

AGENDA 2: ESTABLISHING A LEGAL FRAMEWORK TO PREVENT EXTRAJUDICIAL KILLINGS



— PARLIAMENT OF INDIA —

INTRODUCTION

Extrajudicial killings are nothing but a corrosion of democracy. Any country that abides by International law must consider that it is a human rights violation. This topic covers aspects of violation of indigenous as well as international law. It also reiterates the role of the police, which is to identify suspects, gather evidence and then produce them to court to initiate prosecution in accordance with the CrPC instead of taking law and order into their own hands and assuming the duties of Judge, Jury and Executioner. Some state governments argue that this is done in a bid to improve law and order, but this claim has no logical backing to it as it is counterproductive to the essence of the Indian Constitution.

However according to some reports there are evidences from the CBI that these killing and shootings appear to be staged. These fake encounters are common because Encounters are - at least in part - a response to India's slow and dysfunctional criminal justice system. The police often see cases evaporate as trials are delayed and witnesses turn hostile. Defendants are also known to buy their freedom. But the response - taking the law into their own hands - reflects something even more sinister: a culture in which some police officers assume that they can kill with impunity, safe in the knowledge that they are very unlikely to face any consequences.

Since Maneka Gandhi, the Supreme Court of India has been consistent in its argument that the procedure prescribed by law must be fair and reasonable. In turn, the law must be in sync with the other fundamental rights. The Armed Forces (Special Powers) Act of 1958 (AFSPA) is currently under review, with the goal of striking a fair balance between citizens' rights and public order. The Supreme Court has upheld the AFSPA's constitutional validity illustrating its insensitivity to citizens' rights in cases where 'national security' is involved.

HUMAN RIGHTS AND ITS VIOLATION

In the context of human rights violations, extrajudicial executions are unlawful and deliberate killings, carried out by order of a government or by means of one of its sovereign functions. The concept of extrajudicial executions brings together several types of killings: death in police custody, assassination and killings by officers performing law enforcement functions but involving a disproportionate use of force to any threat posed. Therefore, an extrajudicial execution is, in effect a murder committed or condoned by the state.

These types of killings lack accountability, and substantial evidence hence is considered against the law. The very fact that the accused are victims and not produced in court is a human right violation. Considering the law offers every victim to have the freedom to defend his stance and hire a lawyer to do so, these killings violates that right.

Supreme Court rulings in 2017 strengthened fundamental rights, and emphasised the constitution's protections, including free speech, rule of law, and "guarantees against authoritarian behaviour."

REVIEWING AFSPA

The government has failed to review and repeal AFSPA, which gives soldiers effective immunity in committing these unlawful killings. Indian law makes it difficult, if not impossible, to prosecute public officials. Section 197 of the Criminal Procedure Code bars courts from recognizing any offences alleged to have been committed by public servants in the discharge of their official duties unless the central or a state government permits prosecution. In addition to this, Section 7 of the AFSPA prevents state police from registering an FIR against the armed forces without prior permission of the Union Government, adding another loophole in the accountability factor of this act, which is seen clearly in the Shopian incident where Major Aditya Kumar faced judicial repercussions.

Soldiers continue to have immunity from prosecution when deployed in areas of internal conflict due to provisions of the AFSPA.

The AFSPA — in force since 1957 in the North-East-whole of Nagaland, Assam, Manipur and parts of Arunachal Pradesh; and since 1990 in Jammu and Kashmir — has become a symbol of excessive State power.

The court has now sought and tabulated details on 62 specific cases in which there is some evidence that the deaths involved were not genuine operational casualties but extrajudicial killings.

Since there is an absence of inquiry regarding all these cases and strong violations against victims and the real question here is why would such cases not have an effective investigating system.

Some reports state that these validate and support discreet regional powers that spread the ideology of terrorism and non-state actors.

There are 1528 cases of extra-judicial killings in Manipur which do not have any legal documentation and alleged fake encounters that need to be investigated. However recently the CBI was asked and questioned about the progress of this, with Director Alok Verma's personal presence being ordered in Manipur by the Supreme Court. There is a huge amount of backlog in these cases which underlies that murderers are still free. The proceedings have been so slow that the victims have not received justice and all these murders still remain a mystery.

The Supreme Court has appointed a Special Investigating Team to have speedy investigation and solve the matters at hand.

Article 355 of the Constitution has laid down that it is the duty of the Union to protect the State from external aggression and internal disturbances.

Violence has become a way of life in Manipur and the state government does not possess the capacity nor resources to handle the situation, whereas the State legislatures of Assam and Meghalaya have been delegated the power to repeal the AFSPA when they deem fit.

Supposedly, the military do have instructions on the procedures they are to follow when they act in aid of civil power. In *People's Union for Democratic Rights v. Union of India*, (1991) 2 GLR 1, when the court reviewed the army's powers it referred to two sets of instructions issued to the military when acting in aid of civil power. The first was a 1969 pamphlet issued by the Government of India as guidance for military but it was confidential and the court was not allowed to review it. A 1973 basic book instructions for army acting in aid of civil power was also referred to in the case. In a personal meeting with Justice Raghuvir, former Chief Justice of the Guwahati High Court, and the Justice who wrote the opinion in *People's Union for Democratic Rights*, SAHRDC asked for details on the nature of these instructions. Justice Raghuvir stated that he was only able to see a few pages and that the whole booklet was not available to non-military personnel. He believes that the military keeps these instruction manuals confidential so that it can not be proven that the armed forces fail to comply with their own standards.

This is another example of the lack of judicial review and allows the armed forces to remain above the law. The Constitution Bench judgment in *Naga People's case* [*Naga People's Movement of Human Rights v. Union of India*, (1998) 2 SCC 109]

had held that while considering a declaration of "disturbed area" under AFSPA, it was not open to the Court to consider whether the material before the Government was sufficient. The limited extent of Judicial Review available to the Court was to see whether the declaration is based on relevant material or on wholly extraneous considerations.

LEGAL VIOLATIONS

The Armed Forces Special Powers Act of 1958 (AFSPA) is one of the more draconian legislations that the Indian Parliament has passed in its 45 years of Parliamentary history. Under this Act, all security forces are given unrestricted and unaccounted power to carry out their operations, once an area is declared disturbed. Even a non-commissioned officer is granted the

right to shoot to kill based on mere suspicion, justifying that it is necessary to do so in order to maintain the public order. The greatest outrage of the AFSPA under both Indian and international law is the violation of the right to life. This comes under Article 6 of the ICCPR, and it is a non-derogable right. This means no situation, or state of emergency, or internal disturbance, can justify the suspension of this right.

The offences under section 4(a) of the AFSPA are: “acting in contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of five or more persons or the carrying of weapons or of things capable of being used as weapons or firearms, ammunition or explosive substances”. None of these offences involve the use of force, but the armed forces are allowed to retaliate with powers which are immensely out of proportion when compared to the offence.

If the AFSPA were defended on the grounds that it is a preventive detention law, it would still violate Article 22 of the Constitution. Preventive detention laws can allow the detention of the arrested person for up to three months. Under section 4(c) of the AFSPA a person can be arrested by the armed forces without a warrant and on the mere suspicion that they are going to commit an offence. The armed forces are not obliged to communicate the grounds for the arrest.

Unlawful Activities Prevention Act (UAPA)-1967: Section 2 and Section 15 of the UAPA defines an unlawful activity and a person who can be branded as a terrorist. Under this definition there are a number of groups fighting for indigenous rights in disturbed areas which can then be considered unlawful and immediately allows for the exercise of indefinite powers by armed men or soldiers irrespective of the activity.

Article 21 of the Indian Constitution guarantees the right to life to all people.

The underlying law violates The Right to Life and strips the citizens a basic sense of freedom with ongoing conflict and chaos of the supremacy the armed personnel have in disturbed areas.

Extrajudicial killings violate Articles 14, 20(1), and 21 of the Indian constitution and went against Article 359 (emergency provisions), which clearly lays down that Articles 20-21 are non-derogable). Difficult circumstances such as terrorism or insurgency could not be a justification for encounters.

International human rights law prohibits the arbitrary deprivation of life under any circumstances. Article 3 of the Universal Declaration of Human Rights states that “everyone has the right to life, liberty and security of person.

Article 4 of the ICCPR states that this right cannot be waived “even in times of public emergency threatening the life of the nation.

Code of Criminal Procedure, 1973 -a sanction from the central or the state government is required to arrest or institute criminal prosecutions against public servants, including police officers and members of the civil or armed forces. The government has ignored repeated calls to amend the law to ensure that public officers who violate human rights are no longer protected from prosecution.

CrPC

The CrPC (Code of Criminal Procedure) establishes the procedure police officers are obligated to follow for arrests, searches and seizures, procedure from which the army are exempted.

While explaining the AFSPA bill in the Lok Sabha in 1958, the Union Home Minister stated that the Act was subject to the provisions of the Constitution and the CrPC. He said “these persons have the authority to act only within the limits that have been prescribed generally in the CrPC or in the Constitution.” This would require a training regime for the armed forces in this procedure.

Chapter 10 Section 129 in of the CrPC allows for the dispersal of an assembly by use of civil force. The section empowers an Executive Magistrate, officer-in-charge of a police station or any police officer not below the rank of sub-inspector to disperse such an assembly. This can be likened to the powers the army has to disperse assemblies under section 4(a) of the AFSPA. The CrPC clearly dilutes the ranks which can disperse such an assembly, whereas the Act grants the power to use maximum force to even to non commissioned officers. Moreover, the CrPC does not state that force to the extent of causing death can be used to disperse an assembly.

Chapter V of the CrPC lays down the arrest procedure the police are to follow. Section 46 establishes the way in which arrests are to be made. It is only if the person attempts to evade arrest that the police officer may use all means necessary to effect the arrest. However, sub-section (3) limits this use of force by stipulating that this does not give the officer the right to cause the death of the person, unless they are accused of an offence punishable by death or life imprisonment. On the contrary the AFSPA lets the armed forces kill a person who is not suspected of an offence punishable by death or life imprisonment.

POLITICAL INVOLVEMENT

Politicians have been taking multiple steps to deal with the issue at hand. The chief minister of Uttar Pradesh has named and conducted an entire operation on the basis of this called as 'operation clean'. Apart from rising turmoil and chaos the chief minister has given full authority to the state policemen to conduct encounters. This operation has injured many.

The rising powers of rebel groups in disturbed areas are spreading violence and the immunity to armed men and action against these rebel groups are leaving many killed or injured. The continuous fight for justice is failing and innocent lives are taken away. The fact that military personnel have an upper hand in these areas is corroding the value of a judicial system in India.

Reason for conflict is increasing which gives more purpose to the rise in violence that cause the growth of terrorism which threatens the safety of innocent individuals.

The increase in extrajudicial killings is threatening the security and the stability of the judicial system. This issue is of growing importance and needs a permanent solution. It threatens national security and distorts the belief of citizens in the government and its actions. The breaches in policies and the loopholes in current resolutions is weakening the strength of justice. This problem needs a permanent solution that protects citizens and secures democracy.

QARMA

- Necessities of a legal framework to prevent extrajudicial killings
- Prohibition by law and prosecution
- Prevention - Modifications to chain of command, restraints on use of force (Special reference to the AFSPA)
- Clear system of accountability and liability for the prevention of these killings

