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# Extra-Judicial Killing: Real or Staged?

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## ABSTRACT

*Primarily, encounters were rare, they were used as a way devised to affect with complex situations and as a way of self-defence. However, in the 90s century the frequent and uncontrolled rise in extrajudicial killings by police or military force created grave doubts regarding the authenticity and purpose or intention behind the encounters. In between 1990s and mid-2000s, the Mumbai Police in India used extrajudicial killings to cripple the underworld in the city and break down uncontrolled extortion rackets. Police officers, who referred to as "Encounter Specialists", believed that these killings in delivering speedy justice to the society. From that period till early 2003, the police killed about 1200 alleged criminals.*

*Though police or military officers were firm in its stand and supported encounters widely, various human rights activists, social welfare associations and relatives of deceased strongly opposed the encounters. They believe that encounters are a clear violation of human rights and the constitutional right to life of the person under article 21 which provides protection of life and personal liberty.*

*The research includes a detailed comparison of extrajudicial killing or 'encounter' and fake 'encounter'. Further, the study discusses the justifications given by the police or military officer in favour of the extrajudicial killing and laws applicable in India, through which police officer have vested some power for their safety at the time of arresting a criminal. This paper also seeks to present in brief, the judicial and legal approaches regarding the legality of encounters.*

*"The Police has not come out of its colonial image. Despite 6 decades of independence the Police is largely considered as a tool of harassment, oppression and surely not considered a friend of the public". Arnesh Kumar v. State of Bihar<sup>3</sup>.*

## I. INTRODUCTION

India is the second largest democracy with the third largest economy in the world. Political, social and economic developments gave rise to social complexities, which has led to an immense increase in crime rates. The State with the help of police machinery, government

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<sup>3</sup> (2014) 8 SCC 273).

authorities and judiciary invented various ways to curb the rising crime rates in India. Various laws were enacted by the legislature in correspondence to the increasing crime rates, and the laborious task of arresting the criminals and send them to the court of justice was the job of the police department and executive. The failure of the police department in arresting the criminals, resulted in criminals going scot-free and there by diminishing the deterrent value of the penal laws of the state. To deal with such situations, the police forces began to use retributive measures, thereby giving rise to “extra-judicial killings” or popularly known in India as “encounters”.

In a country like India, which is governed by the Rule of law, there should not be and there must be no place for any killing other than the procedure established by law. It is of utmost importance that the Police force understand that it is the role of the courts to decide whether the person is guilty of an offence or not and the fact that each and every individual has a right to a fair trial even though he has been accused of any heinous offence. It is high time that the Police should keep in their minds, one of the basic principles of Criminal Jurisprudence, that *“A person is innocent until proven guilty.”*

## **II. WHAT IS “EXTRA-JUDICIAL KILLING” OR “ENCOUNTER”?**

Extrajudicial killing is a way of killing a person illegally. It violates human rights. It is a practice of killing unlawfully of any person without any legal sanction or legal process, by government authorities. There is no proper complaint filed and even no investigation takes place against that person. It straight away violates the human rights of individuals, denying them from any opportunity to defend themselves and to ask for legal help.

The nature of these types of killing is naturally unlawful and is mostly carried out by the state government or other authorities of state like the police force, armed force, etc. The deadly punishments include killing by slaughtering, strafing, assassinations, indiscriminate firing, and mass killing.

The situation of extrajudicial killings is different in different countries. It is practiced mostly in Ethiopia, Indonesia, India, Iraq, Jamaica, Pakistan, Mexico, Philippines, Russia, Turkey, Thailand, and Nigeria.

## **III. HERE A ANOTHER QUESTION ARISES, WHAT EXACTLY IS A “STAGED OR A FAKE ENCOUNTER”?**

A “fake or a staged encounter” happens when the police forces or the armed forces kill the suspects when they are unarmed or in custody or while taking the person from one place to

different place, and the police claim that suspect was escaping from the custody and also threatening to shoot police force that's why police had to shoot in self-defense. In such cases, the police may plant weapons and other evidences near the dead body to show justification for the killing. To show the inconsistency between records that show that the individual was in police custody at the time of the "encounter", the police may say that the suspect has escaped.

#### **IV. TREND IN INDIA**

As per the reply of an RTI query filed, In India, there are about 1,783 cases of fake encounters were registered between 2000-2017 out of which only 1,565 cases were disposed of. Fake encounters are essentially previously arranged encounters between the police or military forces and victims who they believe to be "culprits". According to the data given by NHRC, Uttar Pradesh accounts for 44.55% (794) cases of the total cases registered across all states.

After Uttar Pradesh, the next five states which account for the highest number of fake encounter cases are Andhra Pradesh, Bihar, Assam, Jharkhand and Manipur. However, each of them registered less than 6% of total cases registered since 2000-2017, Andhra Pradesh (94 cases; 5.27%), Bihar (74 cases; 4.5%), Jharkhand (69 cases; 3.87%), Assam (69 cases; 3.87%) and Manipur (63 cases; 3.53%). The National Capital Region (New Delhi) registered 40 cases while Jammu and Kashmir registered 22 cases during the same period. The RTI did not provide any data for states of Goa, Arunachal Pradesh, Sikkim, Nagaland, Mizoram, and Lakshadweep.

In the year 2012, 226 fake encounter cases were reported, which is the maximum number since 2000, out of which only 195 cases were disposed of and 31 cases are still pending. Furthermore, from 2010-2017, NHRC reported about 725 cases (40.68%) of total the number of fake encounter cases since the dawn of the 21<sup>st</sup> century in India. In 2017, 19 fake encounter cases were reported, out of which only 10 have been disposed of.<sup>4</sup>

#### **V. VIOLATION OF HUMAN RIGHTS**

Humans are entitled to some basic rights such as civil, political, economic, social, and cultural rights. Article 20(1) of the Indian constitution provides the citizens with protection in respect of conviction for offences and article 21 with protection of life and personal liberty<sup>5</sup>. Extrajudicial killing or "encounter" is a clear violation of all these human rights.

Article-21 of the Indian constitution guarantees right to life and personal liberty to every person including foreign nationalist. Right to life and personal liberty is one of the most basic human

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<sup>4</sup> Source data <https://www.firstpost.com/india/nhrc-registered-1782-fake-encounter-cases-between-2000-2017-uttar-pradesh-alone-accounts-for-44-55-4332125.html>

<sup>5</sup> The constitution of India, 1949

rights and even the state has no authority to violate this right. The state is obliged to protect the life of every person and can't shake off their hands on the ground that it is a case of exception where a policeman under grave and sudden provocation acted violently causing death of the person. Therefore, the state is bound to protect the life of people against any sort of aggression and force used by any person including the police officers themselves.

It means that before depriving a person of his life, the state is required to put the person on trial in accordance with the provisions of the Criminal Procedure Code (CrPC)<sup>6</sup>. According to article 22(1) of Indian constitution, the accused must be informed of the charges against him and then given an opportunity to defend himself (through counsel) and only then, if found guilty by the court of law, can he be convicted and executed.

## **VI. THE JUSTIFICATION GIVEN IN FAVOR OF ENCOUNTER KILLING**

In Indian law, there is no direct provision for police force through which they are authorized to encounter of criminal even though they are charged for grievous crime. On the other hand there are some enabling provisions which are vested to the police or armed force through which they can deal at times, when they think they are not safe and they has to kill the criminal in self-defence. In maximum cases of encounter, it is done for the self-defence of the police officer. This generally happens when the police is trying to arrest the criminal, but the criminal opens fire or tries to escape from the police custody.

### **(A) RIGHT OF PRIVATE DEFENSE**

Under chapter 4, of Indian Penal Code, 1860, gives provisions for 'Right of private defence' by an individual. It is a natural and inherent right of every human being. It is mentioned in sections 96 - 106 IPC.

There is a duty to protect the life and property of the subject is primarily of the state, but no state, howsoever large its resources, can protect in all situations. Therefore, this necessary limitation on the resources of the state has given to the subject pro tanto the right to take the law into the hands and to provide for his safety.

Therefore provision states that "*Nothing is an offence which is done in the exercise of the right of private defence*"<sup>7</sup>. Whereas IPC Section 100<sup>8</sup> & section 103<sup>9</sup> deals with the exercise of the right of private defence of the body which extends to causing death and with the exercise of

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<sup>6</sup> The Code of Criminal Procedure, 1973 (Act no. 2 of 1974)

<sup>7</sup> The Indian Penal Code, 1872 ( Act no. 45 of 1860)

<sup>8</sup> *ibid*

<sup>9</sup> *ibid*

the right of private defence of the property which extends to causing death.

***Section 100: When the right of private defence of the body extends to causing death-***

*The right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions hereinafter enumerated, namely :--*

***First***-Such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault;

***Secondly***-Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault;

***Thirdly***-An assault with the intention of committing rape;

***Fourthly***-An assault with the intention of gratifying unnatural lust;

***Fifthly***-An assault with the intention of kidnapping or abducting;

***Sixthly***-An assault with the intention of wrongfully confining a person, under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release.

8[***Seventhly***-- An act of throwing or administering acid or an attempt to throw or administer acid which may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such act.]<sup>10</sup>

***Section 103: When the right of private defence of property extends to causing death-***

*The right of private defence of property extends, under the restrictions mentioned in Section 99, to the voluntary causing of death or of any other harm to the wrong-doer, if the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right, be an offence of any of the descriptions hereinafter enumerated, namely; -*

***First***-Robbery;

***Secondly***-House-breaking by night;

***Thirdly***-Mischief by fire committed on any building, tent or vessel, which building, tent or vessel is used as a human dwelling, or as a place for the custody of property;

***Fourthly***-Theft, mischief, or house-trespass, under such circumstances as may reasonably

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<sup>10</sup>The Indian Penal code, 1872, Inserted by Criminal Law (Amendment) Act, 2013 (w.e.f. 03/02/2013).

*cause apprehension that death or grievous hurt will be the consequence, if such right of private defence is not exercised.*

From the above IPC provisions, we observe that the right of private defense is available in respect of the "body" and "property" both.

Hence, in cases where there exists reasonable apprehension in the mind of the police officer that there exists threat to their life or limb, they are justified in exercising right of private defense of body which may also extend to causing death.

Right to self-defense starts as soon as reasonable apprehension of his life is in danger or his body in risk of grievous hurt or threat to commit the offence, even though offence may not have been committed. It is further noted that, when the person is in danger of life or limb he/she is not expected to weigh in golden scale the proportionate force required to revoke the danger, and if he carries his defense further at the heat of moment law makes him not guilty of any offence.

The above mentioned provisions read along with Exception-2 to Section 300 IPC<sup>11</sup> will be as follows:-

- i. If the act of causing death is committed under any of the situations falling either in Section 100 or in Section 103 IPC, the act of causing death is not an offence in view of Section 96 IPC<sup>12</sup> and the offender in such a case whether he is Police or a private person is not guilty of any offence and is fully protected by law.
- ii. In the absence of any of the situations listed under Section 100 or Section 103, if the offender, instead of obeying Sections 101 or 104 IPC, exceeds the power given to him and causes death with premeditation and not without any intention of doing more harm than is required for such defence, he will be guilty of "murder" falling under Section 300 and punishable under Section 302 IPC.
- iii. In the absence of any of the situations listed under Section 100 or Section 103, if the offender, instead of obeying Sections 101 or 104 IPC, exceeds the power given to him and causes death but without premeditation and without any intention of doing more harm than is required for such defence, his case will fall under Exception 2 to Section 300 IPC and he would be guilty of "culpable homicide" not amounting to murder falling under Section 299 IPC and punishable under Section 304<sup>13</sup> of IPC.

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<sup>11</sup> The Indian Penal Code, 1872 ( Act no. 45 of 1860)

<sup>12</sup> *ibid*

<sup>13</sup> *ibid*

- iv. When the defense of encounter killing put forward by the Police officer and he cannot be legally supported, it becomes a "fake encounter" which is nothing short of "murder" punishable under law.

The burden of proof in case of self-defence is discharged by predominance of probability and it need not be established beyond reasonable doubt. Hence, in almost all cases where life of police officer is at risk he is deemed to be vested with right of self-defence.

#### **(B) THE DEFENCE OF GRAVE AND SUDDEN PROVOCATION**

Similar to the provisions of the right of private defence is the defence of "grave and sudden provocation" falling under Exception 1 to Section 300 IPC.

*“When culpable homicide is not murder.—Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.”<sup>14</sup>*

Unlike in the case of an act constituting "self-defence" which is excused by Section 96 IPC, the defence of "grave and sudden provocation" does not acquit the offender from criminal liability. The gravity of an act done which otherwise would have amounted to murder under Section 300 IPC, is lessened in view of the conduct of the victim providing grave and sudden provocation of such a degree as to deprive the offender of his self control thereby lessening the offence of culpable homicide amounting to murder into culpable homicide not amounting to murder by virtue of Exception 1 to Section 300 IPC. Even though, the offender should not be the exciter and the provocation must not be one on account of the lawful exercise of his duties by the public servant or on account of the lawful exercise of the his right of private defence.

#### **(C) ACT DONE BY PUBLIC SERVANT FOR THE ADVANCEMENT OF PUBLIC JUSTICE**

Sometimes encounter is claimed to be amounting to murder but, in such cases, exception 3 of Section 300 of IPC applies, it reads as-

*“Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.”<sup>15</sup>*

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<sup>14</sup> ibid

<sup>15</sup> ibid



This exception shall not apply where the act of a public servant is illegal and unauthorized by law or if he intentionally exceeds the powers entrusted to him by law.

This section is also supported by section 160 of the Bombay Police Act 1951, read with Bombay Police Manual, which provides that no public servant shall be liable to any fine for giving effect in good faith to any order or direction issued by the higher or apparent authority by the state government.

#### **(D) THE CODE OF CRIMINAL PROCEDURE, 1973**

The Code of criminal procedure, 1973 also provides provisions for encounter by police officer during arrest of the offender. Section 46 provides, 'How arrest made'. It says that-

*"Section 46-Arrest how made.*

- 1. In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action.*
- 2. If such person forcibly resists the endeavour to arrest him, or attempts to evade the arrest, such police officer or other person may use all means necessary to effect the arrest.*
- 3. Nothing in this section gives a right to cause the death of a person who is not accused of an offence punishable with death or with imprisonment for life."*<sup>16</sup>

According to section 46 CrPC, law permits to use all necessary means to effect arrest of the person, however imposes an inherent limitations on this right, with respect to minor offences which are not punishable with death or with life imprisonment. The section gives police the powers, which can be arbitrarily used or misused by the police. It depends on the discretion of the police officer to decide as to which means are necessary to effect the arrest of the person.

#### **(E) BOMBAY POLICE MANUAL RULE 1959-**

*(1) "...If therefore an arrest can not otherwise be effected the use of firearms to effect the arrest is justifiable and the police officer is protected from the consequence and even from the liability for the death of a person fired on under such circumstances, in case if the person to be arrested is accused of an offence punishable with death or imprisonment of life.*

*2) ....nothing deprives the police officer of his right of self defence if the resistance to arrest is such as would justified him in causing death in defence of his own person under section 100 of*

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<sup>16</sup> The Code of Criminal Procedure, 1973 (Act no.2 of 1974)

*IPC. This right of self defence includes the use of firearms to overcome the resistance, if necessary, even with the fatal effect. They can not, if desist on mere shoe of resistance, they are bound to redouble the efforts, even at the risk of their lives, if opposed and the law protects from any consequences which the resistance entails.*

*(3)When the offence is punishable with death or imprisonment of life and there is no other means of effecting the arrest of the suspected person, the resort to firearms is justifiable in spite of any danger there may be of thereby wounding him and causing death.”<sup>17</sup>*

Thus law not only justifies use of firearms in arresting the person guilty of an offence punishable with death or life imprisonment but also cast it as a duty.

Accordingly, Section 28 of the Bombay Police Act 1951, states that “a police officer will be always deemed to be on duty, so they are always vested with all the powers conferred by law to him, even though the duty period is over. Thus it can be seen from above mentioned discussion that though, not directly or specifically permitted, encounter can be supported under various enactments by law.

## VII. JUDICIAL PERSPECTIVE FOR ENCOUNTER

Judicial perspective upon the issue of encounter may differ from case to case. Below are some judgements given by High Courts and the Supreme Court, commenting upon the legality of encounters.

1. In ***Prakash Kadam vs Ramprasad Vishwanath Gupta***<sup>18</sup>, the Supreme Court observed that-

*“fake ‘encounters’ by the police are nothing more but ‘cold-blooded murders’, and those committing them must be punishable by death sentences and placing them in the category of ‘rarest of rare cases’”.*

2. In ***Inder Singh v. State of Punjab***<sup>19</sup> case, it was held that-

*"This Court has in recent times come across far too many instances where the Police have acted not to uphold the law and protect the citizens but in aid of a private cause and to oppress the citizen. It is a trend that bodes ill for the country and it must be promptly checked."*

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<sup>17</sup> Bombay Police Manual Rule, 1959

<sup>18</sup> 2011 INSC 0628

<sup>19</sup> (1995) 3 SCC 702).

## VIII. GUIDELINES TO BE FOLLOWED FOR THE POLICE ENCOUNTER INVESTIGATION

The Supreme Court noticing the plea of Peoples union for civil liberties (PUCL) questioning about 99 Police encounters resulting in the death of about 135 persons between the years 1995 and 1997 in Mumbai. The SC in *People's Union for Civil Liberties & An V. State of Maharashtra*<sup>20</sup> Issued set of 16 guidelines on 23<sup>rd</sup> September 2014, making it compulsory for a magistrate to investigate so-called encounter deaths to ensure that investigations into police encounters are carried out effectively and independently. This is a big step towards addressing the high number of extra-judicial killing in India.

The guidelines include compulsory registration of FIR in cases of encounter deaths, a magisterial inquiry into the case, investigations either by the Crime Investigation Department or another independent agency and holding back out promotions or gallantry awards for police officers until the genuineness of the encounter is determined by the investigating authority or till the final report is submitted.

## IX. CONCLUSION

*“For an orderly and civilized society, state sponsored terrorism in the form of “fake encounter” certainly is not a welcomed desideratum and can never be a substitute for the eventual punishment through the crucial process of fair trial following the procedure established by law.”-*

***Justice V. Ramkumar (former judge at High Court of Kerala)***

Extrajudicial killings by police or military officers and other powerful groups have been in practice in most countries. Cases are registered but never investigated or rarely examined. There are still large number of cases extrajudicial killing in Nigeria, India, Philippines, Bangladesh, Pakistan, etc are still pending. The issues of police officers executing illegally, custodial deaths, fake encounters still prevail on a high scale in Indian system. There are no special acts or strong laws made against this malpractice. Although the SC has ordered to set up a special investigation and has recommended that the National Human Rights Commission takes part in it actively. There are other NGOs who work against the practice of extrajudicial killings like Human Rights Watch, Amnesty International, etc. The United Nations program provides for the protection of basic human rights but it never taken any strong steps towards giving a proper guideline to be followed by the government officials during

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<sup>20</sup> CDJ 2014 SC 831

custody of police.

Ultimately to curb this white collared crime there needs to be a strong law protecting the right to life of people in the country. Further there must be change in the acts which provide powers to police officials and change in the mentality of the powerful groups as well as educating people with their rights.

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