

South Asia Forum for Human Rights

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India: Denial of sanction for prosecution of 'guilty' police and security personnel

The UN Human Rights Council is tasked with undertaking a Universal Periodic Review (UPR) of the fulfillment of the human rights obligations and commitments of all 192 UN Member States, based on objective and reliable information and ensuring equal treatment of all states. The first round review will be on 7-18 April 2008. In this round, among other countries the report of India will be reviewed.

Recalling that on the occasion of election to the UN Human Rights Council in 2007, India made a 'Voluntary Pledge' (UN A/61/718. General Assembly, 29 January, 2007), to realize its obligations under international human rights instruments, South Asia Forum For Human Rights will like to make the following submission to the UN Human Rights Council regarding some aspects human rights situation in India.

While appreciating that the Indian Constitution guarantees the fundamental rights of its citizens and the Indian from time to time has made several interventions to provide relief to victims of violations of human rights and the fact in recent years India has made exceptional progress in the area of institutionalizing 'transparency in governance' through the enactment of Right to Information Act and it is making every effort to abide by its national mechanisms and procedures to promote and protect the human rights and fundamental freedoms of all its citizens, we are constrained to point out India's failure to repeal or amend the Armed Forces Special Powers Act and other provisions in Indian Criminal Procedure Code which provides virtual immunity to the members of the security forces and the police personnel from prosecution in civilian courts for violation of the human rights of the citizens.

The Law of Arrest and Rights of the Accused:

Article 22 of the Constitution of India provides for Protection against arrest and detention in certain cases and Section 57 of the Criminal Procedure Code (Cr. Pc.) provides that a person arrested shall not to be detained more than twenty-four hours. However, the chronic use of anti-terrorist laws, preventive detention laws and the Armed Forces Special Powers Act have created a situation where the normal methods of 'investigation' have been replaced by disappearances, illegal detention, custodial torture, sexual violence against women and summary executions disguised as armed encounters. In almost every police station of India 'accused' persons are routinely beaten and abused. Investigations show that the majority of the so-called 'criminals' who are tortured and abused in the police stations are the poor, belonging to the communities of Dalits (formerly the untouchable castes), tribals and minority religions like Islam and Christianity.

Clauses (1) and (2) of Article 22 of the Constitution of India apply to persons arrested or detained under a law other than a preventive detention law and clauses (4) to (7) apply to persons arrested or detained under a preventive detention law. Clause (1) provides that no person who is arrested shall be detained in custody without being informed as soon as possible of the grounds for such arrest or be denied of the right to consult. Clause (2) provides that every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest.

Unfortunately, in spite existence of these provisions and several judgments of Indian Supreme Court and the directives of the National Human Rights Commission, the police and security forces continue to violate the rights of Indian citizens. This situation prevails essentially because of the existence of several 'impunity' or impunity like provisions in Indian laws.

Legal Impunity –denial of sanction for prosecution of police/security personnel:

In this regard it is important to note that Section 197 of the Indian Cr. Pc. provides for prior sanction by the government for prosecution of police and security officials by a civil court. The effect of

this 'sanction' is particularly evident when we examine the use of this power by the executive in the 'disturbed areas' where it has been used to prevent investigative agencies of states and even that of the central government like the Central Bureau of Investigation (CBI) from filing 'charge sheets' against erring security personnel. This power has been used extensively to bypass orders of the High Courts in Jammu and Kashmir and Assam.

The Armed Forces Special Powers Act 1958 which has been of serious concern to the UN human rights bodies contains a similar impunity clause. Section 6 of the Act provides that, 'No prosecution, suit or other legal proceeding shall be instituted, except with the previous sanction of the Central Government against any person in respect of anything done or purported to be done in exercise of the powers conferred by this Act'. Today nearly 40 million Indian citizens living in the states of Assam, Arunachal Pradesh, Meghalaya, Manipur and Jammu and Kashmir are affected by this Act.

India Defends the Armed Forces Special Powers Act in the UN:

In its third periodic report to the UN Human Rights Committee submitted in 1997 the Indian representative defended the Section 6 of the Act on the ground that the section was there to avoid the possibility of harassment and vexatious civil or criminal proceedings which could hamper due discharge of their duties. The report further asserted that Section 6 did not confer immunity or impunity in cases where human rights were violated or the law of the land was breached. The report claimed that the central Government readily accorded sanction for prosecution in all cases where it is satisfied that the grievance is justified.

The report claimed that the special powers could be exercised only in situations enumerated in the legislation, namely dispersal of unlawful assembly, preventing persons from carrying weapons, destruction of arms dumps, search and seizure, and effecting of arrest of persons suspected of commission of a cognizable offence. According to the report, the Act, specifically provided that once a member of the armed forces arrested any person and takes him into custody, the person must be handed over to the nearest police station, to ensure that the normal rights of an arrested person are made available to him in accordance with the provisions of the Constitution and the Criminal Procedure Code. (CCPR/C/76/Add.6. 17 June 1996)

Though the government of India has claimed that Section 197 of Cr. Pc. and Section 6 of the Armed Forces Special Powers Act cannot be construed as an impunity provision, yet, this is precisely the effect of these provisions, despite protestations to the contrary by all concerned. We will like to submit that this process had been aided and abetted by the Indian government.

India's Response to Judicial Review of Armed Forces Special Powers Act:

Between 1980 and 1990 the Armed Forces Special Powers Act was challenged before the Guwahati High Court by citizens' groups in the north-eastern state of Assam. It is interesting to note that the Central government appealed against every judgment of the Guwahati High Court, which restricted the powers of the Central government and its forces under this Act.

In 1991, when the Guwahati High Court had ordered the Central government to review, every month, whether the 'disturbed areas' notification under section three of the AFSPA 1958 was necessary to be continued, the Central government appealed to the Supreme Court against this decision.

In its 1998 judgement in the case known as the Naga Peoples' Movement for Human Rights (NPMHR) Vs. The Union of India the Supreme Court while upholding the constitutional validity of the Armed Forces Special Powers Act had instructed that:

'While exercising the powers conferred under clauses (a) to (d) of Section 4 the officers of the armed forces shall strictly follow the instructions contained in the list of "Do's and Don'ts" issued by the army authorities which are binding and any disregard to the said instructions would entail suitable action under the Army Act, 1950. The instructions contained in the list of "Do's and Don'ts" shall be suitably amended so as to bring them in conformity with the guidelines contained in the decisions of this Court and to incorporate the safeguards that are contained in clauses (a) to (d) of Section 4 and Section 5 of the AFSPA as construed' (AIR 1998, SC 431)

Articles 141 and 142 make all decisions of the Supreme Court of India 'law' binding on all agencies of the state. Yet we find that these instructions of the Supreme Court of India are followed only in

breach. The fact the Central government has challenged every judgment of the Guwahati High Court which has put any reasonable restriction on the powers conferred to its forces by the Act has further contributed to the creation of a culture of impunity. This has strengthened by the dominant discourse on security in the country and continues to legitimise the use of violence by the state, particularly extra judicial killing, torture, illegal arrests/abductions of the so-called 'criminal' and the 'terrorist'.

We present a few cases below as evidence of this practice.

The Case of Javed Ahanger (1990 – 2007) in Kashmir:

On the night of August 17 or 18, 1990, Javed Ahmad Ahanger, an 18-year-old student, was arrested by members of the National Security Guard (NSG) from his home in Batmalloo, Srinagar. His mother, Parveena Akhter Ahanger, filed petitions concerning his 'disappearance' in the Jammu and Kashmir High Court.

In 1991, an investigation into his 'disappearance' was carried out by an Additional District and Session Judge, Srinagar, on the direction of the Jammu and Kashmir High Court. After examining several witnesses, including police officers, in its report to the High Court in 1992 the District Judge found that there was evidence to show that Javed Ahmad Ahanger had been arrested by members of the NSG and that he had subsequently 'disappeared'.

In December 1995, upon the direction of the High Court, the Shergari police Station House Officer finally submitted his report stating that the case had been investigated and they were ready to file 'charge sheet' against officials of the NSG under section 364 of the Ranbir Penal Code, for 'kidnapping or abducting in order to murder' (the Ranbir Penal Code is the equivalent of the Indian Penal Code used in India administered Jammu and Kashmir). The High directed the administration of Jammu and Kashmir to seek sanction of the Central government for prosecution of the officials of the NGS.

In July 1996, the central government notified the High Court that it would not grant sanction for the prosecution of the NSG personnel. The ground for refusal was the failure of Jammu and Kashmir police to examine in person the NSG personnel responsible. The central government asked the state government to resubmit its request for sanction after conducting further investigations under the "prescribed procedure". The fact remains that the NSG did not cooperate with the Jammu and Kashmir police in 1991-1992. It continues to non-cooperate till date. The sanction for prosecution, in spite of the order of Jammu and Kashmir High Court has not been granted till date.

The Case of Late Jalil Andrabi, in India Administered Jammu and Kashmir:

Jalil Andrabi, a human rights lawyer was detained for questioning on March 8, 1996 by security forces of the Indian State. When he did not return home, a habeas corpus petition was filed by the Jammu and Kashmir High Court Bar Association. Jalil Andrabi's body was found nineteen days after his 'disappearance'. According to post mortem report he died at least a week before the discovery of his body. He had been shot in the head and his eyes had been gouged out.

On August 13, 1996, the Jammu and Kashmir High Court directed the police and security forces to make joint efforts to arrest the suspected perpetrators. In April, 1997, the SIT presented its initial findings to the High Court. It claimed that one Major. Avtar Singh from the 103rd Unit of the Territorial Army and other soldiers were responsible for the abduction and killing of Jalil Andrabi.

The SIT was unable to arrest Major Avtar Singh as they could not find him. The representative of the army claimed that as Major Singh's services had been terminated, his whereabouts were not known to the army.

Three years later on October 18, 2000, the Jammu and Kashmir High Court directed the Commanding Officer of 103rd Unit of the Territorial Army to 'provide all possible assistance in producing the accused before the court'. On December 26, 2000, the trial magistrate presented the army with the option to try the suspect by court martial or in a civilian court. On January 22, 2001, the army sent a letter to the magistrate stating that Major Avtar Singh would be tried in a court martial.

In March 2001, the SIT submitted its final report to the High Court. The SIT had found during its investigations that Major Avtar Singh may have been involved in at least six other extrajudicial executions.

The Jammu and Kashmir High Court Bar Association then submitted a petition to the High Court demanding that Major Avtar Singh be tried in a civilian court. The petition reminded the court of the failure to produce Major Avtar Singh before the judge. The High Court, acting on the petition, stayed the court martial. Major Avtar Singh is still at large, despite orders by the court, he has not been arrested.

The Case of encounter killing in Pathribal, Kashmir:

In the aftermath of the killing of 35 Sikhs at Chattisinghpora in Anantnag district of Kashmir valley on March 21, 2000 members of J & K police and security force officials of the 7 Rashtriya Rifles (RR) allegedly killed 5 persons in an encounter, dubbing them foreign militants responsible for the massacre of the Sikhs.

Subsequently, DNA tests conducted on the tissue samples collected from the exhumed bodies established that all the five persons killed were locals. The DNA reports identified the deceased as - Zahoor Ahmad Dalal of Mominabad, Mohammad Yusuf Malik of Kokernag, Bashir Ahmad Bhat of Kapran-Dooru, Juma Khan (s/o Faqeer Khan) and Juma Khan s/o Sher Ali Khan of Brari Angan, and that they were blood relatives of the local people and not foreign militants as claimed by the security forces and the government.

A probe by the Central Investigation Bureau (CBI) was ordered into the incident. On November 4, 2006 the CBI presented its charge sheet in the court of Muhammad Yusuf Akhoun, chief judicial magistrate (Srinagar). In the charge sheet the CBI named Brig. Ajay Saxena, Lt. Col. Brajendra Pratap Singh, Mj. Amit Saxena, Mj. Saurav Sharma and Sub. Idrees Khan of 7 Rashtriya Rifles who were posted in Anantnag in March 2000 when the Pathribal incident occurred.

The proceeding of this case have been stalled as in response to an appeal by the General Officer Commanding (GOC), 15 Corps, the Supreme Court has to stay the proceedings. Now CBI and the state of Jammu and Kashmir have to file affidavits stating their reasons why the ongoing proceedings should not be scrapped.

Armed Forces Special Powers Act 1958 (AFSPA) and United Nations:

In this context it is useful to recall the concluding observations of the UN Human Rights Committee on India's 1997 report on the implementation of ICCPR. The UN Human Rights Committee had expressed concern 'at the continuing reliance on special powers under legislation such as the Armed Forces Special Powers Act, the Public Safety Act and the National Security Act in areas declared to be disturbed, and at serious human rights violations, in particular with respect to articles 6, 7, 9 and 14 of the ICCPR, committed by security and armed forces acting under these laws as well as by paramilitary and insurgent groups'. The UN Committee also pointed out that the legal provision for prior sanction of the government for 'criminal or civil proceedings against members of the security and armed forces' contributed to a 'climate of impunity and deprives people of remedies to which they may be entitled in accordance with article 2, paragraph 3, of the ICCPR.' (CCPR/C/79/Add.81, 4 August 1997)

Ten years later, during its seventieth session in 2007 the UN Committee on Elimination of Racial Discrimination (CERD) noted that India continued to retain the Armed Forces Special Powers Act (AFSPA) even after the government appointed Review Committee on the Armed Forces Special Powers Act urged the Indian State to repeal the Act and to replace it 'by a more humane Act', in 2005. The CERD also requested India to make the report of the Review Committee public. (CERD/C/IND/CO/19/5 May 200). Even this has not been done.