Institutionalising the Police State
Jammu and Kashmir Police Bill

SAHRDC

The Jammu and Kashmir (J&K) state government recently released the Jammu and Kashmir Police Bill 2013 (hereinafter Police Bill) ostensibly to comply with a Supreme Court (SC) order that all the states should revamp their policing legislation to achieve greater public service and accountability. The J&K government has used the order as an opportunity to increase control over the public and to push its political agenda on the revocation of the Armed Forces (Special Powers) Act (AFSPA), which would be welcome were it not a subterfuge. The bill effectively creates a police state, adopting numerous draconian provisions from emergency legislation, rendering extraordinary powers ordinary and any repeal of AFSPA meaningless. Importantly, the J&K government uses the draft bill to all but guarantee public officials, including members of the army, immunity from prosecution for criminal acts and human rights violations, the concern at the heart of the army’s reluctance to see the AFSPA go (“Omar’s Balm for Army on AFSPA”, PTI, 24 November 2011). Rather than achieving accountability, the bill deprives the state’s population of numerous rights, condones police acts done without any sense of proportionality, turns neighbour against neighbour, all the while shielding the police from oversight and accountability.

In 2006, the SC ordered all central and state governments to adopt reforms designed, in the words of the petitioners, “to ensure that the police is made accountable essentially and primarily to the law of the land and the people” (Prakash Singh and Ors vs Union of India, Writ Petition (Civil) 310 of 1996 (Supreme Court), 22 September 2006).

The Court designed its order to capture the universally agreed upon recommendations of Indian reform committees aimed at addressing “the urgent need for preservation and strengthening of Rule of Law”. Despite the SC order’s clear intentions, the J&K government offered a bill designed to consolidate police power with little regard for democratic principles, constitutional rights or the rule of law.

Building a Police State

The Merriam-Webster dictionary defines a police state as:

A political unit characterised by repressive governmental control of political, economic, and social life usually by an arbitrary exercise of power by police and especially secret police in place of regular operation of administrative and judicial organs of the government according to publicly known legal procedures.

While aspects of the definition currently apply to the situation in J&K, the Police Bill goes further towards legally and permanently entrenching a police state. It concentrates enormous power in the police with little oversight by the judiciary or the legislative assembly and with little access to justice when the police violate rights.

Draconian Police Powers

Where Is the Proportionality? The Police Bill establishes the prevention of crime as one of its primary goals. To achieve this goal, it removes any sense of proportionality from police action. For example, Section 4(g) demands that the police “prevent and reduce crimes by exercising lawful powers to the maximum extent”. Accordingly, the police must intervene using the most extreme measures regardless of the circumstances. The lack of proportionality is also apparent in Section 136, which threatens nearly every citizen with incarceration for even the most minor offences. It permits imprisonment for cleaning furniture, defacing a wall, urinating in public, riding a bicycle after dark, letting a pet run free, and jumping the queue, among other trivial “crimes”. The lack of proportionality in
the calculation on appropriate police action grants the police arbitrary powers that could be used to effectively control and harass the public, a fear supported by other provisions that seem designed to monitor and control the population.

**Civilian Monitors and Enforcers:** The bill sets the stage for the police to extensively monitor and control citizens using civilians as stool pigeons and enforcers. For example, Section 23 requires all service providers, as notified by the government, to maintain accurate records of their clients and transactions. Under Section 24, the service provider must “expeditiously” release these records “on demand by a police officer”. The bill defines a service provider broadly so as to cover any person, agency or employee who provides a service, even for free, including services related to “phone, internet, computer, vehicle, food, water, finance, rent, pawnage, hospital, laboratory, sanitation, repair, electricity, deposit, share, construction, security, trade, loan, fuel, rest, [and] recreation”. Nowhere does the bill require a warrant for this information or judicial oversight over its release. It violates privacy rights, and could easily be used to achieve economic, social or political control.

It piles the pressure on service providers by allowing the government, by notification, to require service providers to obtain a certificate from the police before starting their businesses (Section 25). The police are entitled to ask for any “reasonable and necessary information ...about their contemporary and past activities” before issuing a certificate. It grants the police enormous discretion to determine what information is required, which means it can effectively monitor all persons in the service industry and punish anyone it does not like by refusing a certificate.

The bill further co-opt citizens to act as informal police in a manner designed to turn citizens against each other. It uses a carrot-and-stick approach to encourage citizens to police each other. Section 62 allows the director general of police (DGP) to establish and arm a voluntary civilian force, the village defence committee (VDC), to protect “life and property” in the villages. Ordinary civilians also can volunteer, although for some remuneration, as special police officers (SPOs) if the DGP with the approval of the government, authorises it (Section 63). The bill allows the police to “demand” that citizens serve as civilian police – a demand that cannot be disobeyed without “reasonable cause” (Section 14 (1)). The police can also demand “professional, mental or physical services of any person” during an accident or disaster to prevent danger or to maintain peace (Section 129). Informers or members of the public who provide information that helps prevent crime or leads to the investigation or arrest of a suspect may be paid a reward (Sections 33-34). Alternatively, those who refuse to aid the police, when required, violate the law and could be prosecuted (Sections 14(2), 129 and 135(2)).

**Rights or Right to Torture?** The bill provides few rights to anyone held in police custody. It requires the police to provide “legally permissible sustenance and shelter” and to inform all those held of their right to legal aid (Section 5(f)). It does not meet the D K Basu guidelines required by the SC to notify anyone held in custody of the right to inform someone of his/her arrest or detention; the right to be examined by a doctor on request and every 48 hours thereafter; or the right to a lawyer during interrogation.

Instead, it seems designed to deprive the public of their rights. Section 13 allows the police to demand personal information from anyone for “sufficient reasons” and permits the police to “take appropriate and reasonable steps for establishing...identity.” Read broadly, the provision suggests that the police may demand a DNA sample without judicial oversight. Section 16(2) allows the police to enter private establishments if members of the public are there. The bill does not define “private establishment” or how many “members of the public” must be present, which allows the police broad discretion to enter any private property.

Most egregiously, the Police Bill paves the way for torture. Section 22 requires the police to take any person injured by them to the “nearest qualified medical practitioner”. Section 20 obligates all physicians to treat any accused or suspect brought by the police. Many fear these provisions will allow the police to choose the doctor who will examine the patient for evidence of torture, rather than forcing the police to allow an independent doctor or one chosen by the patient to conduct the examination (Mir Mehraj Uddin, “Jammu and Kashmir Police Bill, 2013”, Greater Kashmir, 26 February 2013).

Section 20 does not require the suspect/accused to consent to treatment, which means that the treatment could violate medical ethics, violate the suspect’s/accused’s constitutional rights and even constitute torture. Under Section 21 of the bill, any hospital treatment is subject to “adequate police surveillance and observation” and the hospital must turn over all medical records to the police if requisitioned, which not only violates doctor-patient confidentiality, but is likely to intimidate the patient and hospital staff. Further, the bill allows only members of the State Human Rights Commission (SHRC) or the Complaints Authority – not family, friends, lawyers or physicians hired by the family – to verify the condition of a person believed to have been harmed or tortured by the police (Section 45(1)). These provisions seem designed to inhibit the suspect/accused from revealing torture and to ensure that evidence of torture remains hidden.

**Extraordinary Powers as Ordinary:** The bill enhances the overall draconian police powers for areas deemed “Special Security Zones” or, in the language of the AFSPA and the Disturbed Areas Act (DAA) from which they were drawn – “disturbed areas” (Section 82). Section 85 allows the government to ban or regulate “production, sale, storage, possession, or entry of any devices or equipment or...substance or any inflow of funds” in these zones, which means it can decide what enters the zone and how it can be used, including basic necessities, cell phones and money (“Government Wants to Formalise Draconian Police Practices”, The Daily Rising Kashmir, 26 February 2013). The government could use this power not only to control the population but to punish it freely.
Another concern is that while the AFSPA and the DAA spell out special police powers in their text, the bill seems to allow the government to authorise special powers through Special Operating Procedures (SOPs) that apply only in the zones (Section 86). Presumably, the SOPs designed to deal with disturbed areas are likely to grant the police greater powers, which means the executive, without any legislative input or oversight, could determine powers that the centre felt were appropriate for a legislature to decide. Since the J&K government does not always publish its SOPs, civilians may know nothing of these special powers. Finally, rounding out its de facto police state powers, the bill also removes democratic governance by allowing the government to create a special administrative body to merge “administrative and developmental measures… with the police response” (Section 4).

No Democratic Oversight

The bill seems to aim at avoiding all democratic oversight and accountability. It leaves much of the details of police powers to be determined by the government or the DGP through rules, orders, and SOPs (Sections 81(2), 91 and 153). The Police Bill offers the police little guidance of what actions it may take legitimately and legally, which elevates the importance of these rules, orders and SOPs. Only the rules made by the government are subject to legislative oversight, and even then that oversight is likely to be illusory as the legislative assembly has a measly 14 days in which to review and amend the rules (Section 153).

The bill also shuts out the legislature and judiciary on nearly all policing decisions. For example, the government can simply decide which service providers can receive police certificates to operate, a power that should belong to an independent authority. The police do not have to seek a judicial order to force service providers to turn over client information, although this is a typical safeguard against tyrannical behaviour. Section 154 expressly allows the government to make provisions, published in the Official Gazette, to remove any difficulties in “giving effect to the…Act.” It is not clear how far this power goes, but it effectively allows the executive to act as the legislature.

The bill further ensures that there will be little or no police accountability. Section 142 requires government permission to prosecute the police or any public servant. It extends this immunity (Noorani 2012: 241) in Section 92 to cover even the police personnel who are not on duty (ibid). Presumably, the bill intends the state and district complaints authorities to be accountability bodies; however the bill continually places barriers to filing complaints and achieving justice. Section 10(i) deems “all information collected by the police” confidential, which will make it difficult for complainants to access the information they need to file a complaint. Section 120 establishes a six-month statute of limitation that runs from the time of the incident, which may not be reasonable, for example, if a person is detained for the entire period. Once a complaint is filed, the complainant has no right to be heard and is entitled only to the complaints authority’s conclusions, rather than reasons, which inhibits any challenge to the decision (Sections 110 and 117). Only complaints of serious misconduct, which covers custodial death, rape, wrongful detention and deprivation of property by force, can lead to binding orders of redressal (Section 111). The State Police Complaints Authority is entitled to order the government to register a first information report (FIR) or to “initiate departmental action”, (Section 111) but it is not clear whether registering a FIR constitutes permission for prosecution sufficient to override the immunity clause. Combined in this manner the lack of democratic oversight and accountability give the police a relatively free reign to violate human rights.

Prakash Singh Revisited

In addition to the problems already identified, the bill fails to fulfil the requirements of the SC order. The Court sought to insulate the police from political interference. It mandated a State Security Commission to serve as a watchdog for this purpose wanted the DGP and either the state home minister or chief minister to sit on the commission while the other members including leaders of the opposition, would ensure the body’s independence. Under the bill however, five of the nine members are from the government, which is enough to form a quorum and deprive it of the requisite independence (Sections 68-69).

The order also demanded that the police separate investigatory work from law and order enforcement to increase efficiency and relieve tension with the public. Under the bill, the government may order this separation, but it is not mandatory (Section 87).

Finally, the bill fails to achieve the requisite accountability of the police for misconduct that is not “serious” as it does not allow the district complaints authority, which is responsible for dealing with complaints of non-serious misconduct, to order the government to undertake any corrective action. Only the State Complaints Authority, which is responsible for hearing complaints of serious misconduct or complaints against certain high-ranking officers, is entitled to make binding orders, which may not include the power to order prosecution.

Conclusions

Under the guise of complying with the Prakash Singh judgment, which sought to achieve police independence and accountability, the J&K government is attempting to pass a new police law that grants the police, and by extension the government, enormous power. Combined, these powers allow the police to act arbitrarily against the population to achieve political, economic and social control, effectively creating a police state.

NOTES

1. The Supreme Court expressed its “hope that all State Governments would rise to the occasion and enact a new Police Act wholly insulating the police from any pressure whatsoever thereby placing in position an important measure for securing the rights of the citizens under the Constitution for the Rule of Law, treating everyone equal and being partisan to none, which will also help in securing an efficient and better criminal justice delivery system.”

2. Both the SPO and the VDC clauses are likely to violate the Constitution according to the Supreme Court ruling in Nanfield Sunder and Ors vs State of Chhattisgarh. The SC ruled that the Chhattisgarh Police Act provisions on SPOs violated the Constitution by allowing the government to bypass the ordinary process and eligibility requirements for
the hiring of police officers, by failing to establish guidelines for when SPOs could be hired, and for arming SPOs without putting them through the training so they know the complex legalities behind discharging a firearm (Paras 38 and 48). The Chhattisgarh government has since responded by regularising the forces, which Nandini Sundar is challenging as contempt of court (“Salwa Judum: SC Asks Chhattisgarh to Respond to Contempt Plea”, Zeenews.com, 24 July 2012). The provisions on SPOs in the bill do not address these concerns.

Article 129 does not reference prosecution, however, the bill makes it clear that the civilians is legally obligated to provide the services required by the police, which means there will be some type of punishment if the provisions is violated (Nandini Sundar & Ors vs State of Chhattisgarh, (2011) 7 SCC 547 and “Salwa Judum: SC Asks Chhattisgarh to Respond to Contempt Plea”, Zeenews.com, 24 July 2012). For example, is the wording vague enough to allow the police enter a private home if two friends come for a visit?

For example, the state government has yet to publish the SOP it adopted in 2011 on crowd control, although presumably it is in full force. (“New SOP to Tackle Civilian Unrest in J&K”, outlookindia.com, 29 April 2011).

REFERENCE