

Judging the soldiers: Confronting extrajudicial killing on India's borders

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*Last month, the Supreme Court of India ruled that armed forces personnel and police cannot use excessive or retaliatory force in Kashmir and the northeast. **Surabhi Chopra** writes that this marks a shift from the de facto immunity that many soldiers operating in areas covered by the Armed Forces (Special Powers) Act have exploited to date. However, she also notes that the government are unlikely to welcome the development, or support investigations into human rights abuses in the borderlands.*



It is not always easy to keep a nation secure whilst also safeguarding individual liberties. But since September 11, 2001, many proud democracies seem to be failing to prioritise rights at all. Whether in the US, Australia, Bangladesh or India, politicians have unflinchingly curtailed due process in the name of national security, without fear of losing votes (they know that the people most affected by these restrictions –foreigners and minorities—count for the least at the ballot box). In principle, the judiciary should act as a counterweight, keeping governments honest and safeguarding high constitutional principles that would otherwise be neglected in the grind of daily politics. On national security matters, however, [courts have been timid, shirking this counter-majoritarian role.](#)

All of which makes a [recent ruling](#) by India's Supreme Court both surprising and heartening. It held that soldiers policing India's border regions would no longer enjoy the legal immunity they have abused for decades. In making its decision, the court confronted one of India's ugliest truths: the world's largest democracy unlawfully executes citizens who live in its more restive reaches, and does so with seemingly little compunction. In the name of national security, it has deprived an unknown number of its citizens of the most fundamental right of all—the right to life.

This unlawful killing is facilitated, ironically, by legislation. In 1958, facing separatist demands in the northeastern states of Assam and Manipur, the Indian government dusted off a colonial law that allowed domestic deployment of the military in "disturbed" areas. The resulting statute, the [Armed Forces \(Special Powers\) Act \(AFSPA\)](#), underpins the heavy military presence in the Kashmir valley and India's northeast. It gives soldiers lavish legal powers to use force. And even when they exceed these broad limits, it insulates them from any legal consequences. It allows the central government, not the local prosecutor on the ground, to decide if soldiers can be criminally prosecuted. They almost never are.



Women mourning relatives killed by soldiers under AFSPA in Manipur. Credit: [American Centre Mumbai](#) CC BY-ND 2.0

This de facto immunity has proved to be dangerous. With little fear of punishment, soldiers in Kashmir and the northeast regularly [exceed their legal powers](#). Torture, sexual assault and homicide have been inflicted on entire villages as retribution for attacks by separatist militants. Some of these onslaughts are infamous: the shooting of ten men in Malom, Manipur in 2000; the mass rape in Kunan Poshpora, Kashmir in 1991; the weeks-long occupation of Oinam, Manipur in 1987, where some people were buried alive—and two women were forced to give birth in public. Other attacks, such as the killing of eight men in Tabanglong, Manipur in 2000 or the 1994 attack on the residents of Mokokchung, Nagaland are less well known. Alongside the occasional retaliatory rampage, security forces also traffic in more routine, quieter killing. The suspicion that someone is involved with militancy should lead the armed forces to liaise with the police, investigate the suspect, and if necessary, arrest him. Instead, soldiers have often dispensed with due process, and simply executed suspects – hearsay, rumour, even a hunch turning into a death warrant.

Bereaved families in “disturbed” areas complain to the police, as do victims of torture and assault. But even if the local authorities pay them any mind, the central government stymies criminal proceedings. With little prospect of prosecution, some victims have kept quiet about their grievances, leaving crimes unreported. But others have sought an alternative remedy. They have “sued” the state under constitutional law for violating the constitutional right to life and demanded monetary compensation. In many cases, they have won.

These successful demands for (mostly modest) compensation create an embarrassing dissonance. In decision after decision, a court of law has found that the armed forces have committed egregious violence. And in almost every instance, the central government has withheld criminal proceedings. It could not be clearer that the government would rather indulge the military than genuinely obey the law. The judiciary is reduced to the role of disbursing financial aid even as it claims to be the enforcer of fundamental rights.

In a recent case, [Extra Judicial Execution Victim Families Association versus India](#), however, the Supreme Court seemed to embrace its proper constitutional role, as one of the checks and balances that make liberal democracies liberal. Civil society groups from the northeastern state of Manipur highlighted 1528 cases of extrajudicial killing and disappearances by the armed forces which had been neglected or denied by the authorities, demanding a systemic response to a systematic practice. In response, the court ordered a proper, independent investigation of these cases (refusing to be mollified by the military’s own internal inquiries). Crucially, it also clarified that the legal cover soldiers enjoy under the Special Powers Act does not extend to “excessive” or retaliatory violence. This should compel the central government to permit prosecution of the military’s human-rights violations.

As a result, those responsible for the 1528 killings in Manipur might finally face criminal charges. Long-neglected complaints of unlawful violence in India's other militarised zones – Kashmir, Tripura, Nagaland, Assam – may also, by analogy, be investigated. And if speaking up is no longer futile, some unreported crimes may now come to light. In Kashmir alone, [NGOs say that at least 6000 civilians](#) have never been accounted for after being picked up by the armed forces. Now, the state will face stronger pressure to acknowledge the unlawful executions, clandestine cremations and unmarked graves that lie behind these numbers.

However, after years of getting away with murder, the Indian government will not welcome these developments. Even if it permits criminal trials of soldiers, it is unlikely to allow them to be prosecuted diligently. Soldiers can be tried in either civilian courts or military tribunals. The latter, more opaque forum will almost certainly be preferred. But even if the government undermines the trials of individual soldiers, it will find it difficult to deny the scale and frequency of their crimes in Kashmir and the northeast—or its own support for these crimes.

In the Supreme Court, the government argued that soldiers are confronting a “war-like” situation, and investigating them would hurt military morale (and therefore, hurt India). This argument was firmly rebuffed. India was not at war, the Supreme Court said, and those who live in regions facing insurgency could not be deprived of due process and their rights under the Indian constitution.

The government's argument is not new. It has argued previously that war-like conditions justify hair-trigger belligerence in Kashmir and the northeast. At the same time, it has also insisted that these regions suffer not from “conflict”, but merely from “disturbance” or “civil unrest”. Admitting to a conflict would subject India to the rigors of international humanitarian law. It would like to steer clear of the Geneva Conventions, while also invoking “war” to evade domestic due process. With the Supreme Court's recent decision, this double dodge became a little harder to sustain.

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