

INTERNATIONAL JOURNAL OF LAW
MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 4 | Issue 5

2021

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Fake Police Encounter: A Serious Impediment to Fair trial of Accused in India

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ABSTRACT

Article 21 of the Constitution states, "No person shall be deprived of his life or personal liberty except in accordance with the procedure established by law."

This means that before depriving a person of his life, the state is required to put up that person on trial in accordance with the provisions of the Criminal Procedure Code. Fake encounters, on the other hand, completely sidestep and circumvent this legal procedure, as they really mean bumping off someone without a trial. Hence, such encounters are totally unconstitutional & in total negation of the Principles of Rule of law & constitutional propriety. They are naked abrogation of Human rights & fundamental principles of Criminal jurisprudence which postulates that an accused is presumed to be innocent until proven guilty by a Court of Law, rising cases of fake encounters in India has tarnished the Image of India at global level on human rights index & given a bad taste to our goodwill at International Forum.

Recently, there has been a sporadic & considerable rise in the cases of Fake encounters in our country which is a dangerous precedent & such street justice is not at all acceptable in a civilized society governed by Rule of law.

In the current article, author intends to examine the meaning & facets of Fake Encounters in India, legal & Constitutional mechanisms enumerated in India & various International instruments which cover the field. There has also been brief mention of various judgments of Supreme court of India at relevant places which has heavily criticized this illegal practice & has called for exemplary punishment to delinquent Cops who indulge in such unlawful activities & literally called them "Cold-blooded Murderers".

Keywords: *Fake Encounter, Rule of Law, Criminal Jurisprudence, Cold-blooded Murderers.*

I. INTRODUCTION

Fake Encounters can be defined as extrajudicial killing of persons who are usually in custody of law enforcement agencies, without following the due process of law. Encounters are a grave violation of Human Rights and portray the pitiful state of our criminal justice system. Fake

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Police Encounters are naked & blatant violation of Human Rights & Fundamental rights of accused of a Free & Fair trial. Increased Encounters by Police have become the new normal & the cops are increasingly becoming trigger happy, many of which encounters turn out to be fake. In garb of Encounters, law enforcement agencies, mainly the Police are becoming Judge, Jury & Executioner all in a drop of hat, which is a dangerous & alarming signal for any society which operates on Rule of Law. In recent times, there has been surge in Fake encounter cases in India, like Shopian Fake Encounter Case in Kashmir, Manipur Killings. In 2017, the Supreme Court of India directed the CBI to investigate 1528 alleged Fake Encounters between 2000 to 2012 in the insurgency hit Manipur. A RTI query revealed that between 2000 and 2017 there were 1,782 cases of fake encounters registered in India, with Uttar Pradesh accounting for 794 (44.55%). The state is followed by Andhra Pradesh (94), Bihar (74), Jharkhand (69), Assam (69) and Manipur (63). Delhi reported 40 cases while Jammu and Kashmir reflects 22 cases during the same period. The Practice of Encounter Killings has been deployed by the Police & Armed Forces for years, during conflicts or insurgencies & even in normal circumstances, they have virtually become a part of unofficial State Policy, as per NHRC which remarked in 2004. Trigger happy Policemen often resort to Encounter Killings in the pursuit of Gallantry Awards & Out of turn Promotions, also it is done because of pressure by Political masters to show quick results by means of Fair or Foul.

II. HISTORY OF FAKE ENCOUNTERS AND EXTRA-JUDICIAL KILLINGS IN INDIA

The episodes of encounters by both Police and Security forces have been existing in Indian society for a long time. Police and other officials have resorted to encounters for different situations like to stop insurgencies in the states of Bengal in the 1960s and Punjab in the 1980s. Encounters by Police are not only seen in disturbed areas such as Kashmir or the northeast but also in ordinary circumstances in the course of their regular discharge of duties.

In the Phibhit encounters of 1991, 10 passengers from a bus of Sikh pilgrims were killed claiming that they were Khalistani terrorists. India has a history of fake encounters like the encounter of Veerappan of Tamil Nadu and that of Sohrabuddin Sheikh in 2005. The Manipur Extra-judicial killings were another such blunder by the Police forces which cost the lives of more than a thousand people.

III. LEGAL PROVISIONS CONCERNING ENCOUNTER IN INDIA

There is no direct provision in the Indian law which legalises encounters, however there are certain provisions, which bestows officers involved in encounters, with certain powers to deal with criminals. The usual plea taken by Officers to validate their killings is that the encounter

had to be resorted to in order to save themselves from attack by alleged criminals. The Legal Provision related to Private Defense is contained in Sections 96-106 IPC.

Section 100 specifies the various circumstances (**death, grievous hurt, kidnapping, rape, acid attack etc.**) under which a person causing death in exercise of private defense, will be justified & excused from Criminal liability.

There is a special act called Armed Forces Special Powers Act, 1958 which arms the security forces to deal with problems of law & order in disturbed areas. The Power to declare any area as disturbed under this act rests with both the Central & State governments. The Act was passed by the Parliament of India to provide special legal immunity to armed forces operating in the troubled areas of Arunachal Pradesh, Assam, Meghalaya, Manipur, Mizoram, Nagaland, Tripura, this act was also made applicable to State of J&K.

Sec.4 of the AFSPA(Armed Forces Special Powers Act) confers special powers on the Armed Forces.

It states- Any commissioned officer, warrant officer, non-commissioned officer or any other person of equivalent rank in the armed forces may, in a disturbed area,-

(a) If he is of opinion that it is necessary so to do for the maintenance of public order, after giving such due warning as he may consider necessary, fire upon or otherwise use force, even to the causing of death, against any person who is 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 of fire-arms, ammunition or explosive substances.

Besides these, Section 46 of CrPC also enables Police to use force resulting in the killing of an accused at the time of arrest, if the offence allegedly committed by the accused is punishable with death or life imprisonment. Use of force for self-defence should continue as long as danger to the body or property continues.

Article 14 states-“The State shall not deny to any person equality before the law or equal protection of laws within the territory of India”. Since in Fake Encounters, the deceased is killed by law enforcement agency which is required to make him face trial in court of law, but the agencies kill the accused arbitrarily, thus circumventing the legal process & also denying to him equality before law which he could have got, had he faced trial in a court of law & also the presumption of innocence.

Article 21 of the Indian Constitution guarantees the fundamental right to life and personal

liberty, which can only be deprived in accordance with procedure established by law. Such procedure has to be reasonable, fair and just. This right extends to all persons without exception including a person accused of a heinous crime – even if that person has a criminal record.

Under Article 22 of the Constitution, the right of an accused person to be defended by an advocate of his choice is recognised as a fundamental right. This is also a statutory right under Section 303 of the Code of Criminal Procedure, 1973. Moreover, the accused person can avail of all legal defences available to him and he enjoys the presumption of innocence until proven guilty.

The Extrajudicial Killings, or Fake Encounters are against the Key Constitutional provisions of Article 14 & 21 of the Indian Constitution.

IV. INTERNATIONAL LEGAL REGIME ON ENCOUNTER KILLINGS

(A) International Covenant on Civil and Political Rights (ICCPR)

These treaties lay out rules and regulations for the police forces to use their power and force in accordance with law & in proportion to danger involved. The ICCPR clearly mentions that the Police should only use a reasonable amount of force and that the domestic framework should determine the legitimate purpose and circumstances permitting the use of force.

Article 6(1) of the International Covenant on Civil & Political Rights (ICCPR) provides: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life”. Article 14(2) of ICCPR provides, everyone accused of a crime is to be considered as innocent until otherwise. So, these international covenants clearly put an embargo on the law enforcement agencies to refrain from using extra-judicial means for crime prevention & to honour the individual & civil rights of accused.

V. JUDICIAL VIEW ON ENCOUNTER KILLINGS IN INDIA

It has been held by Supreme Court in *Prakash Kadam & etc. v Ramprasad Vishwanath Gupta & Anr*² that ‘Fake encounters’ are equivalent to ‘cold blooded’ and ‘brutal murder’ by persons who are expected to uphold the supremacy of law. Also it has been observed by the Hon’ble court that if crimes are committed by common people, ordinary punishment should be given, but if the offence is committed by policemen much stricter punishment should be given to them because they do an act totally opposed to their duties, and where a fake encounter is established against policemen in a trial, they **must be given death sentence**, considering it as the ‘**rarest of rare cases**’. The Court warned the police department that they will not be

² [(2011)6 SCC 189]

exonerated for carrying out ‘murder’ in the name of ‘encounter’ on the rationale that they were obeying to the orders of their superiors in the department or politicians, howsoever high. If a policeman is given an unlawful order to do a fake ‘encounter’, law casts a duty upon him to decline to execute such illegal order, otherwise he will be held liable for murder, and if found guilty sentenced to death. Concluding the verdict, a bench headed by **Markandey Katju, J.** placed the encounter philosophy on par with ‘**Criminal philosophy**’ and took the example of **Nuremburg Trials** stating that “In the Nuremburg trials the **Nazi war criminals** took the plea that ‘**orders are orders**’, nevertheless they were hanged and those police personnel, who perceive they can kill people in the name of encounter and get away with a free hand, should know that ‘**gallows await them**’.

Further in **Om Prakash v State of Jharkhand**,³ the Hon’ble Supreme Court, condemned the incidents OF Fake Encounter as ‘**State-sponsored terrorism**’ and stated that it is **not the duty** of the policemen to neutralize the accused just because he is a ‘**dreaded criminal**’. The police have to arrest the culprit and put them up for trial. Such killings must not be cherished. They are not justified by our criminal justice administration system.

The Constitution of India has guaranteed human rights in the form of fundamental rights in **part III** of the Constitution. Article 21 specifically focuses on the **protection of life and personal liberty**. The Human Rights is an inbuilt feature of the Fundamental Rights Articles in the Constitution of India.

The Hon’ble Supreme Court in the case of **PUCCL v State of Maharashtra**,⁴ after taking into account the suggestions made by Bombay High Court, the Counsels, National Human Rights Commission (NHRC) & other stakeholders issued some f guidelines to be followed in the investigation of death following police encounters. The Apex court held that ‘Article 21 of the Constitution guarantees ‘**sacred and cherished right**’ to life or personal liberty to ‘**every single person**’ in the country and that even the state is not exempt to abide by that right. In this case, the genuineness of encounters in which nearly 130 people died was in question.

The Hon’ble Apex Court remarked that in a society governed by rule of law, it is mandatory that extra-judicial killings are independently investigated, without any bias, so that justice prevails.

Following set of Guidelines were issued by the court in the above case:-

³ [(2012) 12 SCC 72]

⁴ [(2014) 10 SCC 635],

- **Record tip-off:** Any inputs received about criminal movements or activities related to the commission of grave criminal offence, shall be recorded in writing or in some electronic form.
- **Mandatory registration of FIR in encounter deaths:** Pursuant to receipt of such intelligence, if any encounter takes place in which firearm is used by the police party and the outcome of which is death of the offender, then an FIR shall be registered and the same shall be submitted to the court under **Section 157** of the CRPC as per the procedure established under **Section 158** of the code.
- **Independent probe by CID/ Special Police Team:** The **CID** or police team of another police station under the monitoring of a senior officer (at least a level above the head of the police party engaged in the encounter) shall administer an impartial investigation into the encounter, taking into account various factors as stated out in the order in detail.
- **Magisterial inquiry:** In all cases of police firing where death occurs, a magisterial inquiry under **Section 176** of the CRPC must be held and then a report must be sent to the Judicial Magistrate.
- **Conveying information to the Human Rights Commission:** The information of the incident must be sent to NHRC or the State Human Rights Commission, and involvement of NHRC is not necessary unless there is serious doubt about impartiality of the investigation.
- **Informing victim's descendants:** In the event of death, the next of kin of the alleged criminal must be informed at the earliest.
- **Medical Aid:** If the criminal/victim is injured, medical aid should reach him at the earliest and a magistrate or medical officer must record his statement along with the certificate of fitness.
- **No Delay:** The FIR, panchanamas, sketch, and police diary entries should be forwarded to the concerned Court without any delay.
- **Co-operation by officers involved in an encounter:** The police officer(s) concerned must surrender their weapons for forensic and ballistic analysis, or any other material as required by the investigating team, as per rights under **Article 20** of the Constitution.

- **Sending report to Court:** After full investigation, the report shall be sent to the competent court under **Section 173** of the CRPC, after which trial must be held.
- **Submission of half-yearly report: Six monthly statements** of all cases where deaths have occurred in police firing must be sent to NHRC by DGPs, which must reach NHRC by 15th day of January and July of each year.
- **No Instant police awards till clean chit:** The concerned officers shall not be instantly promoted or awarded soon after the occurrence of the encounter. The police department can proceed ahead with the rewards only, when the gallantry of the concerned officers is established beyond doubt.
- **Disciplinary action:** If the evidence on record after the completion of the investigation depicts that death had occurred by use of a firearm amounting to offence under the IPC, disciplinary action against such officer must be initiated forthwith and services of such officer be terminated for the time being under suspension.
- **Legal recourse to victim's descendants:** Should the family of the victim find any lack of independent investigation or impartiality by any of the functionaries involved in the investigation process, they may make a complaint to the Sessions Judge having territorial jurisdiction over the location of the incident.

VI. NHRC GUIDELINES IN CASES OF FAKE ENCOUNTERS

In **March 1997**, **Justice M. N. Venkatachaliah** (the then chairperson of the NHRC), in the backdrop of increased complaints from the general public and non-governmental organisations related to instances of fake encounters by the police underlined that the police have not been conferred with any right to take away someone's life, except under **two circumstances:**

- If the death is caused in the exercise of the **right to private defence**,
- **Section-46** of the CrPC that authorises the police to use **force**, extending up to the causing of death, as may be **necessary to arrest** the person accused of an offence punishable with death or imprisonment for life.
- In the light of this notion, the NHRC asked all states and Union Territories to ensure that police follows the following set of guidelines in cases of encounter killings:

- **Register:** When the in-charge of a Police Station receives information about the deaths in an encounter, he shall **record that information in the appropriate register.**
- **Investigation:** Received information shall be regarded as **sufficient to suspect and immediate steps** must be undertaken to investigate the relevant facts and circumstances leading to the death so as to ascertain, if any, offence was committed and by whom.
- **Compensation:** It can be granted to the dependents of the deceased when the police officers are prosecuted on the basis of the results of the investigation.
- **Independent Agency:** Whenever the police officers belonging to the same police station are the members of the encounter party, it is appropriate that the cases for investigation are referred to some other **independent investigation agency**, such as State CID.

In 2010, NHRC extended these guidelines by including:

- **Registering FIR:** When a complaint is made against police alleging committing of a criminal act recognized as cognizable case of culpable homicide, an **FIR must be registered** under appropriate sections of the IPC.
- **Magisterial Probe:** A **magisterial enquiry** must be held in all cases of death which occurs in the course of police action, as expeditiously as possible (preferably **within three months**).
- **Reporting to Commission:** All cases of deaths in police action in the states shall be preliminary **reported to the Commission** by the Senior Superintendent of Police/Superintendent of Police of the District **within 48 hours** of such death.
- A **second report** must be sent in all cases to the Commission **within three months** providing information like post mortem report, findings of the magisterial enquiry/enquiry by senior officers, etc.

VII. CONCLUSION

Although the Rule of Law has been argued to be part of the basic structure of the Constitution & encounter killings militate against the Rule of Law. The process of decision-making by a Court of law is a slow & tardy process, extrajudicial killings have no place in a liberal & rights-respecting Democracy. Encounters shouldn't become a tool to bypass the law & to attain short-

cut justice because Justice hurried is Justice buried & as per the Criminal law jurisprudence followed by our country” An accused is presumed to be innocent until proven guilty in a court of law”. No civilized society should tolerate Extra-Judicial killings & with the recent spurt in Encounter killings in our country , the role of Judiciary & NHRC also increases to ensure that no innocent is killed in the name of Encounter as it will lead to erosion of Public faith in Criminal Justice system & we will be reduced to barbarian state, thus giving licence to already Trigger-happy policemen & a lot more avenue for Corruption.

The Supreme Court equated extra-judicial killings with state-sponsored terrorism and held that they are not recognised as legal by the Indian criminal justice system. Merely because a suspect was a dreaded criminal, the Court observed , it was not the duty of the police to kill the person but to arrest him so that he could be put on trial.

Indian laws regarding police encounters and the procedure to deal with fake encounters has not been very clear which makes it easy for the police officials to take an advantage of this and misuse their powers.

However, the complexity and time that goes in the procedures to get justice most often becomes frustrating and tedious, this also forms one of the important reasons for the increasing encounters in India. Increasing the efficiency of our judicial system and framing stricter, clear procedures to deal with encounters and extra-judicial killings and implementing them effectively will create a sense of fear among the officials, thereby leading to lesser fake encounters in India.

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