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STATE VIOLENCE, LAW AND GENDER JUSTICE

Naina Kapur and Jasjit Purewal*

I. Introduction

If law is meant for the realization of justice, then what do we do when those assigned to administer justice become its worst offenders?

More frightening is the pattern whereby each time the legislature realizes its ineffectiveness in curbing criminals in particular and lawlessness in general, it simply arms the State with more power. Such power, absolute and unchecked, has made a mockery of even the concept of justice. When law enforcers have low accountability and a growing and consolidated power, their control over the individual's access to justice is alarming. And now, much lawlessness and obstruction to justice comes through acts of commission and omission by the police and other custodians of law whose vested interests are enhanced by the growing power in their hands.

Ultimately, the most vulnerable members of society — women — are the biggest victims because the more power that vests within the arms of the State, the more easily they can overlook the rights of people, particularly the voiceless ones. To that extent, the gap between gender and justice persists unchecked in India. And the State continues to overlook its responsibility to protect women's rights to equal and fair redress.

But what should be the response of legal reformers towards regulating state power and abuse, especially with a focus on gender needs? It is not enough to promise implementation unless the law recognizes the onus of making the guardians of the law such as the police, armed forces and security personnel, accountable. Legislative amendments are one option. But often such activity is based on the premise of doing something practical while everything else remains the same. Against this backdrop, even the most liberal criminal law ends up working against women. And when it comes to interpreting laws, even progressive ones, the result is the same

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because the entire ethos is male: created, enforced, and implemented by men, usually from the dominant castes and classes.

Short of strict punitive action by government against the police and other custodians of law guilty of violations and atrocities against the people, access to justice, especially for women, continues to be an illusion.

II. Women v. The Police

In attempting to safeguard the interests of women, the Indian Code of Criminal Procedure (1974) and the State Police Manuals provide various forms of protection. In practice, however, the police have become known for the frequent sexual liberties they take with women under their protection. In 1987 and 1988 the National Commission for Scheduled Castes and Scheduled Tribes carried out a study on cases of custodial rape committed on scheduled caste and scheduled tribe women by police personnel. The report, recording the views of police officers, found: "The police officers, by and large, were of the opinion that the incidents of rape committed on the scheduled caste/scheduled tribe women by the police personnel are rare."¹ Yet according to a recent article in a national daily, this view is far from realistic:

Many social welfare organizations have pointed out that most rape victims are unable to register their complaints as the policemen themselves are more often than not parties to the crime. Indeed, while constables constitute the largest group of culprits, India leads the world in custodial rape. According to one organization, there are 5,000 rape cases annually in Bihar; the figure may not be accurate but it is probably not too far out either.²

The Commission's report clearly found that the practice of sexual violence by police on women largely affected women belonging to poor economic groups. Another report recorded fourteen cases of rape in police custody in Delhi alone between 1988 and 1989; most of the victims belonged to a migrant labor population.³ Despite the facts on State abuse, policemen defy statistics, using arguments based on their own absurd deductions. According to the National Commission's report: "Some of the officers also opined that in a one-to-one situation it is very difficult

1. GOV'T OF INDIA, MINISTRY OF WELFARE, NAT'L COMM'N FOR SCHEDULED CASTES AND SCHEDULED TRIBES, A STUDY ON CASES OF CUSTODIAL RAPE COMMITTED ON SCHEDULED CASTE AND SCHEDULED TRIBE WOMEN BY POLICE PERSONNEL (1988).

2. *Women and the Law*, SUNDAY STATESMAN, July 23, 1989.

3. PEOPLE'S UNION FOR DEMOCRATIC RIGHTS, CUSTODIAL RAPE (1990).

for a policeman to rape a woman without her consent.”⁴ Needless to say, it is difficult to imagine a more opportune situation for rape.

That a gender bias influences the functions of law enforcement agencies was clearly illustrated in the recent killings which took place in the northern state of Uttar Pradesh. On July 27, 1991, two sisters, aged twenty-five and thirty, were hacked to death with axes and swords by their three brothers and a cousin. When police officials were questioned as to the motive for the murder, they replied: “These women were indulging in immoral behaviors and naturally, they got enraged and killed them.” Other officials sitting by at the time grunted loudly in general agreement. A sub-inspector added, “Which brother will, after all, endure such behaviors from his sisters?” More appalling was the callous indifference of the Superintendent of police of the area who, when questioned about the case, replied, “I am not interested in talking about the case. I have to attend to a *bara khana* [feast] being held at the police lines, which to me is more important.” Irrespective of the brothers’ guilt or innocence, this attitude typifies the general insensitivity of the police to gender issues.

In 1980 the Inspector-General of Police of the State of Rajasthan advised his officers always to keep in mind the dictum: “Policemen must refrain from committing rapes while the State Assembly is in session.” In a 1988 interview with Prafulla Chandra Ratho, the then Director-General of Police of the State of Orissa, concerning the abduction and rape of a schoolgirl in broad daylight before hundreds of passive onlookers, the following exchange took place:

Interviewer (I): In any case, the rape of . . . is a severe indictment of the law and order situation in Orissa. No crime could be more dastardly.

D.G.: Rape is not a manifestation of crime. It does not reflect the crime position. Neither do rapes reflect the law and order position.

I: What you are saying is that the number of rapes in any given area is no index of the crime position or the law and order situation of that area.

D.G.: Yes. Rape is not an indicator of either the crime position or the law and order situation. There is no nexus between rape and law and order. The number of rapes is not inter-linked with the crime position of the area. By crime, we mean professional crime. Like theft, murder, dacoities, communal riots. If we use this yardstick, rape is not a crime. The motive of gain is not present in rape. I am giving you a professional’s view.

4. See *supra* note 1.

I: Let me project a hypothetical scenario. A given area has a very high incidence of rape but there are no thefts, murders for gain and dacoities. Would you describe the area as crime-free?

D.G.: Yes. There may be a high incidence of rape but the area is certainly not crime-prone. I would definitely describe it as free from crime.⁵

Such insensitivity in the arms of power has worked and will invariably work against women. And it is that view which certainly accounts for the popular belief amongst many police officers that the existing provisions regarding the treatment of women by police are adequate to safeguard the interests of women.⁶

III. Gender v. Police Accountability

In March, 1980, the Government of India through the Ministry of Home Affairs issued a letter to the Chief Secretaries of all State Governments and Union Territories "to prevent the police from subjecting women to indignities at the time of interrogation, etc." The need to issue such a letter was spelled out as follows: "In view of the frequent allegation [sic] about misbehavior with women arrested or kept for interrogation by the police, it is necessary that effective steps are taken to prevent the police from subjecting women to any indignity or misbehavior."⁷

The letter goes on to reassert various provisions of the Criminal Procedure Code. This includes provisions which make it obligatory that a woman be searched only by a woman "with strict regard to decency" or which prohibit the police from examining a woman as a witness in any place other than her residence.⁸ The fact is that such provisions have been in place since 1898! The National Commission Report comes close to a century afterward. This makes the Indian Government's directions seem a mockery, a point which the Commission simply overlooks.

It was only with much public protest and pressure from women's groups in 1983 that the Government was finally compelled to make changes in the law of rape and to address the question of sexual abuse by policemen. The situation arose in response to yet another outrage committed by two policemen against a village girl in police custody. These changes were introduced by the 1983 Criminal Law (Amendment) Act.

5. A.N.M. Abdi, *Crime Most Foul*, ILLUSTRATED WKLY, July 26, 1987, at 26-29.

6. *Id.* at 23.

7. See *supra* note 1, at Annexure III, 54.

8. See INDIA CODE OF CRIM. PROC., §§ 51(1), 100(3) and 160(1) (1973).

The most notable inclusion in the new Act was the creation of a separate category covering rape of women in police custody. In such kinds of rape, it was to be presumed that the women did not consent and that a mandatory minimum sentence of ten years was to be imposed.

Seven years after introducing this change, the Supreme Court, interpreting the provision in another case of rape of a village girl by two policemen, chose to reduce the ten-year sentence imposed on the police to five years. The reason? The girl according to the defence attorney was of "easy virtue" and "lewd and lascivious" character.⁹ When women's groups agitated for a review of the case, the Supreme Court remained adamant and took refuge in a more perverse conclusion — that the girl delayed five days in making her complaint.¹⁰

The absurdity of this logic is obvious. By its very nature, custodial rape is a serious atrocity against women because it is carried out by custodians of the law itself. But this aspect of the case was totally obscured. Instead, questions about a woman's "virtue" or even her understandable fear in reporting a rape by police to the police were allowed to override the offense and nullify the act of rape itself. As a test case, it clearly showed how a male bias permeates even the most liberal process of protection. Despite liberal reforms created for the benefit of women, actual interpretation becomes a fatal obstacle.

Even if one accepts that legislation such as the 1983 amendment is "progressive," women must question the purpose or value of such legislation when it can be interpreted against their interest. Before women begin to view the "liberal" state as the primary source of their betterment they must recall that, even prior to the operation of law per se, men's dominance over women was accomplished both socially and economically. That being so, we must ask what, in gender terms, is the state's yardstick for accountability? How is it that male power inevitably becomes state power? The answers to these questions are important before women get caught between seeking more power for the State on behalf of women and finding that power unchecked.¹¹

IV. Prostitution

It is this ambiguity that has characterized the piecemeal reactions to the law of prostitution in India and the role of the police. Such reactions

9. Prem Chand & Anr. v. State of Haryana, 1989 A.I.R. (S.C.) 937.

10. State of Haryana & Anr. v. Prem Chand & Anr., 1990 A.I.R. (S.C.) 538.

11. See CATHARINE A. MACKINNON, TOWARD A FEMINISM THEORY OF THE STATE 161-163 (1989). See generally chapter 8, The Liberal State.

have served to legitimize different mechanisms of control over prostitutes, a fact which continues to create unease and dissent in “dealing” with prostitution. In most countries, one finds that everything necessary to work as a prostitute is illegal, although it is not illegal to *be* a prostitute. Such prohibition systems are hypocritical and, therefore, invariably unenforceable and corrupt. For example, prostitution is the one profession which thrives on the complicity of the police. But that reality has nothing to do with legislation which has never recognized the existence of police collusion in the prostitution network.

Despite attempted legislative amendments aimed at not punishing prostitution or prostitutes *per se*, the moral hypocrisy of the legislature has remained intact. The government, while seeming to deal with morality and decency in public, has steered clear of penalizing the individual man, be he client or policeman. So the latter continues to hide behind his bribes, to rape prostitutes, and to use them as informants. Ironically, laws against pimping have simply forced prostitutes to depend upon illegal forms of “protection” against State control. Exploiters thrive on State hypocrisies.

The State views the prostitute as somehow worse than the pimp, the brothel-keeper and other “non-sexual” criminals because she flouts “moral” as well as legal codes. And to perpetuate that notion, the State preserves legislation, such as the Bombay and Madras Police Acts, which enhances police potential to exploit their control over prostitutes by enabling them to order the discontinuance of brothels. Loitering has also been made punishable under the Municipalities Acts of Bombay, Uttar Pradesh, Orissa, Bihar and others, which prohibit “public” prostitution and restrict brothels to certain areas. In effect, such laws, obsessed with questions of morality (when it comes to women), simply arm the State with greater power to moralize and exploit. This is why such laws rarely criminalize men for violence against prostitutes or, in fact, for any other form of exploitation of prostitutes. Figures produced by Jean D’Cunha, Lecturer at St. Xavier’s College, Bombay, are clear evidence of such discrimination and abuse:

While only 596 brothel-keepers and 304 procurers were arrested during 1980-87 and 1980-84 (May end) respectively, 9,230 prostitutes were arrested between 1980-87, i.e. 3,564 for the practice of prostitution in a public place . . . and the rest for soliciting for prostitution. Not a single pimp was arrested during the period 1980-84 (May end), nor has a single Landlord been arrested since the enforcement of the Act in 1958 to date. The same trend persists under the Bombay Police Act. Thus while only 1,395 pimps were arrested between 1980-87 for

indecent behavior under this Act, 53,866 prostitutes were arrested in the same period.¹²

Recently, the government has equipped law enforcement officers with more subtle forms for persecuting prostitutes through such legislation as the Juvenile Justice Act, 1986. The Act defines a "neglected juvenile" as a juvenile who:

- i) is found begging or
- ii) is found without having any home or settled place of abode and without any ostensible means of subsistence and is destitute; or
- iii) has a parent or guardian who is unfit or incapacitated to exercise control over the juvenile; or
- iv) lives in a brothel or with a prostitute or frequently goes to any place used for the purpose of prostitution or is found to associate with any prostitute or any other person who leads an immoral, drunken or depraved life;
- v) who is being or is likely to be abused or exploited for immoral or illegal purposes or unconscionable gain.¹³

On the basis of this definition, the Delhi police earlier in 1991 raided the red light district of Delhi and took 112 children into custody. Their "justification" for doing so was that such children were "neglected juveniles" by virtue of being "children who live with prostitutes, or associate with a prostitute or any other person who leads an immoral, drunken or depraved life."

The main object of the Juvenile Justice Act, 1986, was to take a welfare approach to juveniles and evolve a system for the protection, development and rehabilitation of children by the State. In defining a neglected juvenile, however, the Act creates a peculiar distinction in separating all other destitute and vulnerable juveniles from those who are born to prostitutes. This is in spite of the fact that the more general definition of neglected child may already cover a child of a prostitute, i.e. "a child with no ostensible means of subsistence, or found destitute, or whose parent or guardian is unable to care for it properly."¹⁴

The police claimed its power specifically from clause (iv) above. An interesting ambiguity in the Act is that a sub-clause warns clearly that where the parent or guardian of the child is available, the police officer

12. Jean D'Cunha, *The Law in India: Biased Against Prostitution While the Racketeers and Clients Go Scot-Free*, in EXPLOITATION OF WOMEN AND CHILDREN: ITS CAUSES AND EFFECTS (Asian Regional Conference) 225 (Nov. 17-18, 1988).

13. India Juvenile Justice Act § 2(1)(f) (1986).

14. *Id.*

should first make an enquiry through the Juvenile Justice Board on the status of the child, and then initiate action. This clause would sufficiently cover all groups and preclude any indignity or trauma of the parents or children when they are subject to the Act. But since the Act lists prostitutes as a sub-group, the police have strangely decided that prostitutes are somehow legally excluded from the definition of "parent" and that they and their children should be denied the right to a proper enquiry into the actual "status" of the children. Not only did the police flout all procedural norms set out under the Act, which called for conducting an enquiry prior to removal of children living with a parent or guardian, but clearly the arbitrary removal of these children was based on an unequivocal moral premise: All prostitutes are unfit mothers. The right of prostitutes as mothers were subverted to cater to a moral whim. A further outrage in this absurd and high-handed action of the police is that 85 percent of those "children" rounded up were in fact "adult" men and women, including mothers. And much to the discomfort of the Juvenile Justice Board, among the 110 who were rounded up the few who were in fact juveniles were found to be attending schools and receiving a "proper education" and not in fact neglected juveniles at all.

The lesson from this incident is obvious, but will not be easily admitted into the attitudes either of the police or the State. Their preoccupation with the "immorality" of the prostitute's life has subverted their understanding of her rights. A State which has done nothing to provide destitute women with an alternative to this degrading profession must at least protect them from legal indignities couched in reformist policies. And unless the State recognizes the need to prosecute men, that is, the client or, more specifically, the police, for their roles in violating prostitutes, legislation seeming to protect and "rehabilitate" the prostitute will remain a mere moral sham.

V. Special Laws

In the situations described so far, we have seen that the police force is the civil body empowered to intervene in matters of law and order. It is given the power to arrest, detain, interrogate, search and seize, but these powers can only be exercised within the parameters of the Indian Constitution and the Criminal Procedure Code. Where those powers are exceeded, the citizen has certain limited remedies.

Under the existing Indian Penal Code, the police are also given ample powers to deal with offenses against the State. These include every description of war waged against the State, whether by insurrection or

invasion. Further, under the Criminal Procedure Code, the police have the power to disperse an unlawful assembly, and to use force if necessary. However, in situations where the assembly refuses to disperse quietly, the armed forces may be called upon to assist the police. The law explicitly cautions the military in such situations to use minimum force and cause minimum injury to either person or property. In other words, the army is intended merely to assist the civil administration in extraordinary situations. There is no provision for martial law.

Yet, despite these existing powers and safeguards conceived to protect the State and the well-being of its citizens, in situations where the State has lost legitimacy under the existing provisions of law, it will inevitably have greater recourse to more tyrannical laws. That means enhanced police powers or, worse still, the armed forces. It is this form of State tyranny that, according to a report published by a civil liberties group called the People's Union for Democratic Rights (PUDR), has led to the erosion of the democratic structure in India over the last forty years:

In the early fifties, under the first Parliament, there were just two areas, Nagaland and Mizoram, that were notified as "disturbed areas." Under the eighth Parliament ten states, in full or in part, are the declared disturbed areas. About 25 million people live in these areas. In the early fifties the army hardly intervened in civilian conflicts outside parts of the North East region. In the fifteen year period, 1970-85, army or paramilitary forces intervened in civilian conflict in 34 instances. In the last five years, they intervened in 68 cases. And they intervened in 22 out of the 31 states and union territories.¹⁵

Most striking is the fact that the army has, over time, been given greater power to intervene in civil affairs under special enactments, so much so that the limitations prescribed under various laws including the Constitution and Criminal Procedure Code have been undermined. At the same time, in places such as Punjab, the police have also been armed with enhanced powers. The most notorious examples of this are the Terrorist and Disruptive Activities (Prevention) Act (TADA) (1985) and the Armed Forces (Special Powers) Act (1958 as amended 1972).

VI. TADA

In 1985, a series of bomb explosions took place in Delhi, killing a number of innocent people. Ostensibly it was this incident which led the Government to introduce TADA. Bearing in mind the situation prevailing

15. 8 LOK SABHA DEBATES No. 19 (Aug. 19, 1985).

in respect to terrorist violence, TADA passed through Parliament with little opposition. Subsequently, the Government cited Delhi, Chandigarh (Union Territories) and four states — Punjab, Haryana, Uttar Pradesh and Rajasthan — as places where terrorist activities were subject to the Act. Still, the Act, in clear terms, extended to the whole country. Yet by November 1989, of the 19,286 persons charged under the Act, 10,568 persons belonged to states other than those initially cited by the Government.

Who were the 19,286 people arrested? According to PUDR, journalists, civil rights activists, academicians (including two professors from Bombay University), “tribals” (aboriginals) in the contiguous districts of Andhra Pradesh, Maharashtra and Madhya Pradesh, workers, opposition party members in Congress-I ruled states and Congress-I members in opposition ruled states were among those arrested under the Act.

Despite rampant misuse of the Act for generally oppressive purposes, TADA was extended for a further four years in May, 1987 for the following stated reason:

The Terrorist and Disruptive Activities (Prevention) Act, 1985 was enacted in May, 1985 in the background of escalation of terrorist activities in many parts of the country at that time. It was expected then that it would be possible to control the menace within a period of two years and, therefore, the life of the said Act was restricted to a period of two years from the date of its commencement. However, it was subsequently realised that on account of various factors, what were stray incidents in the beginning have now become a continuing menace specially in States like Punjab. . . .¹⁶

This time “in order to combat and cope with the terrorists effectively. . . in states like Punjab. . . it is not only necessary to continue the law but to strengthen it further.” According to parliamentary records, however, there was nothing to indicate ineffectiveness in applying the law in 1985. In fact, of the total of 3,896 cases registered in 1984-85 under the Act, 3,242 cases resulted in conviction, a conviction rate of about 82 percent.¹⁷

Under the Act, the definition of terrorist and disruptive activity is wide enough to cover any range of private or public activity. This covers not only any action taken “by act or speech” but also “through any

16. Usmanbhai Dawoodbhai Memon & Others v. State of Gujarat, 1988 A.I.R. (S.C.) 922.

17. Solidarity Group in Support for the Restoration of Civil & Democratic Rights in the North-East, *Naga Hills of Manipur: Under Civilian or Military Rule? — a Backgrounder*, in *ARMY ATROCITIES IN NAGA AREAS* (People's Union For Democratic Rights, Oct., 1987).

other media or in any other manner whatsoever.” Hence songs, street plays and the like are covered. This accounts for the arrest of a famous poet/singer from Andhra Pradesh under the Act. TADA also covers offenses falling under the Indian Penal Code, the Arms Act, the Explosive Substances Act, the Explosives Act, the Inflammable Substance Act, and the Official Secrets Act if they are committed in the aid of “terrorism” and “disruption.” In other words, the scope and extent of the Act is so wide as to displace the ordinary criminal law and its processes if the offense is covered by TADA.

Under the existing criminal law a confession made by an accused is inadmissible in evidence. However, under TADA § 15, it is admissible. Under TADA § 16, all proceedings are to be held in camera. The names and identities of the witnesses appearing against the accused can be kept secret from the accused. Therefore, if a witness implicates an accused person, it is for the accused to prove otherwise. The onus under TADA consistently falls on the accused in breach of the basic legal norm that a person is innocent until proven guilty. This is no more clearly stated than under section 21 of the Act, which provides that where a co-accused has made a confession implicating the accused, it is presumed that the accused is guilty. While there are many other similar provisions, these few clauses of TADA clearly show how the legislature is used to subvert the basic principles of democratic rights under the Indian Constitution to enhance the power of the Government.

In 1988 the Supreme Court observed that TADA is an extreme measure to be resorted to only when the police cannot deal with the situation under the ordinary penal law. Since the Act is a “drastic measure, it should not ordinarily be resorted to unless the Government’s law enforcing machinery fails.”¹⁸ But the Supreme Court also upheld TADA, citing terrorism as a “special criminal problem,” requiring a “special court” and a “special procedure.” Given the record of violations and abuses set out by PUDR, the Court’s response is clearly untenable.

TADA’s worst victims are women. In practice under the Act, persons are detained for long periods of time without any specific charge. Male members of many families are thus quietly whisked off by the police, who are not bound to reveal the whereabouts of the arrested men.

18. See The Assam Maintenance of Public Order (Autonomous Districts) Act (1953); The Assam Disturbed Areas Act (1955); The Armed Forces (Special Powers) Regulation Act (1958); The Armed Forces (Assam and Manipur) Special Powers Ordinance (1958); Reg. 5 of The Nagaland Security Regulations (1962); and the Armed Forces Special Powers Act (1972).

Therefore, women search in vain to get information about their men. Since TADA trials are not time-bound, the family has no way of knowing when the arrested men will return. The psychological and economic trauma suffered by the women in the family adds greater burdens to their lives. The State in no way feels responsible for compensating these women, viewing it as a mere consequence of their belonging to families of suspects. Investigating police often molest and rape the women as a terror tactic. And the sheer existence of TADA has given the police an absolute sense of non-accountability.

VII. Law and the Armed Forces

In India in the last few years, the Government has been resorting to the army more frequently to deal with civilian insurgency. By definition, the army exists to defend the nation's borders and, unlike the police, the army is not trained to restrain itself to minimum force. It is trained to brutalize at large, i.e. to shoot, arrest, interrogate, abuse. It does not know how to deal with sensitive issues (such as civilian insurgency) which have sociological roots. When the ruler of the State opts to use the army to combat civil insurgency, weed out terrorism and bring about peace, it serves in fact further to alienate the people, who then begin to associate army brutality with State policy. In a country like India, which has such an old democratic tradition, this form of rule is viewed with even greater hostility.

The Armed Forces (Special Powers) Act (1958, as amended 1972) has had precisely this effect. It not only violates basic constitutional principles but also has given the armed forces vast, unfettered powers and has virtually enabled the armed forces to impose military rule in many parts of the North-East. An Act granting similar powers to the armed forces in Punjab has also been passed.

In 1963, Nagaland became a full-fledged state although there were still Naga areas in Assam, Arunachal Pradesh, and the Hill areas of Manipur (the "North-East"). The Indian Constitution guaranteed the right of the Naga people to their culture and natural resources and recognized their right to self-government. It was in fact originally agreed between the Naga people and the Governor of Assam that the Naga National Council would be the sole political authority in the Naga areas. However, since then the Government decided to treat the matter as a law and order problem and eventually passed the 1958 Act.

The Act comes into effect when an area is declared to be "disturbed or dangerous"¹⁹ and there is no provision for review of this decision. The

19. India Armed Forces (Special Powers) Act, § 3 (1972).

Act contains sweeping powers that allow the most junior officer of the armed forces to arrest without warrant, detain, seize, raid or even shoot a person on mere suspicion.²⁰ The Government has justified the Act as a counter-insurgency measure.

The Act also grants the security forces immunity from prosecution. In the case of Assam and Manipur, though the armed forces known as the Assam Rifles were intended to act "in aid of the civil power," they have in fact exercised absolute powers in certain areas beyond any form of control by the state officials responsible for maintaining law and order. Such officials include the Superintendent of Police.

A 1987 report of the PUDDR, Delhi and a more comprehensive background report published by the Solidarity Group in Support for the Restoration of Civil and Democratic Rights in the North-East show how the experience of the North-East States has left a trail of torture, rape, assault and death carried out by the armed forces.²¹ Instead of seeking an agreeable solution to the problem of the Naga people, the Government has subjected them to thirty-five years of increased army rule through multifarious legislation.²²

Just as in times of war, when the army is brought in with impunity to deal with civil insurgency, sexual abuse of women is taken as an inevitable consequence of army rule. The experience of women in the North-East confirms this.

In July, 1987, during a combing operation termed "Operation Bluebird," an effort to recover arms from local insurgents, wide-scale human rights abuses were reported. Among these were repeated sexual abuses of the local women by the Assam Rifles officers. Those women particularly vulnerable were those whom the security forces described as having relatives in the National Socialist Council of Nagaland (NSCN). One victim of rape was a seventeen-year-old woman from Khongdei Khuman village. Her evidence was placed on affidavit before the Court of the Chief Judicial Magistrate, Imphal (Manipur). The woman's husband was suspected by the Assam Rifles to be an NSCN member. In her statement, she recollects how the Captain of the Assam Rifles at Lakhmai, where she was attending school, had summoned her. She was questioned as to the whereabouts of her brother and as to whether or not he had visited

20. *Id.* § 4.

21. Solidarity Group in Support for the Restoration of Civil & Democratic Rights in the North-East, *Naga Hills of Manipur: Under Civilian or Military Rule? — a Background, in ARMY ATROCITIES IN NAGA AREAS ANNEXURE 'D' (People's Union for Democratic Rights, Oct., 1987).*

22. Sebastian Hongray v. Union of India, 1984 A.I.R. (S.C.) 1026.

her. When she denied knowing anything, she was accused of lying and the captain threatened that she would be “tied up and tortured.” She was ordered to report daily to the captain, which she did, from the 13th to the 27th of July. Then on August 15, 1987 she was again interrogated by the commanding officer stationed at Khongdei Village School. He repeated questions as to the whereabouts of her brother, which she replied she did not know. In her statement she describes how she was not allowed to leave the room this time:

[H]e told the jawan (soldier) to leave the room and I followed the jawan to the door. Just after the jawan crossed the door the C.O. closed the door and would not let me leave the room, and got hold of me very rudely. I shivered at the sight of his cold-blooded anger. I struggled to free myself from his hand. He pulled off the shawl I was wearing and continued pulling at my clothes while keeping me under suffocating grip. I screamed and shouted for help but no one came to my rescue. The C.O. in full military dress pulled out pistol and threatened to shoot me if I screamed. He then pulled my hair and pinched my cheeks so hard and finally I was overpowered and the C.O. raped me. It was most horrifying moment of my life and very painful.²³

The Central Government has failed to investigate this and other reported abuses. Various habeas corpus petitions were filed against the Assam Rifles. One petition was specifically filed by the Manipur Baptist Convention Women’s Union, for abuses against women committed during the combing operation; the Court ordered its registrar to investigate the allegations on the spot.

In some cases brought before the courts with the assistance of human rights organizations, the army has been found responsible for grave human rights abuses. In at least two instances compensation has been awarded and, in others, there has been sufficient evidence to charge the armed forces with murder. The Supreme Court in an historic judgment directed the army to give one *lakh* rupees damages to each of the widows concerned and directed the Superintendent of Police to begin prosecuting the guilty army personnel.²⁴

23. INDIA “OPERATION BLUEBIRD”: A CASE STUDY OF TORTURE AND EXTRAJUDICIAL EXECUTIONS IN MANIPUR (Oct. 1990).

24. Section 92 of the Jammu and Kashmir Constitution sets out the provisions for Governors Rule *inter alia*:

92. Provision in case of failure of constitutional machinery in the State.-

(1) If at any time the Governor is satisfied that a situation has arisen in which the

But legal proceedings against the army in the North-East are rare and difficult. One reason for this is the section of the 1958 Act that grants the armed forces general immunity from prosecution, even for serious criminal offenses, by providing that “[n]o prosecution, suit or other legal proceeding shall be instituted except with the previous sanction of the Central Government against any person in respect of anything done or purported to be done in exercise of the powers conferred by this Act.”²⁵ According to a report of Amnesty International, villagers have complained that it is virtually impossible to obtain permission to prosecute.²⁶ Those complaints which have taken place have been private ones in which compensation payments have been ordered by the Supreme Court as described above. Provisions like section 6 serve to compound women’s suffering. Given the impunity with which the army is able to act, sexual abuse of women has become a regular feature of the army presence in the North-East.

VIII. Women, Fundamentalism and Military Force

That women do become specific targets of security forces is not only common to the North-East and Punjab but also more recently to Kashmir.

Government of the State cannot be carried on in accordance with the provisions of this Constitution, the Governor may by Proclamation-

(a) assume to himself all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by anybody or authority in the State; (b) make such incidental and consequential provisions as appear to the Governor to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provision of this Constitution relating to anybody or authority in the State:

Provided that nothing in this section shall authorize the Governor to assume to himself any of the powers vested in or exercisable by the High Court or to suspend in whole or in part the operation of any provision of this Constitution relating to the High Court.

25. India Armed Forces (Special Powers) Act § 6 (1958).

26. Section 22 of the Jammu and Kashmir Constitution provides:

Section 22. Rights of women. The state shall endeavour to secure to all women:

- (a) the right to equal pay for equal work;
- (b) the right to maternity benefits as well as adequate medical care in all employment;
- (c) right to reasonable maintenance, extending to case of married women who have been divorced or abandoned;
- (d) the right to full equality in all social, educational, political and legal matters;
- (e) special protection against discourtesy, defamation, hooliganism and other forms of misconduct.

In this state women are trapped in a vice between the forces of fundamentalism and military rule.

In early 1990, Governor's Rule was imposed in Kashmir.²⁷ While the J & K Constitution clearly gave the Governor vast powers under Governor's Rule, in carrying out such powers the Governor clearly exceeded his mandate, violating the fundamental rights of the Kashmiri people guaranteed to them under the Indian Constitution. Initially this took the form of an amendment to the Public Safety Act, Ch. IV (1978), which gave vast powers to the Divisional Commissioners and the District Magistrate to arrest and detain persons under the Act. In addition, TADA was also made effective in Kashmir from 1985. From 1988, more and more persons were being detained under it. The Governor then arbitrarily ordered that all cases to be tried under TADA would be in Jammu. The result was inconvenience and expense to families, in addition to inaccessibility to lawyers in Jammu.

Under Governor's Rule, security forces and the army were also given extensive powers to search, seize and arrest without a warrant, thus making the armed forces do the work of the police without any civilian authority to check on possible abuse of power. Under the Indian Constitution, the armed forces exist to aid civil authorities, though their primary function is to guard the borders against foreign intrusion. While assisting the civilian authorities, they are authorized only to aid civil administration, not to usurp it. But increased use of the security forces has in fact undermined the authority of the local police and the morale of the civil administration. Theoretically, the Border Security Force (BSF) is accountable to the Director General of Police. In practice, however, the security forces have been acting arbitrarily.

In this context, the position of Kashmiri women has always been more militant than that of their counterparts in the rest of the country. Equal status in law, employment, education and development have been given to the women of Kashmir under the secular law.²⁸ But in practice, under the Muslim law which governs Kashmiri Muslim women, a woman is equal neither in the house nor outside.

The rise of Muslim fundamentalism in Kashmir and the increased army presence has hardened the fundamentalist position and the threat to the status of Muslim Kashmiri women has grown even worse. The

27. COMMITTEE FOR INITIATIVE ON KASHMIR, *KASHMIR IMPRISONED — A REPORT* 45 (July 1990).

28. *Id.* at 46.

Islamization program warns women that severe action will be taken if they do not maintain *purdah*. One organization that is determined to enforce the fundamentalist spread of Islam among Muslim women is the Dukhtaran E-Milat (Daughters of Revolution). In the absence of any women's organizations to raise a secular voice for women, the Daughters of Revolution have filled a void with a peculiar mix of feminism and fundamentalism. According to a report of the Committee for Initiative on Kashmir, the organization is uncompromising in its position on Islam and women:

In an interview with us, Nahida Naseem, the General Secretary of the Dukhtaran E-Milat (Daughters of Revolution) said that under Islamic law it was very necessary that they practice the *purdah* — even if it is imposed by force. They saw the *purdah* as a “weapon for the safety” of the woman. She felt that if women wore clothes that showed their body, they would “naturally be teased.” Yet they did not see the role of the women enclosed in “the four walls of the House.” They encouraged women taking up careers as doctors, engineers, etc. as long as they followed the tenets of Islam.²⁹

Addressing the question of abuses of women by security men,

[T]hey felt that women should attack [them] with household implements. This would force the personnel to kill these women and their honor would be saved even if they became “Shaheed” (martyrs) in the process. Nahida Naseem said that under the Islamic law, a woman who had been raped and accepted as a wife of any man, would receive “glory.” In fact the Koran makes provisions even for prostitutes to be saved and so they would encourage men to marry these women.³⁰

Fundamentalism is the only source of collective strength for women in the region. Its pressure has begun gradually to intimidate women into uniting. Alongside the growing oppression of fundamentalism, Kashmiri women are having to face the indignity of a military violence whose pattern of abuse is directly linked with the anti-Muslim bias of the security forces.

The Report of the Committee for the Initiative on Kashmir brings out this reality in several detailed and comprehensive accounts of systematic rape and sexual abuse of Muslim women in Kashmir:

Shameema, wife of Ali Mohammad Mizgar alias Khan. Two army men came and took Ali Mohammad away and tied him to a tree in

29. *Id.* at 51.

30. *Id.* at 52.

front of the village shop. Then four army men came back. Two of them took her [Shameema] into the house to conduct the search. Two men stood outside the house. As soon as she went in she was knocked down by the men. One put a rifle on her chest and the other began to molest her. She resisted and began to shout. They forced her to go into the living room and to open the cupboards. Before she could do that they knocked her down again. A neighbour's ten-year-old was sleeping. He was thrown out of the house. They tore her salwar and put a hanky on her mouth to stop her from shouting and raped her³¹

Haji Aziza Begum was asleep when the army came to their house around four in the morning. There was a knock on the door and her son Vhulam Mohammed opened the door. About 15 men with SLR's entered the room. Some of them took the men outside. One army man asked her what was inside her pheran. She told them that she was nine months pregnant but they insisted that she had hidden something inside. They asked her to undress. She refused. They lifted her pheran and began poking her stomach with rifles asking her what was inside They kept asking her to open her clothes, pinched her cheeks, caught her by the hair and beat her. She fainted.³²

When members of the team asked the local people why they would not lodge a formal complaint about such abuses, they simply replied, "The DC is a good man but he is helpless. If it would be of any use we would lodge an FIR [first information report]."³³ In the wake of the reported stories, this pattern of search and interrogations repeats itself. On each occasion, women are used and abused to intimidate and break the morale of the people.

In its conclusion, the Report clearly states, "There seems to be a deliberate attempt to make women the primary target of attack by the security forces."³⁴ In the face of such a hostile State, it is no wonder women feel compelled to join with fundamentalist forces to protect themselves.

Recently, twenty to thirty women in the Kunnen Village were reported to have been raped by security forces on February 23 and 24, 1991. Every effort has been made by the government to discredit this report. This effort is suspect, given that the District Magistrate and the Divisional

31. *Id.* at 53.

32. *Id.* at 64.

33. CO-ORDINATION COMMITTEE ON KASHMIR, REPORT, Annexure 'B' at 28 (July 7, 1991).

34. *Id.*

Commissioner visited the place of the incident, interviewed the women and confirmed the story of the rape. In fact, an FIR was ultimately filed based on the Magistrate's report. Despite the evidence and actions of the local administration, the Governor has denied the story on the basis that "no complaint was filed within a short time." According to a report of the Co-ordination Committee on Kashmir, when it was suggested to the Governor that the charges against the security forces were serious, a prima facie case did exist and that an independent sitting judge of the Supreme Court should be appointed to conduct a judicial enquiry, the Governor's reply was "that a judicial inquiry was not possible because no rule of law existed in the Valley, normal legal procedures would not work and the local witnesses would be made to say what militants want them to say and therefore, truth would not come out."

IX. Conclusion

In India, like the world over, the game of governance is an ever-growing conflict of power between the rulers and the ruled. The democratic norms of the Indian polity have been systematically weakened in the last ten years, and the custodians of law and order are the worst offenders. The equation of power here has changed drastically in favor of the State and its guardians, but this appropriation of power is being challenged by different movements all over the country.

The growth of urban insurgency in the two critical border States of Kashmir and Punjab has its roots in social and political discontent with the State. Increasing State terrorism in these areas has resulted in terrorism and anarchy growing in an equal and proportionate reaction. But apart from these violent, organized reactions to the Government, there is a growing human rights movement which is countering the anti-people action and propaganda of the Government.

Since 1975, the Indian human rights movement has been an unusually successful experiment of bringing together people's rejection of human rights violations by the State. Since India is a pluralistic society and polity, this movement has transcended the different ideological, religious and political differences to bring together organized democratic and civil rights groups.

The most promising experiment, however, has been the Indian People's Human Rights Tribunal formed in 1987. Started by a group of human rights activists and concerned public figures, the Tribunal is creating a people's court of enquiry against the blatant legal and judicial State violations. The Tribunal draws its support from a national network and

has heard three cases since 1987. Two retired judges preside in the Tribunal where victims are called for evidence. Even though the judgment of the Tribunal is not binding legally, it is a highly respected people's statement of asserting their right and their will.

The democratic spirit in India is alive and well and academicians, artists, and activists use different forms to spread awareness and challenge State repression. In this context, the women's movement in India has grown remarkably in the last ten years and successful campaigns for legal reform and action against guilty law enforcement officials do get national coverage. Yet, given the male entrenched culture within which women are still the least represented group and suffer its worst violations, the process toward gender justice is extremely slow.

The State's refusal to acknowledge that those most affected have least access to or understanding of their rights continues to leave women the worst affected. And how can the State presume to protect the rights of women when its legal yardstick is clearly male in terms of conception, implementation and accountability? In the quest for gender justice, women must and will challenge this basic inequitable premise.