

LAW

Shielding the Armed Forces for Actions Under AFSPA, But at What Cost?

The Narendra Modi government claims "the Indian army has a record of maintaining the highest level of humanity," but cases from Manipur and Kashmir indicate otherwise.



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On 16 March 2010 at about 8:30 a.m., Orsonjit went to get his scooter repaired. At about 10:20 a.m. Orsonjit's mother called him on his mobile phone to return home for lunch. Orsonjit informed his mother that he was in the scooter workshop and could possibly return after the work is over.

In the evening, the ISTV News, a local cable news network in Manipur, reported, with pictures showing Orsonjit's body, that he had been killed in an encounter with the police. Police officers who appeared in the news claimed that Orsonjit was killed in an armed encounter with the police at Taothong Apheibi, Imphal West. The police also said that they had recovered a .32 caliber revolver with two live rounds and a mobile handset from Orsonjit.

(Asian Human Rights Commission, Urgent Appeal Case, March 25, 2010)

The incident in which the deceased Khumbongmayum Orsonjit died is not an encounter nor can the security

forces plead that it was in the exercise of their right of private defence.

— As noted in the Supreme Court judgment, July 8, 2016

In an apparent disregard for the constitutionally granted right to life, the BJP government at the Centre has once again approached the Supreme Court, this time with a **curative petition**, challenging the **judgment from July 8, 2016** that ordered a detailed investigation into 1,528 documented cases of alleged fake encounters in insurgency-affected Manipur. Justices Madan B. Lokur and Uday Lalit gave sharp observation and recommendations in the judgement, which aimed to ensure greater accountability of security forces accused of extra-judicial killings under the **Armed Forces (Special Powers) Act** (AFSPA). In contrast, the curative petition submitted by attorney general Mukul Rohatgi, to a bench headed by Chief Justice J.S. Khehar, is rooted in the concept of punitive repression rather than upholding the principles of rule of law and public accountability.

Placing the security forces above the law, the curative petition contends that “the action taken by army during operations cannot be put to judicial scrutiny” and maintains that “to apply principle of judicial review over action which has taken place in the last two or three decades is detrimental to the morale of the armed forces”. In other words, the Centre attempts to protect the security forces from public accountability and in the process seeks to legalise extra-judicial counter-insurgency operations and institutionalise impunity.

The petition stands in disturbing contradiction to the Supreme Court ruling that noted that “democracy would be in grave danger” if armed forces were permitted to kill citizens on a

mere allegation or suspicion that they were enemies of the state. This recall plea is not curative but punishing; punishing to India's democratic values and ethos that gives equal rights to redressal, to all. As illuminated remarkably in the court ruling, "It does not matter whether the victim was a common person or a militant or a terrorist, nor does it matter whether the aggressor was a common person or the state. The law is the same for both and is equally applicable to both".

The ruling from the apex court, which came as a significant legal development for families of victims of alleged fake encounters in Manipur, is now being labeled by the Centre as "impugned" and as a threat to peace and security. What is truly under threat, however, is the human rights claims of aggrieved families for whom the order was a partial victory and paved way for possible redressal.

In a such a time of deepening nationalist tenor and its insidious influence on independent institutions, it becomes urgent to reiterate that placing security forces above the law will only legitimise indiscriminate killings and perpetuate gross human rights abuses with impunity. This in no way protects the "security and integrity of the territory of India," as claimed in the curative petition, but will only undermine the democratic values of India, constitutional rights and its rule of law.

On July 8, the apex court passed the ruling while dealing with the petition that was jointly filed in 2012 by Extra Judicial Killings Victims Families Association and Human Rights Alert, Manipur, with legal assistance from Human Rights and Law Network, New Delhi. The writ petition highlighted 1,528 alleged extra-judicial executions carried out by the police and security forces in Manipur, with an elaborate documentation of 62 cases. The petitioners claimed that the police refused to lodge complaints of killings and, as a result, no investigation

or prosecution has ever taken place. They also brought to the notice of the apex court that “victims of the extra-judicial executions include innocent persons with no criminal record whatsoever but they are later on conveniently labeled as militants”. Responding to the petition, the Court proposed in 2013 to appoint a special three-member commission headed by Justice N. Santosh Hegde, a retired judge of the Supreme Court of India, to investigate and verify the facts with regard to the killing of persons in the cases cited by the petitioners.

The commission investigated six cases and in its report **confirmed that all six probed were fake encounters**, including the case of Orsonjit. Highlighting the rampant abuse of AFSPA and dereliction of duty by the police, the commission’s report further furnished ample circumstantial evidence to prosecute the culpable security personnel. The judgment also refers to the information provided by the National Human Rights Commission (NHRC) on 62 cases from the writ petition. The NHRC had held that 31 were fake encounter or extra-judicial killing; in seven of the 62 cases, no complaint was made to the NHRC; and in 17 cases, the NHRC had not yet reached a verdict.

The 2016 judgment of the Supreme Court further includes the conclusions in the six cases that the Hegde commission investigated.

Case 1: Md. Azad Khan

The incident in which the deceased Md. Azad Khan was killed was not an encounter nor was he killed in exercise of the right of self-defence.

Case 2: Khumbongmayum Orsonjit

The incident in which the deceased Khumbongmayum Orsonjit died is not an encounter nor can the security forces

plead that it was in the exercise of their right of private defence.

Case 3: Nameirakpam Gobind Meitei and Nameirakpam Nobo Meitei

The incident in question is not an encounter but an operation by the security forces wherein death of the victims was caused knowingly.

Case 4: Elangbam Kiranjit Singh

... this commission is of the opinion that the incident, in question, cannot be justified on the ground of self-defence.

Case 5: Chongtham Umakanta

... we are of the considered opinion that the case put forth on behalf of the security forces was an encounter and that Umakanta was killed in an encounter or in self-defence cannot be accepted.

Case 6: Akoijam Priyobrata

The deceased did not die in an encounter.

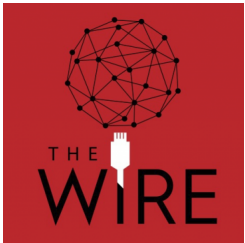
The observations of the Hegde commission in 2013 and the ruling of the Supreme Court in 2016 not only highlighted the illegal and violative underbelly of the counter-insurgency operations of the Indian army in Manipur but also indicates the unwillingness of the state and central government to address the human rights claims of the victims and their families through legal means. The recourse to justice through judicial process is subverted at the very onset by not filing FIRs against security forces. The neutralisation and subsequent complicity of the police have only aided the security forces in its continued coercive actions to crush the individual and collective struggle for justice.

Previous inquiry commissions, like the Upendra Singh Commission (2004), Jeevan Reddy Committee (2005) and Justice Verma Commission (2013), have held the armed forces responsible for abuse of power and recommended the review and repeal of AFSPA. The Upendra Singh commission report, which indicted the Assam Rifles for Thangjam Manorama's murder, was kept under wraps for a decade by the state government. The report, which revealed the "brutal and merciless" torture of Manorama by the Assam Rifles team, was only handed over to the Supreme Court in 2014. The state's complicity was unmistakable when it denied the request of Christof Heyns, the UN special rapporteur on extrajudicial, summary or arbitrary executions, to visit Imphal in 2012. Notwithstanding the observations by its own appointed commissions, India has consistently defended AFSPA at Universal Periodic Reviews and claimed that it was not violative of fundamental rights.

In its latest petition, the Centre states that "the Indian army has a record of maintaining the highest level of humanity and is not a rogue army. Human rights and respect for the life of a human being are kept at the highest pedestal". However, well-documented cases of human rights abuse and institutional denial of justice, in both Manipur and Kashmir, indicate otherwise. Legislatively sanctioned extra-legal powers to security forces, AFSPA has been used in Manipur and Kashmir as an instrument of repression and provides blanket immunity to the armed forces. Brutal rape and murder of Manorama, 16-year-long hunger strike and detention of Irom Sharmila, naked women activists holding a large banner reading "Indian Army, Rape Us!", the Kunan Poshpora rapes, Machil and Pathribal fake encounters and the mass graves of Kashmir speak volumes of the bloodied history of AFSPA in these areas.

With its curative petition, what the Centre is really trying to do is place such “counter-insurgency actions,” however brutal or unconstitutional that may be, above the law. By refusing to accept the argument of the apex court in its 2016 ruling, which clearly stated that “...in such cases it is not the encounter or the [military/police] operation that is under scrutiny but the smoking gun that is under scrutiny,” the Centre is defending the crimes committed by security forces, which were nothing but calculated acts of brutality against men, women and children. Such cases of human rights violations in places like Manipur and Kashmir cannot be placed outside the purview of judicial enquiry as it violates the right to life, the right to fair trial and the right to remedy, guaranteed to all. Government-sanctioned subversion of the judicial process in cases of violations and closing channels for legal redressal is tantamount to endorsing such crimes. It undermines the constitution of India and has the danger of consequently placing India as a country where dispensability of human lives is a norm.

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