

RIGHT TO KILL CAMOUFLAGED UNDER THE GAMUT OF “EXTRA JUDICIAL KILLINGS/POLICE ENCOUNTERS”

Written by Abinash Das

1st Year LL.M. Student, P. G. Department of Law

ABSTRACT

The concepts of instant justice and police violence are not novel and have been immensely popular. There are varying justifications for condoning encounters, ranging from the importance of a deterrent effect that encounters have to the burdensome mechanism of due process. In determining the authenticity of an encounter, the State asserts that such encounters were spontaneous and unplanned. Access to justice in an egalitarian democracy must be understood to mean qualitative access to justice, which is imperative of an individual's access to courts or guaranteeing representation as enshrined under Article 21 of the Constitution. Denial of this right undermines public confidence in the justice delivery system and poses a threat to the rule of law.

KEYWORDS: Encounter, police personnel, private defence, self defence, eye-witness, arresting authority, credibility, investigation, criminal justice, terrorists, hardcore criminals, accused, official duty, administration, apprehension of danger, outrageous killing, offence, retributive justice, death, culpable homicide, innocent, guilty, egalitarian, democracy, representation, public confidence, threat, rule of law, fair trial, natural justice

I. LAYING THE BACKGROUND:

“Encounter Killings” or “Extra Judicial Killings” by the Police is on the rise and the recent act of such brutality was seen in the case of rape and murder of a woman from Hyderabad, wherein the Telegana Police executed four accused without giving them a fair trial and following the due process of law. The ramification of such killings or Encounters have been widely accepted

and have been praised by the masses, media and the political leaders but on the other side it reflected the gross violations in the legality, appropriateness and failure in the due process of law and violation of the right to life & personal liberty conferred to all the citizens of India under Article 21 of the Constitution of India. This further leaves us to ponder whether such action of the Police is *per se* unconstitutional/illegal or the Police was justified in adopting to the measures of retributive justice to bring instant and speedy justice to the victims. Further, the concept of presumption of innocence until proven guilty seems to be a failed concept in Indian scenario. Any accused person without a fair trial or forensic evidence if charged with a heinous offence is presumed to be a culprit in the eyes of the masses in India and hence the acts of Encounter killings by the Police are glorified and praised amongst the masses.

There are varying justifications for condoning encounters, ranging from the importance of a deterrent effect that encounters have to the burdensome mechanism of due process. In determining the authenticity of an encounter, the State asserts that such encounters were spontaneous and unplanned. The State does so by arguing two grounds:

- 1) The Police officers killed the accused in self-defence (Section 96- 106 of the Indian Penal Code, 1860) or;
- 2) That they were allowed to do so procedurally (relying on provisions of procedural law, such as the CrPC, AFSPA 1958 etc).

II. RIGHT OF PRIVATE DEFENCE: IMPEDIMENTS TO JUSTICE

The usual defence pressed by the State or the Police authorities to justify their act of an Encounter killing is that they had to resort to the use of the bullets in order to protect themselves i.e. right of private defence from the deadly attack of the accused criminals. Contrary to the popular misconception that the “Encounter killing” is a defence available only to the Police personnel, it is pertinent to bear in mind that encounter killing/right of private defence is a right available to all persons.

Section 96 of IPC declares that nothing is an offence which is done in exercise of the right of private defence. Section 97 declares that every person has a right to defend his own body and the body of any other person against any offence affecting the human body and also the

property of himself or other person against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass etc. However, Section 97 specifies that such right is subject to the restrictions. Section 99 IPC contains a caution that the right of private defense is not available for inflicting more harm than is necessary for the defense. Furthermore, Section 100 of the IPC describes various situations under which a person exercising its right of private defence can take cause the death of a person. However, Section 101 of the IPC cautions that the right of private defence is not available to a individual if the conditions of Section 100 of IPC are not satisfied which extends to Police authorities as well and the it has to be read in *toto with* Exception 2 of Section 300 of IPC.

The encounter killings by the Police are only justified if it satisfies all the conditions of the Section 100 or 103 of IPC. But the question still remains that even in case of justifiable killings or encounters can the Police officials go scot free without even a proper trial ascertaining whether the situation pertaining to the Encounters satisfied the conditions of Section 100 or 103 of IPC or not. Since, there is no eye-witness or evidence to record these encounters, it has been time and again alleged that the Police Officials for their personal bias or judgment of declaring an alleged accused a culprit indulge in this retributive justice and shoot down these alleged persons in an outrageous killing against the procedure established by law.

An examination of the Chapter of General Exceptions shows that the Employees of the State/Police are not an exception to the general principle where the very nature of the service requires them to carry arms, employed in connection with the defence of the country or maintenance of the law and order within the country.

III. AN APPROVAL TO POLICE ENCOUNTERS: PITFALLS OF SECTION 46(3) OF CODE OF CRIMINAL PROCEDURE, 1973

Section 46 of CrPC details the manner in which an arrest is to be made. S.46(2) of the CrPC states that if *the person being arrested forcibly resists the endeavour to arrest him, or attempts to evade arrest, the person empowered to arrest may use necessary means to effect the arrest.*

Whether the means were necessary depends on whether a reasonable man, having no intention to cause serious injury to the other, would employ the same means. S.46(3) of CrPC states thus:

‘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.’

A mere perusal of Section 46(3) of the code states that one may cause the death in case the person is *merely accused* of an offence that is punishable with death or life imprisonment while attempting to effect arrest using necessary means. This interpretation has been considered in the landmark case of *‘Harendra kumar Deka vs. State of Assam’*, wherein the ambit of private defence was considered. Section 46 (2) of the Code authorises the police officer attempting to arrest some person to use all means necessary to effect such arrest if the person sought to be arrested forcibly resists or attempts to avoid the arrest. The word “*all means*” used in sub-section (2) are wide enough, meaning thereby that assistance from others may be taken in affecting the arrest as iterated in the case of *‘Nazir vs. Rex (1952)’*. But the means contemplated under Sub-Section (2) do not extend to the causing of death of the person avoiding arrest if such a person is not accused of an offence punishable with death or with imprisonment for life, as is expressly declared under Sub-section (3) of Section 46.

It must be remembered that the CrPC is applicable to all persons accused of offences under the Indian Penal Code (‘IPC’) 1860. Such people form a class. However, reading S.46(2) and 46(3) together, within the broader class of those accused of offences under the IPC, there are two categories of accused contemplated: those who are accused of offences that are punishable with death or life imprisonment; and those who are not. For the latter, the arresting authority cannot use means that involve causing death to effect arrest, while for the former; the arresting authority is allowed to do so. However, there is no real or substantial distinction between the two categories of accused that warrants the arresting authority to cause death for only one category of persons.

Similarly, prosecution of any public servant who is alleged to have committed an offence while discharging the official duties is required to be proceeded by a sanction of the appropriate government under ‘Section 197 of the Code of Criminal Procedure’. It is imperative that the alleged offence is committed in discharging of official duty by the accused and is not merely a

cloak for doing an objectionable act. Use of the expression '*official duty*' implies that the act or omission must have been done by the public servant in discharge of his duty.ⁱ The appropriate government in each case is required to thoroughly enquire into the circumstances which led to the commission of the offence by the public servant and come to a logical conclusion whether the sanction for prosecution is required to be granted or not. In *Devinder Singh Vs. State of Punjab through CBI, (2016) 12 SCC 87*, the Hon'ble Apex Court has held that the Police officers involved in encounters enjoy a insulation from sanction under the ambit of Section 197 of the CrPC, 1973. The Hon'ble Apex Court held that the Protection of the sanction is an assurance to the honest and sincere officers conducting their official duties to the best of their abilities however, the authority cannot be camouflaged to commit the crime. An exhaustive guideline for the sanction under Section 197 of CrPC was laid down in the captioned matter.

IV. NEED FOR A STRONG ACCOUNTABILITY MECHANISM: ROLE OF JUDICIARY

In '*Om Prakash vs. State of Jharkhand*' (2012) 12 SCC 72 and '*Rohtash Kumar vs. State of Haryana* (2013) 14 SCC 434; it was held that merely because a person is a dreaded criminal or is accused of an offence, the police officers cannot kill them in cold blood and must make all effort to arrest them. The Apex Court further went a step ahead and described that if the encounters are not put on a check they will tantamount to state sponsored terrorism. Hence there should be unimpeachable evidence on record to establish the action of Police is indefensible. The process of sanction under Section 197 of CrPC has to be used with diligence and must be protected from misutilization. These cases further establish that the right to life is sacrosanct and cannot be denied to an accused, except as per procedure established by law *which must necessarily* be fair, just and reasonable. A provision allowing an arresting authority the power to cause the death of an accused without affording them an opportunity to be heard cannot be countenanced as fair, just or reasonable.ⁱⁱ

It has been acknowledged and noted by the Courts that the police or other armed forces may legitimately cause the death of a person in the exercise of their right to private defence. However, in the landmark case of '*Challa Ramkonda Reddy vs. State of Andhra Pradesh*', it was held that where a citizen was deprived of his life or liberty except in accordance with the

procedure established by law, it could not be a defence to say that officials of the State were discharging sovereign functions of the State, and the concept of sovereign immunity could not be read as an exception to A.21. Therefore, it is rather strange for the police to rely on S.46(3) of the CrPC to justify extrajudicial killings, for they cannot plead that causing the death of an accused in the absence of provocation is a sovereign state function. *According to the data by (National Human Rights Commission) NHRC, since 1993, about 2,560 cases of extra-judicial killings have been reported in the country, out of which 1,224 were found to be fake encounters.*ⁱⁱⁱ

If a person is classified as an 'enemy' under the Army Act 1950, the rule of law would apply and the armed forces or police officials could not resort to killing the enemy as the only possible solution. It was held that retaliatory force and private defence were distinct and the former could not be exercised by the armed forces or the police. It was further held that in order to prosecute police officials, there has to be a reasonable connection between the act committed and their official duty, and it would have to be shown that the act was indefensible, mala fide and vindictive. It could easily be argued that S.46(3) of the CrPC permits the killing of a person accused of an offence punishable with death or life imprisonment and this is part of their official duty when the said accused attempts to avoid arrest.

V. NATIONAL HUMAN RIGHTS COMMISSION AND SUPREME COURT GUIDELINES:

There is a procedure prescribed by the law for criminal investigation which is embedded in the Constitution under Article 21 as the right of life and personal liberty. It is fundamental, non-derogable and is available to every person. Even the State cannot violate that right. Hence, it is the responsibility of the police, being the officers of State, to follow the Constitutional principles and uphold the Right to Life of every individual whether an innocent one or a criminal.

Although the police have been given the power to use arms but for the sole purpose of right of private defence only which is also applicable to all persons. However, nothing must be done against the fundamental rights conferred upon the citizens of India or to settle personal feuds with malafide intentions.

NHRC guidelines in 2010 highlight that if the use of force cannot be justified and the death falls outside the jurisdiction of the above-mentioned reasons, it is a crime and the police officer would be guilty of culpable homicide (an act which has resulted in a person's death but is held not to amount to murder). The NHRC has taken *suo moto* cognizance in various cases and has requested the Director General of the investigation of send fact finding to probe the matter carefully. The work of NHRC has been commendable in this aspect.

VI. THE PUCL DECISION AND ITS CONTINUING INFLUENCE:

In *PUCL vs. Union of India (2010) 10 SCC 635*, the Hon'ble Supreme Court was dealing with writ petitions questioning the genuineness of 99 encounter killings by the Mumbai Police in which 135 alleged criminals were shot dead between 1995 and 1997. It was observed that it was for the police to deal with the alleged terrorists as per the procedure established by law when they were in receipt of the information on their location and 'administrative liquidation' could not be resorted to. The guidelines regarding the Encounters were laid down in the captioned matter which still holds good, which is as follows:

- 1) *Whenever the police is in receipt of any intelligence or tip-off regarding criminal movements or activities pertaining to the commission of grave criminal offence, it shall be reduced into writing in some form (preferably into case diary) or in some electronic form. Such recording need not reveal details of the suspect or the location to which the party is headed. If such intelligence or tip-off is received by a higher authority, the same may be noted in some form without revealing details of the suspect or the location.*
- 2) *If pursuant to the tip-off or receipt of any intelligence, as above, encounter takes place and firearm is used by the police party and as a result of that, death occurs, an FIR to that effect shall be registered and the same shall be forwarded to the court under Section 157 of the Code without any delay. While forwarding the report under Section 157 of the Code, the procedure prescribed under Section 158 of the Code shall be followed.*

- 3) *An independent investigation into the incident/encounter shall be conducted by the CID or police team of another police station under the supervision of a senior officer (at least a level above the head of the police party engaged in the encounter). The team conducting inquiry/investigation shall, at a minimum, seek:*
- a. To identify the victim; colour photographs of the victim should be taken;*
 - b. To recover and preserve evidentiary material, including blood-stained earth, hair, fibers and threads, etc., related to the death;*
 - c. To identify scene witnesses with complete names, addresses and telephone numbers and obtain their statements (including the statements of police personnel involved) concerning the death;*
 - d. To determine the cause, manner, location (including preparation of rough sketch of topography of the scene and, if possible, photo/video of the scene and any physical evidence) and time of death as well as any pattern or practice that may have brought about the death;*
 - e. It must be ensured that intact fingerprints of deceased are sent for chemical analysis. Any other fingerprints should be located, developed, lifted and sent for chemical analysis;*
 - f. Post-mortem must be conducted by two doctors in the District Hospital, one of them, as far as possible, should be In-charge/Head of the District Hospital. Post-mortem shall be video-graphed and preserved;*
 - g. Any evidence of weapons, such as guns, projectiles, bullets and cartridge cases, should be taken and preserved. Wherever applicable, tests for gunshot residue and trace metal detection should be performed.*
 - h. The cause of death should be found out, whether it was natural death, accidental death, suicide or homicide.*
- 4) *A Magisterial inquiry under Section 176 of the Code must invariably be held in all cases of death which occur in the course of police firing and a report thereof must be sent to Judicial Magistrate having jurisdiction under Section 190 of the Code.*

- 5) *The involvement of NHRC is not necessary unless there is serious doubt about independent and impartial investigation. However, the information of the incident without any delay must be sent to NHRC or the State Human Rights Commission, as the case may be.*
- 6) *The injured criminal/victim should be provided medical aid and his/her statement recorded by the Magistrate or Medical Officer with certificate of fitness.*
- 7) *It should be ensured that there is no delay in sending FIR, diary entries, panchnamas, sketch, etc., to the concerned Court.*
- 8) *After full investigation into the incident, the report should be sent to the competent court under Section 173 of the Code. The trial, pursuant to the chargesheet submitted by the Investigating Officer, must be concluded expeditiously.*
- 9) *In the event of death, the next of kin of the alleged criminal/victim must be informed at the earliest.*
- 10) *Six monthly statements of all cases where deaths have occurred in police firing must be sent to NHRC by DGPs. It must be ensured that the six monthly statements reach to NHRC by 15th day of January and July, respectively. The statements may be sent in the following format along with post mortem, inquest and, wherever available, the inquiry reports:*
 - I. *Date and place of occurrence.*
 - II. *Police Station, District.*
 - III. *Circumstances leading to deaths:*
 - a. *Self defence in encounter.*
 - b. *In the course of dispersal of unlawful assembly.*
 - c. *In the course of affecting arrest.*
 - IV. *Brief facts of the incident.*
 - V. *Criminal Case No.*

VI. *Investigating Agency.*

VII. *Findings of the Magisterial Inquiry/Inquiry by Senior Offices:*

- a. *disclosing, in particular, names and designation of police officials, if found responsible for the death; and*
- b. *whether use of force was justified and action taken was lawful.*

- 11) *If on the conclusion of investigation the materials/evidence having come on record show that death had occurred by use of firearm amounting to offence under the IPC, disciplinary action against such officer must be promptly initiated and he be placed under suspension.*
- 12) *As regards compensation to be granted to the dependants of the victim who suffered death in a police encounter, the scheme provided under Section 357-A of the Code must be applied.*
- 13) *The police officer(s) concerned must surrender his/her weapons for forensic and ballistic analysis, including any other material, as required by the investigating team, subject to the rights under Article 20 of the Constitution.*
- 14) *An intimation about the incident must also be sent to the police officer's family and should the family need services of a lawyer / counselling, same must be offered.*
- 15) *No out-of-turn promotion or instant gallantry rewards shall be bestowed on the concerned officers soon after the occurrence. It must be ensured at all costs that such rewards are given/recommended only when the gallantry of the concerned officers is established beyond doubt.*
- 16) *If the family of the victim finds that the above procedure has not been followed or there exists a pattern of abuse or lack of independent investigation or impartiality by any of the functionaries as above mentioned, it may make a complaint to the Sessions Judge having territorial jurisdiction over the place of incident. Upon such complaint being*

made, the concerned Sessions Judge shall look into the merits of the complaint and address the grievances raised therein.

The Hon'ble Apex Court has directed these guidelines to be strictly observed in all cases of death and grievous injury in police encounters which has been declared as a law under Article 141 of the Constitution of India.

VII. CONSTITUTIONAL VALIDITY:

In *Subramanian Swamy vs. CBI*; while holding S.6(A) of the Delhi Special Police Establishment Act 1946 to be violative of A.14, it was observed that every public servant against whom there is reasonable suspicion of commission of a crime or there are allegations of an offence under the Prevention of Corruption Act, 1988 had to be treated equally and similarly under the law. Any distinction made between them on the basis of their status or position in service for the purposes of inquiry or investigation was nothing but an artificial one and offending Article 14. Similarly, the mere fact that an offence attracts greater punishment cannot be the basis on which one group is subject to a harsher procedure (in this case, death) by the same law. They are all, ultimately, *accused* of a particular offence and are innocent until proven guilty in a court of law. Thus, the classification is not based on any intelligible differentia and is arbitrary.

Even if such classification is held to be valid, it does not have any rational nexus with the object of the CrPC. If one of the objects of the CrPC is that an accused person must have a fair trial in accordance with the principles of natural justice, one fails to see how allowing the arresting authority the power to cause the death of some accused and not others has any connection with the object. In fact, it is entirely contrary to the object of the CrPC. In *Subramanian Swamy vs. Raju*, it was observed that there may be differences amongst the members included within a particular class. So long as the broad features of the categorization are identifiable and distinguishable and the categorization made is reasonably connected with the object targeted, Article 14 will not forbid such a course of action. However, in this case, neither are the broad features distinguishable and neither does the classification have any nexus with the object of the statute.

Article 21 of the Constitution states that:

“No person shall be deprived of his life or personal liberty except according to procedure established by law”.

In *Maneka Gandhi vs. Union of India*; it was held that the procedure to be established by law had to be fair, just and reasonable and could not be unfair or arbitrary. Further, in *Kartar Singh vs. State of Punjab*; it was held that in order for a procedure to be fair, just and reasonable, it had to conform to the principles of natural justice. One of the core principles of natural justice is *audi alteram partem*, or to hear the other side. It further includes two facets: 1) notice of the charge against the said person and; 2) an opportunity to explain the said charge.

In *Nirmal Singh Kahlon vs. State of Punjab*; it was held that A.21 contemplates the right of an accused to have a fair trial, through a fair procedure and fair investigation. However, by allowing the arresting authority to cause the death of a person accused of a particular offence renders their rights under A.21 a dead letter as they are denied an opportunity to be heard by an independent adjudicatory authority. Presumption of innocence is an important concept in criminal law, however, that is defeated if such a power is given to an arresting authority.

Time and again, it has been strongly condemned by the Hon'ble Apex Court that the State (through Police) cannot violate the rights conferred upon the individuals under Article 21 of the Constitution. A bench of Justice R.M. Lodha and Justice R.F. Nariman in *PUCL (supra)* has strongly protested the extra judicial killings by the Police and held that the the State (Police) is duty bound to follow the due process of law. The excerpt is as follows:

“killings in police encounters require independent investigation. The killings in police encounters affect the credibility of the rule of law and the administration of the criminal justice system.”

“We are not oblivious of the fact that police in India has to perform a difficult and delicate task, particularly, when many hardcore criminals, like, extremists, terrorists, drug peddlers, smugglers who have organized gangs, have taken strong roots in the society but then such criminals must be dealt with by the police in an efficient and effective manner so as to bring them to justice by following rule of law.”

The foregoing discussion is to show that the Court does not tolerate the killing of an accused unless it is in the exercise of self-defence. S.96 to 106 of the IPC deal with the right to private defence. In the cases wherein this right may extend to causing death, there should have necessarily been a reasonable apprehension of danger to the body or property and it must necessarily satisfy one of the conditions in S.100 of the IPC. For S.46(3), for death to be caused it must simply be shown that; 1) the accused attempted to evade or forcibly resist arrest and; 2) the person was accused of an offence which was punishable with life imprisonment or death. It must be observed that; 1) the bar is set rather low in the latter case and; 2) one situation involves a legitimate exercise of self-defence while the other can be used vindictively and masked as a procedural defence. It would be very easy to justify the extrajudicial killings of persons accused of an offence, say sedition, by simply showing that they were attempting to evade arrest. This is rather absurd and completely antithetical to the rule of law.

VIII. CONCLUDING REMARKS:

The '*UN Policy on the Use of Force and Firearms by enforcement Officials*' has been critical of such actions by the Indian Police showcasing that illegal actions on part of the police have '*elements of criminality*'. The power given to the Police is incredibly dangerous as not only is it given legal sanction, it also has to contend with political pressure, several police biases and a society that bays for blood in response to a heinous offence. However, if S.46(3) is to be interpreted literally, the State would end up denying access to justice for many accused persons, leaving, more often than not, justice to be determined by the barrel of a gun. The Hon'ble Apex Court has time and again intercepted the extra judicial killings or the system of retributive justice by the Police, which till today is prevalent. There is no iota of doubt that the legislature and the Hon'ble Apex Court needs to intervene and carve out a stringent and robust procedure to curb down this menace or restrict the sanction under Section 197 of CrPC to certain limited conditions only. From a column by Justice V Ramkumar, former judge of at High Court of Kerala and in his words,

“ For an orderly and civilized society, state sponsored or mayhem in the form of ‘fake encounter’ by Police is certainly not a welcome desideratum and can never be a substitute for the eventual punishment through the curial process of fair trial following the procedure established by law.”

If the end of justice is justice and the spirit of justice is fairness, then each side should have equal opportunity to prepare its own case, and to lay its evidence fully, freely and fairly before the court. Furthermore, the need of the hour is proper judicial inquiry into such killings in consonance with the steps laid down by the Supreme Court. Otherwise, it would soon become *'the rule of the gun instead of the rule of law'*^{iv}.

REFERENCES

ⁱ Center for Public Interest Litigation vs. Union of India, AIR 2005.

ⁱⁱ The National Police Commission (NPC, 1977) and 'Padmanabhaiah Committee' (2000) examined the intricacies of departmental accountability at great lengths; "*the NPC in its first report recommended that the majority of complaints against policemen should be dealt with by the Police Department itself*".

ⁱⁱⁱ According to the data by the UP Government, by January 2018, the police had conducted 1, 038 encounters, 32 people were killed in these encounters and a total of 238 were injured; see also *'the trend of extrajudicial killings is extremely worrisome'*.

^{iv} *'The safety of the people is the supreme law'*.