

**SEXUAL VIOLENCE BY THE ARMED FORCES: A CRITIQUE OF  
GOVERNMENTAL POLICY**

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**ABSTRACT**

*Performing an analysis of the numerous allegations of rape and sexual torture against the military and paramilitary forces in India, it is apparent that there has been a divide between public opinion regarding such instances. This paper seeks to examine the judicial and socio-legal view taken by courts and various committees established to investigate such crimes. It examines the nature of the laws governing military and paramilitary bodies and the offence of rape, and whether such laws provide protection to offences of this nature. The Dominance Model of feminist jurisprudence has been applied to these crimes to assess its legitimacy. By comparing actions taken by international organizations such as the United Nations with those taken by the government, the paper lays out the different approaches towards such crimes on a national and international level. It also reviews the accountability of the military and paramilitary organizations in instances of rape and sexual torture committed by members of the armed forces.*

*The scope of the paper is limited to the legal ramifications of such crimes, and the role of the judiciary in recognizing and acknowledging such instances. It is restricted to socio-legal aspects of the subject in question and does not trespass into aligned topics. In conclusion, the author has commented on the overall effect of such crimes on the morale of the nation and of the victims, and discussed the merit of the argument which asserts that such allegations amount to anti-national sentiments.*

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*“The belief in a supernatural source of evil is not necessary; men alone are quite capable of every wickedness” – Joseph Conrad*

## **1. Introduction:**

Ever since the government’s crackdown on Kashmir began in January 1990, reports of rape by the armed security forces emerged and were often conveniently ignored. The brutal aggression that took place in twin villages of Kunan-Poshpora in the Kupwara district of Kashmir was followed by a massive outcry by the public. A hundred and twenty-five soldiers lay siege over the villages, separated the men from the women by taking them to a different location, and then sexually humiliated and tortured over fifty women and female children ranging from ages eight to sixty. The intent was to send a message (typical of warfare practices) that the Kashmir resistance movement would not be tolerated and villages suspected of harbouring militants would face a similar fate<sup>2</sup>.

The offences did not stop with Kunan-Poshpora. Mubina Gani, a young bride who was going to her marital home after her wedding was accosted and raped by soldiers of the Border Security Force (BSF) in Kashmir, May, 1990. Her aunt was sexually assaulted as well and the soldiers wounded members of the wedding party by opening fire on them<sup>3</sup>. But perhaps one of the most heinous forms of such sexual atrocity by the armed forces could be the rape and resultant death of Thangjam Manorama. The victim was tortured, raped and murdered by shooting at her private parts, by a 17 Assam Rifles team<sup>4</sup>.

Various investigative committees were established in response to such crimes due to the public uproar. Committees were also established to examine the constitutionality of the Armed Forces (Special Powers) Act, 1958, and to amend the criminal laws of the country. Though the authorities, over the years, have refused to investigate many such allegations, the judiciary has played a notable role in acknowledging the gravity of these offences.

## **2. Justice for the Victims:**

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<sup>2</sup> *Rape by Security Forces: The Pattern of Impunity*, Human Rights Watch, [www.hrw.org/legacy/about/projects/womrep/General-42.html](http://www.hrw.org/legacy/about/projects/womrep/General-42.html).

<sup>3</sup> *Ibid.*

<sup>4</sup> Manjula Sen, *Right to Rape?*, The Telegraph, [www.telegraphindia.com/1130619/jsp/opinion/story\\_17023481.jsp](http://www.telegraphindia.com/1130619/jsp/opinion/story_17023481.jsp).

A. *Kunan-Poshpora*

It was the 2012 report of the Jammu and Kashmir State Human Rights Commission (J&K SHRC) that investigated the facts behind the alleged instances on the night of February 23 and 24, 1991<sup>5</sup>. Other independent investigations and fact finding missions, such as one led by the former chief justice of the Jammu and Kashmir high court, Justice Bahauddin Farooqi, concluded that the Kunan-Poshpora case had been muddled with massive ignorance of investigative procedure that ought to be followed after such crimes<sup>6</sup>. In 2014, the divisional bench of the state High Court, comprising of Chief Justice M. M. Kumar and Justice Hasnain Masoodi, re-examined the SHRC report and ordered the government to explore the possibility of compensation to the victims within three weeks<sup>7</sup>. It was the first time for members of the higher judiciary to acknowledge that the incident did take place and that it was not just part of a terrorist propaganda. However, a stay on the high court order has already been obtained and it is indeterminate as to how long the final decision may take. It has been over twenty-seven years since the incident, six of the alleged victims have passed away, and justice has been denied through its old foe, delay.

B. *Thangjam Manorama*

A judicial enquiry commission headed by C. Upendra Singh, retired District and Sessions judge, Manipur, found twelve incidents of excesses in the rape and murder of Manorama<sup>8</sup>. The commission concluded that the Assam Rifles men fired on Manorama's private parts to destroy evidence of rape, and yet such evidence was found on her clothes in the form of semen. The case was reopened in 2010 but there have been no convictions as of yet. Manorama's death and the protests that sparked as a result led to the formation of the Committee to Review

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<sup>5</sup> Prashant Jha, *Unravelling a 'mass rape'*, The Hindu, July 28, 2013, [www.thehindu.com/opinion/op-ed/unravelling-a-mass-rape/article4892195.ece](http://www.thehindu.com/opinion/op-ed/unravelling-a-mass-rape/article4892195.ece).

<sup>6</sup> Barbara Crossette, *India Moves Against Kashmir Rebels*, N.Y. Times (Apr. 7, 1991), [www.nytimes.com/1991/04/07/world/india-moves-against-kashmir-rebels.html](http://www.nytimes.com/1991/04/07/world/india-moves-against-kashmir-rebels.html).

<sup>7</sup> Bashaarat Masood, *Konan-Poshpora rapes: HC asks J&K to consider paying compensation in 3 weeks*, Indian Express (July 2, 2014), [indianexpress.com/article/india/india-others/konan-poshpora-rapes-hc-asks-jk-to-consider-paying-compensation-in-3-weeks/](http://indianexpress.com/article/india/india-others/konan-poshpora-rapes-hc-asks-jk-to-consider-paying-compensation-in-3-weeks/).

<sup>8</sup> Sen, *supra* note 3.

the Armed Forces (Special Powers) Act, 1958, headed by retired Justice B.P. Jeevan Reddy. In 2014, the Supreme Court bench comprising of Justices T.S. Thakur and P.C. Ghosh directed the Centre to pay Rs 10 lakh to Manorama's mother<sup>9</sup>.

*C. Miscellaneous*

For Mubina Gani, Hasina, the five women in Anantnag, and a number of other alleged victims, investigations have been conducted and dismissed. The government has been accused of protecting the offenders from facing the outcome of their actions and for ignoring recommendations made by various committees. Investigation made by other organizations, such as the Press Council of India, have also been criticized for being biased and favouring only one side of the equation<sup>10</sup>.

**3. The Armed Forces (Special Powers) Act, 1958 – Need for Amendments:**

Contrary to popular opinion, the Act does not provide immunity to members of the Armed Forces for committing sexual offences. Section 6 of the Act provides protection from prosecution for “*anything done... in exercise of the powers conferred by this Act*”; such “powers” include causing death, search and arrest without warrant, etc. However, section 6 does provide that any such prosecution would require previous sanction by the Central Government.

*A. Relevant Recommendations of the Justice Verma Committee*

The Committee was set up after the rape and murder of Nirbhaya in 2012. It recognized that sexual violence against women in conflict areas was a regular, systematic offence and not an exception. The Committee called for regular monitoring of such areas by specially-appointed commissioners to check on the safety and security of these women, especially those in police or armed forces' custody. The committee called for a thorough review of the Act and further recommended –

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<sup>9</sup> *Thangjam Manorama Case: SC directs Centre to pay Rs. 10 lakh as interim compensation*, Human Rights Law Network, [www.hrln.org/hrln/womens-justice-/pils-a-cases/1665-thangjam-manorama-case-sc-directs-centre-to-pay-rs-10-lakh-as-interim-compensation.html](http://www.hrln.org/hrln/womens-justice-/pils-a-cases/1665-thangjam-manorama-case-sc-directs-centre-to-pay-rs-10-lakh-as-interim-compensation.html).

<sup>10</sup> *Supra* note 1.

*“Sexual violence against women by members of the armed forces or uniformed personnel must be brought under the purview of ordinary criminal law”<sup>11</sup>*

*B. Justice Jeevan Reddy Committee Report*

On November 19, 2004, the Government of India constituted a five-member committee headed by retired Justice Jeevan Reddy to review the AFSP Act. While the committee recommended the repeal of the said Act, it also suggested amendments to the Unlawful Activities (Prevention) Act, 1967<sup>12</sup>. The nature of the suggested amendments was such that they would necessarily achieve the purpose of the Armed Forces (Special Powers) Act by supplanting similar provisions. In 2015, it was reported that the Ministry of Home Affairs, Government of India, had decided to reject the recommendations of the Committee to repeal the AFSP Act<sup>13</sup>. Various activists have interpreted this as the government’s extended protection to the armed forces for committing sexual crimes and human rights violations.

*C. Criminal Law Amendment Act, 2013*

The Criminal Law Amendment Act, 2013, was successful in bringing the armed forces under the purview of Section 376(2) (c) of the Indian Penal Code. The punishment prescribed under this provision is of rigorous imprisonment for not less than ten years or life, and makes the convicted offender liable to fine. However, since such cases are tried in military courts, accountability is still missing. In cases of rape by members of the armed forces, sanction by the Central Government is still a prerequisite. Efforts to ascertain the impact of this amendment through the Right to Information Act have met with failure<sup>14</sup>.

#### **4. Feminist Jurisprudence on Sexual Violence:**

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<sup>11</sup> Justice J. S. Verma (Retd.), *Report of the Committee on Amendments to Criminal Law*, pg. 150.

<sup>12</sup> Justice B.P. Jeevan Reddy (Retd.), *Report of the Committee to Review the Armed Forces (Special Powers) Act, 1958*.

<sup>13</sup> Aman Sharma, *Suggestion to scrap Armed Forces (Special Powers) Act rejected by Home Ministry*, Economic Times (Feb. 28, 2015), [economictimes.indiatimes.com/news/politics-and-nation/suggestion-to-scrap-armed-forces-special-powers-act-rejected-by-home-ministry/articleshow/46403349.cms](http://economictimes.indiatimes.com/news/politics-and-nation/suggestion-to-scrap-armed-forces-special-powers-act-rejected-by-home-ministry/articleshow/46403349.cms).

<sup>14</sup> Mohammad Umar, *26 Years After Konan Poshpora, Army Still Enjoys Immunity For Sexual Violence* (Feb. 23, 2017), The Wire, [thewire.in/111344/26-years-after-konan-poshpora-army-still-enjoys-immunity-for-sexual-violence/](http://thewire.in/111344/26-years-after-konan-poshpora-army-still-enjoys-immunity-for-sexual-violence/).

Early prohibitions upon sexual violence towards women existed mainly due to the prevalent thought of women belonging to men as a form of property. It was an offence against the man and not the woman<sup>15</sup>. With the advent of feminism and the advancement of the feminist critique of law, sexual violence against women came to be criminalized by taking into consideration the injustice done to the victim. Feminist jurisprudence advocates genuine equality for women as opposed to nominal equality. There are certain models of feminist jurisprudence which are based upon the criticism of the existing laws and policy through the ages.

The Dominance Model of feminist jurisprudence, propounded by Catharine MacKinnon, states that laws have traditionally been a means of subjugation of women<sup>16</sup>. Patriarchy can be seen as a living, breathing entity at work when it makes use of laws to dominate women and work against their liberation. The protection provided to rapists through the application of the Armed Forces (Special Powers) Act confirms the practicality of the Dominance Model of feminist theory. Victims of rape by the armed forces are denied justice, and ostracized for coming forward with their complaints. Thus, three of the four pillars of democracy i.e. the executive, the legislature and the press, work hand in hand towards silencing victims of rape and sexual brutality simply because such accusations may malign the name of the armed forces<sup>17</sup>.

##### **5. International Response to Sexual Violence by Armed Forces:**

Rape has been criminalized as a wartime offence since before World War II<sup>18</sup>. In March 2005, Kofi Annan, the then UN Secretary General, recorded the conduct of United Nations peacekeeping personnel in a letter to the president of the UN General Assembly. Annan's actions led to the tabling of the Prince Zeid report which, after thorough investigation, gave a systematic accountability-based analysis of the sexual offences perpetrated by UN peacekeeping troops in the Congo, troops that had been granted impunity by the UN itself. Since the submission of the report, the UN has taken

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<sup>15</sup> Corrine J. Saunders, *Rape and Ravishment in the Literature of Medieval England* 34 (2001).

<sup>16</sup> Catharine MacKinnon, *Toward a Feminist Theory of the State* (1989).

<sup>17</sup> refer Essar Batool et al, *Do You Remember Kunan Poshpora?* (2015).

<sup>18</sup> Mark S. Ellis, *Breaking the Silence: Rape as an International Crime*, *Case Western Reserve Journal of International Law* 38 (2007).

numerous measures to hold the troops criminally accountable<sup>19</sup>. In August 2015, the then UN Secretary General Ban Ki-moon fired Babacar Gaye (the peacekeeping chief of the Central African Republic) for failing to take adequate action against cases of sexual exploitation and called the incidents a “cancer” in the UN peacekeeping system<sup>20</sup>.

There is a perceivable difference in the actions taken by international organizations like the UN and the Indian government in response to sexual violence by armed forces. The UN took immediate action to prosecute the offenders responsible and secure justice for the victims, whereas the state government and the Government of India’s first response to such accusations is that of denial.

**6. Accountability of the Government and Armed Forces with regard to Such Offences:**

The Human Rights Watch in its report<sup>21</sup> accuses the powers that be of turning a blind eye to such accusations and actively discrediting the allegations made by the victims. It alleges that Indian military courts have proved themselves to be incompetent to deal with such cases and have instead served to cover up these cases and protect the officers involved. If any action against such accused officers is taken at all, a majority of them are either suspended or court-marshalled. They are not punished under ordinary criminal law of the country. Instead, they benefit from the cover of impunity. Even if investigations are ordered, such investigations rarely result in prosecution. Those who attempt to document such instances are thwarted in their attempts through the use of threats, intimidation or force. It would seem that when a victim is raped by members of the armed forces, she ceases to be a citizen of India and is treated merely as a casualty in war crimes.

While ruling on a PIL filed by Extra Judicial Execution Victim Families Association, the Supreme Court bench of Justices Madan B. Lokur and Uday Lalit asserted that the army cannot use excessive force even under the AFSP Act. The Central Government filed a curative petition seeking recall of the judgment in question. On April 18, 2017, the same bench heard arguments from both sides for the plea of a Special Investigation Team (SIT)

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<sup>19</sup> Umar, *supra* note 13.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Supra* note 1.

to investigate three cases of alleged rape by the security forces in Manipur. The Court criticized the government's defence of such offenders and said that the delay in the cases was not an issue. The Court substantiated its legal reasoning by saying that Bangladesh is still prosecuting and sentencing accused offenders for the 1971 war crimes<sup>22</sup>. This statement of the apex court signifies that a crime remains a crime despite of the passage of time, and that victims should not be denied justice under the excuse of prolonged delay.

## **7. Conclusion:**

The ruling government and numerous press and media outlets have accorded allegations of rape against the armed forces the status of "anti-national" statements<sup>23</sup>. It defies the notions of morality to weigh sexual crimes against nationalist sentiments – which one is more important? Is the act of sexual violence committed against a victim of less importance than the possible rise in anti-national sentiments?

It is a major problem with conviction in cases of sexual violence that people do not provide much credibility to such accusations. When these crimes are committed by men in uniform, it becomes an issue of national integrity and not of the violation of an individual's basic fundamental rights. The general masses and news media are guilty of jumping to the defence of these accused offenders and undermining the seriousness of such offences. It is a systemic form of abuse, as old as time – browbeat the victim into denying they were ever violated.

Questions are also raised as to whether the government or the armed forces should be held accountable for crimes conducted by their personnel. On March 21, 2016, the International Criminal Court issued a historical judgment in the case of the *Prosecutor v. Jean-Pierre Bemba*<sup>24</sup>. International criminal law recognizes the principle of command responsibility, sometimes referred to as the Yamashita standard or Medina standard. It basically means that military commanders are vested with the responsibility to prevent

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<sup>22</sup> Kavita Krishnan, *When it Comes to Rape by Men in the Uniform, the Media Forgets the Victim is also Part of the Nation* (Apr. 6, 2017), *The Wire*, [thewire.in/126186/rape-security-forces-afspa/](http://thewire.in/126186/rape-security-forces-afspa/)

<sup>23</sup> *Ibid.*

<sup>24</sup> Alexandre Skander Galand, *First Ruling on Command Responsibility before the ICC*, [blog.casematrixnetwork.org/toolkits/eventsnews/news/first-ruling-on-command-responsibility-before-the-icc/](http://blog.casematrixnetwork.org/toolkits/eventsnews/news/first-ruling-on-command-responsibility-before-the-icc/)

war crimes and sexual violence by members of their rank<sup>25</sup>. The lack of accountability in cases of sexual violence by the armed forces is a testimony to the stagnant nature of Indian morality.

The Constitution of India purports that no man should be above the law. Even when there is use of force in the interest of the nation's security, sexual crimes cannot be clubbed with such "nationalist" acts. They are perverse and demeaning by their very nature. They are a reflection of humanity revelling in its basest form of cruelty. Sexual crimes, by any rationale, should not be sanctioned by law, which, unfortunately, is exactly what India's history with such cases has established. De-humanizing a person, violating their dignity, and taking away their control over their bodies – through no fault of their own – could only amount to an act of necessity in a world deprived of conscience and ethics. It remains a matter of internal reflection as to how many of us have accepted this as the reality of our world. Unless the legislature takes upon itself to amend section 6 of the Armed Forces (Special Powers) Act, 1958, the *désaccord constant*, on the issue of sexual violence by the armed forces, between the judiciary, the public and the legislature will go on for decades.

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<sup>25</sup> *International Criminal Law Guidelines: Command Responsibility* 41 (Jan. 2016), Case Matrix Network, [www.legal-tools.org/doc/7441a2/pdf/](http://www.legal-tools.org/doc/7441a2/pdf/).