

BOOK REVIEW

PURSUING ELUSIVE JUSTICE: MASS CRIMES IN INDIA AND RELEVANCE OF INTERNATIONAL STANDARDS

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BOOK: *Pursuing Elusive Justice: Mass Crimes in India and Relevance of International Standards* **EDITORS:** Vahida Nainar & Saumya Uma
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The volume under review focuses on the problem of impunity, tracing its history from the Partition of 1947 to the present, across major episodes of state violence, collective violence and mass crimes in India. Struggles for human rights and civil liberties in the country over the past four decades, notably the post-Emergency years have exposed time and again the multi-sited practice of impunity by a state, purportedly democratic, that wilfully abdicates discipline and negates the rule of law.

The period covered by the volume is also the period of economic liberalisation. Vandana Shiva in an early work, traces the violence in contemporary Punjab to the “ecological and political demands of the Green Revolution as a scientific experiment in development and agricultural transformation.” Despite robust development indicators, and the “successes” of the Green Revolution experiment, why did Punjab see 15,000 deaths in the decade of the 1980s, linked to a militant movement fuelled by widespread discontent?¹ Pritam Singh in his recent book on Punjab extends this argument by tracing the roots of Sikh revivalism and militancy to the fractures of the Green Revolution period which triggered a Hindu-Sikh polarization and witnessed escalating violence in inter-groups confrontations as well as confrontations with an increasingly

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¹ VANDANA SHIVA, *THE VIOLENCE OF THE GREEN REVOLUTION: THIRD WORLD AGRICULTURE, ECOLOGY AND POLITICS* 20 (1991).

centralizing state.² Positing an important argument that extends far beyond an understanding of the situation in Punjab or to the Green Revolution alone, Shiva raises a critical question of the relationship between science and society where, “in contemporary times scientific activity has been assigned a privileged epistemological position of being socially and politically neutral,” distancing itself from the new social and political problems it creates that are often reduced to “unanticipated side effects” which are not disruptive to the sanctity of the scientific endeavour. That this might in fact mean spiraling conflict, and the rise of state impunity in quelling the conflict is nowhere more evident than in Punjab. Importantly, what are the connections between economic liberalisation, rising militant conservatism, increase in mass crimes in India and the entrenchment of the state of impunity?

To echo Upendra Baxi in his foreword to this volume, political immunity in the face of gruesome atrocities has a long history and knows no borders/nationality. Yet, “even as the combat against impunity may represent in many a way ‘international community’s most conspicuous failure’, people’s movements against impunity also signify a growth in collective moral sentiments” (Foreword, p. vii). This volume, edited by Vahida Nainar and Saumya Uma testify to this growing collective moral sentiment. Unpacking the tightly knotted terrain of impunity, the essays in this volume straddle practices of state violence with the guarantee of non prosecution – Punjab in the 1980s, Kashmir and the north eastern states; and situations of mass violence where state complicity with dominant perpetrators is established. At a time when forms of mass crimes and their sites proliferate without limit, and at a time when the state is most visible in its abdicating incarnation, is ordinary criminal law adequate for the criminal prosecution of torture, genocide and crimes against humanity? Where there is a gap between domestic and international law, rather than resisting the application of international standards using reductionist arguments of national sovereignty, Nainar suggests, it is “imperative not only to fill the gaps in the Indian penal system but also to demonstrate a legal ability to prevent and prosecute such violations nationally” (Nainar, 13).

Central to an understanding of impunity is the delineation of the legal concept of due diligence. Writing on this subject in the context of the reign of terror unleashed by the Joint Special Task Force (JSTF) established by the governments of Tamil Nadu and Karnataka to capture the forest brigand Veerappan, Saumya Uma sets out four main components of due diligence on the part of a state to protect individuals from derogation of their rights: “(a) to *prevent* abuses, (b) to *investigate* them when they do occur; (c) to *prosecute* the alleged perpetrator and bring the person to justice in fair proceedings; and (d)

² PRITAM SINGH, *ECONOMY, CULTURE AND HUMAN RIGHTS: TURBULENCE IN PUNJAB, INDIA AND BEYOND* (2010).

to ensure adequate reparation, including compensation and redress” (Uma, p. 38). While the illustration of due diligence with reference to the JSTF cases is extremely important, it may be persuasively argued – and this volume provides us with ample justification to do this – that the lack of due diligence is in fact foundational to impunity. The challenge lies in strategies of human rights advocates and movements to force a jurisprudence on due diligence that is the *jus cogens* of human rights and constitutional law. Needless to say, whether we look at the enforced disappearances in Punjab or Kashmir, or encounter killings in Andhra Pradesh, or the Armed Forces Special Powers Act, or Chhattisgarh, Kandhamal, Gujarat, or the cases of atrocities against dalits, the issue of state responsibility and prosecution of police and army personnel, as also representatives of elected governments has been pushed into view by human rights movements at enormous personal cost in terms of loss of lives and liberty of advocates, activists and survivors.

The volume takes us through fields of impunity giving us eye opening accounts that point to the pervasiveness of the problem. Targeted violence (against dalits and sexual minorities) is one aspect that points to the disablement of protective legislation by courts and governments in the case of caste (Maya Nair, pp. 60-96), and in the case of violence against sexual minorities (Siddharth Narrain, pp. 97-133). The arguments presented by Narrain for considering “persecution” as defined in the Rome Statute of the International Criminal Court as a core aspect of targeted violence against sexual minorities are important. Also, persecution as an experiential commonality between dalits and sexual minorities was brought home powerfully by the suggestion of Delhi High Court in its 2009 judgement in *Naz Foundation v. Govt. (NCT of Delhi)*³ that Article 15 of the Constitution of India be deployed to understand the discrimination faced by sexual minorities.

Relevant to this discussion on targeted violence is Nainar’s essay on torture by private actors (pp. 334-360). Detailing the torture and degrading treatment inflicted on the women and children of the Bhotmange family in Khairlanji, Nainar observes very pertinently, that “because there is no law on torture, nor an understanding that torture can and is committed by private actors the accused were not charged for torture. Despite noting severe injuries and the fact of stripping of Priyanka Bhotmange, the court held that it was neither a case of outraging modesty nor a case of caste atrocity, but mere revenge. While all cases of torture may not point to discrimination, a fact to be reckoned with by a legislation on torture is “that members of certain minority or marginalised groups are, as a result of their marginalization, at greater risk of torture” (p. 353).

³ (2009) 160 DLT 277 : (2009) 111 DRJ 1.

The final piece of the first aspect of the problem of impunity has to do with tracing the continuities between various forms of collective violence and “crimes against humanity” as defined by the Rome Statute. Vahida Nainar unequivocally argues that “all situations of mass violence causing grave physical harm, death and destruction, regardless of whether they are caused by religious, sectarian, political, economic, social, cultural interests.... must be named and prosecuted as [crimes against humanity]” (p. 393). Persecution, by this argument, is a crime against humanity (p. 411).

The second aspect of the problem of impunity dealt with in this volume concerns coercive state action and impunity that arises in the context of enforced disappearances (Shastri, pp. 134-163); illegal arrest and detention (Uma, pp. 24-59); and severe punishments (Batra, pp. 164-201). Focussing on capital punishment, Batra raises concerns about the ways in which the laws prescribing mandatory death penalty in India violate standards of international law and were legislated after India’s accession to the International Covenant on Civil and Political Rights, 1979.

What then, is to be done? As a way forward, a cluster of essays in the volume speak of the importance of law reform in the matter of gender based crimes in episodes of mass violence; of integrating victims’ rights to protection, participation in legal proceedings and reparations in Indian law, and the review of the military justice system in India focussing on the extent to which military personnel may be prosecuted for violations contained in the Rome Statute.

By helping us understand the textures of state and civil society -- their tight intermeshing in entrenched practices of impunity -- and the toolkits devised to combat this that are at once locally specific and internationally recognised, this volume consisting of thirteen essays, in Baxi’s words, “traces the itineraries of social and human rights movements combating *institutionalised governance impunity*” (p. xii). It points to a direction in which the cascading idea of justice may cease to be utopian or sisyphean.