to pregnant women and children, and to provide non-formal education for children upto 6 years of age, under the Integrated Child Development Scheme (ICDS).</td>
</tr>
<tr>
<td>Arya Samaj</td>
<td>A Hindu reform movement founded by Swami Dayanand Saraswati inaugurated in the 1870’s, and popular with the</td>
</tr>
</tbody>
</table>
emergent commercial castes in north India, particularly in Punjab. Dayanand insisted that caste-status depended upon meritorious conduct rather than birth, denounced superstition and idol-worship, and that a proper knowledge of ancient texts was crucial to acquiring merit. The Aryas placed great emphasis upon education, and began an influential Anglo-Vedic pedagogical movement combining western science with Vedic shastras as interpreted by Swami Dayanand. They also believed that the defects in Hindu religious practice were a cause of national weakness, and that doing away with these was the only way to prevent the conversion of the lower castes to Islam and Christianity. In the 1920’s they began the activity of re-conversion, known as ‘shuddhi’ or purification, designed to bring Christian and Muslims back into the Hindu fold.

**Ashram**: A house of a Hindu spiritual guide.

**B**

**Babri Masjid**: Historical mosque in North India that was demolished by the Hindu right wing militants on 6 December 1992.

**Bajrang Bali**: Name of a Hindu god, symbolic of courage, strength and devotion.

**Bajrang Dal**: A militant youth organization of the
Vishva Hindu Parishad, itself a front organisation of the RSS, it takes its name from the deity Hanuman.

**Bandh**

Literally means ‘closed’ in Hindi, a form of protest often organized by political parties, where business activities are stopped, and public and private transport cease to operate.

**Bharatmata**

Mother India.

**Bona fide**

good faith.

**Brahmin**

The upper most caste in the Hindu caste hierarchy.

**C**

**Coolie.**

Porter / carrier

**Constitution (Scheduled Castes) Order, 1950**

An Order issued by the President specifying the communities that will be considered Scheduled Castes in the Schedule of the Act

**Commissions of Inquiry Act, 1952**

An Act to provide for the appointment of Commissions of inquiry and for investigation.

**CBCI**

The Catholic Bishops' Conference of India (C.B.C.I.) is the permanent association of the Catholic Bishops of India. It was formally constituted in September 1944 at the Conference of Metropolitans held in Madras. Its objectives are to facilitate coordinated
study and discussion of questions affecting the Church, and adoption of a common policy and effective action in all matters concerning the interests of the Church in India.

D

Dal / Daal
Preparation of pulses, is an essential dish for most Indians.

Dalit
The term means “oppressed people” and refers to persons belonging to a category at the lower end of the caste system, who are considered “untouchables”. They are discriminated against and treated in an inhumane manner.

District Collector
Administrative head of the district.

Division Bench
A panel of two judges of the High Court or the Supreme Court, which hears and adjudicates on a case.

Durga Vahini
Women’s organization of the RSS.

E

Ex gratia
Literally means ‘out of grace or kindness’, in law, an ex gratia payment is one made without recognition of any liability / obligation on the part of the person / institution making the payment.
### G

**Ghar Vaapasi**

Literally means “return home”, it refers to rituals conducted by Hindutva forces in relation to converting or re-converting a person back into the Hindu fold.

**Global Council of Indian Christians**

An organization promoting the interests of Indian Christians.

**Gobar Pani**

The urine of the cow, considered sacred in the Hindu religion.

### H

**Hari Masjid**

A mosque in Mumbai where Muslims who were offering prayers were fired at and killed by police officials during the communal violence in 1992-93.

**Hashimpura**

A place in Meerut, U.P., from where over 40 Muslim men were abducted and allegedly killed by members of Provincial Armed Constabulary – a type of police.

**Hindu Jagran Manch**

Is a right wing activist group affiliated to the VHP which is against conversion.

**Hindu Rajya / Hindu rashtra**

Hindu nation.

**Hindutva**

Ideology and political formation of the Hindu Right.
I

In camera

Closed proceedings in court where spectators are excluded or their entry is restricted.

Inquest

A legal investigation into the cause and manner of death, carried out in contexts including murder, death in custody and death in mysterious circumstances. It is conducted by the magistrate in specified situations, and by the police in other situations as prescribed in Section 174 of the Criminal Procedure Code.

J

Jai Bajrang Bali

Victory to Bajrang Bali – used both as a greeting and in slogans by the Hindu Right Wing, see meaning of Bajrang Bali above.

Jai Hanuman

Victory to Hanuman (a Hindu god) – used as a greeting but also used in slogans by the Hindu Right Wing.

Jai Sriram

Victory to Ram – used as greeting but converted to a slogan by the Hindu Right Wing.

Jus Cogens

A peremptory norm – a fundamental principle of International law that is accepted by the International community of States as a norm from which no derogation is ever permitted.
K
Kalashyatra  Journey carrying the ashes of the body of a deceased person in an earthen pot.

Kandhas / Kandhos  One of the oldest tribal communities of Orissa, mostly belong to Scheduled Tribes.

L
Lok Sabha  House of the People, Lower House in the Indian Parliament.

M
Mala fide  In bad faith.

Manoj Pradhan  BJP MLA from Kandhamal District, accused in a number of FIR’s for criminal offences committed during the communal attacks.

MARG  Multiple Action Research Group, an NGO working for the empowerment of the marginalised and vulnerable sections of society.

Mataji  Mother.

Mohapatra Commission  A Commission of Inquiry established by the Orissa state government, headed by Justice Sarat Chandra Mohapatra to inquire into the violence that began in August 2008.

Muzaffarnagar  A district in western Uttar Pradesh where communal attacks against members of the Muslim community took place in September 2013.
<table>
<thead>
<tr>
<th>Commission</th>
<th>Description</th>
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</thead>
<tbody>
<tr>
<td>Naidu Commission</td>
<td>Following the death of Justice Mahapatra in May 2012, the proceedings of the Commission halted and were commenced again in March 2013 under the chairpersonship of Justice A.S. Naidu.</td>
</tr>
<tr>
<td>National Commission for Minorities</td>
<td>The Union Government set up the National Commission for Minorities (NCM) under the National Commission for Minorities Act, 1992. Various States have also set up State Commissions which are located in the respective State capitals. Aggrieved persons belonging to the minority communities may approach the concerned State Minorities Commissions for redressal of their grievances. They may also send their representations, to the National Commission for Minorities, after exhausting all remedies available to them.</td>
</tr>
<tr>
<td>National Human Rights Commission</td>
<td>The National Human Rights Commission (NHRC) of India is an autonomous public body constituted on 12 October 1993 under the Protection of Human Rights Ordinance of 28 September 1993. It was given a statutory basis by the Protection of Human Rights Act, 1993 (TPHRA).</td>
</tr>
</tbody>
</table>
National People’s Tribunal
Organized by the National Dalit Movement for Justice - National Campaign on Dalit Human Rights, to provide a platform for victims and witnesses of caste based atrocities and discrimination, various government agencies, policy makers, human rights institutions, civil society organisations and academicians to come together and collectively respond to current situation.

National Crime Records Bureau (NCRB) is a Government agency with a mandate to create, maintain and disseminate a secure national database on crime and criminals for law enforcement agencies and promote its use for improving public service delivery. The Bureau was sanctioned, amalgamating a few existing units, vide the MHA Resolution No.24013/13/85-GPA.IV dated 11th March, 1986.

O
Odisha Sadbhavana Manch An umbrella of civil society organizations that formed a fact-finding team which visited Kandhamal in 12-14 September 2008.

Orissa Scheduled Areas Transfer of Immovable Property (By Scheduled Tribes) Regulation Act, 1956
An Act to control and check transfers
of immovable property in the scheduled areas of the State of Odisha by Scheduled Tribes.

<table>
<thead>
<tr>
<th>P</th>
<th>Panas / Panos</th>
<th>Community consisting mainly of dalits, many of whom are Christians.</th>
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<tbody>
<tr>
<td></td>
<td>Panchayat</td>
<td>Village level elected body.</td>
</tr>
<tr>
<td></td>
<td>Panchnama</td>
<td>Also called ‘spot panchnama’, it is a document that lists the evidence and findings that a police official first makes at the scene of the crime. It is signed by the Investigating Officer and two impartial public witnesses.</td>
</tr>
<tr>
<td></td>
<td>Post mortem</td>
<td>Also called autopsy, refers to a medical examination of the body of a deceased person, to determine the cause of death.</td>
</tr>
<tr>
<td></td>
<td>Prima facie</td>
<td>Literally means ‘on its first appearance’, or ‘at first sight’, prima facie case in criminal law refers to one where the facts of the case lead to an inference that the alleged offence has been committed. Prima facie evidence refers to evidence that is sufficient to raise a presumption of fact, unless rebutted.</td>
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</table>
### R
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<tr>
<th>Term</th>
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<tbody>
<tr>
<td>Rajya Sabha</td>
<td>House of Representatives, Upper House in the Indian Parliament.</td>
</tr>
<tr>
<td>Ram / Ram</td>
<td>Name of a Hindu god.</td>
</tr>
</tbody>
</table>

### S
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</thead>
<tbody>
<tr>
<td>Sadhu</td>
<td>A mystic, ascetic or wandering monk in Hinduism.</td>
</tr>
<tr>
<td>Sampradhayik Hinsa Prapidita Sangathana</td>
<td>Association of Victims of Communal Violence in Kandhamal.</td>
</tr>
<tr>
<td>Sangh Parivar</td>
<td>Refers to the collective Hindu Right Wing organizations – including RSS, VHP, Bajrang Dal and BJP.</td>
</tr>
<tr>
<td>Shah &amp; Nanavati Commission</td>
<td>A Commission of Inquiry established by the Gujarat state government to inquire into the Gujarat carnage 2002.</td>
</tr>
<tr>
<td>Shraddhanjali</td>
<td>Literally means ‘Offering of faith’ – is a Hindu ritual consisting of remembrance prayers offered to dead persons.</td>
</tr>
<tr>
<td>Shuddi movement</td>
<td>A movement for converting and re-converting persons into the Hindu fold. Literally means “purification” – consists of rituals for conversion or re-conversion to Hinduism.</td>
</tr>
<tr>
<td>Shudras</td>
<td>The lower most caste in the Hindu caste hierarchy.</td>
</tr>
<tr>
<td>Srikrishna Commission</td>
<td>A Commission of Inquiry established</td>
</tr>
</tbody>
</table>
by the Maharashtra state government, headed by Justice B.N.Srikrishna, to inquire into the communal violence in Mumbai in 1992-93.

**Status quo**

Literally means “the state in which”, connotes the current or existing situation.

**Status quo ante**

Literally means “the way things were before”, in contexts of communal violence, it refers to the situation that existed prior to the violence.

**Sundhis**

A prominent caste of Hindus in States including Orissa.

**Swami**

Religious teacher in Hinduism.

**T**

**Tabliq & tanzim movements**

Movements for conversion to Islam.

**Tahsildar**

A gazetted officer of the Government of India, in charge of governance of a district in a State.

**Tellicherry**

A city on the Malabar coast of Kerala, site of Hindu-Muslim violence in 1971.

**U**

**UN Special Rapporteurs**

UN Special Rapporteurs are titles given to individuals working on behalf of the United Nations (UN) within the scope of "Special Procedures" mechanisms, who bear a specific mandate from the United Nations Human Rights Council,
either a country mandate or a thematic mandate.

V
Vanvasi Kalyan ashram A welfare trust of the Hindu Right Wing for mobilizing tribals.

W
Wadhwa Commission. A Commission of Inquiry established by the Union Government, headed by Justice D.P. Wadhwa, of the Supreme Court, to inquire into the killing of Graham Staines and his two sons by a mob in Manoharpur village in Orissa.