

# Encounter Killings: Odious to Rule of Law and Constitutionalism

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## Abstract

Inside and outside of its international borders, India is commended as the world's biggest democracy, a standout if as yet creating example of overcoming adversity held together by a constitution that upholds basic goals of opportunity, fairness and equity for all. Simultaneously, this huge and pluralist country state is spoken to as tormented not just by negative "advancement pointers" like mass destitution and illiteracy, yet in addition by an evident wantonness – or in certain occasions and places, an all out nonattendance – of "lawfulness." Extra legal executions are one such example which seeks for dire attention. What mocks the criminal justice system is not only the audacity with which such crimes are being committed but the impunity enjoyed by those in uniform. The gist of justifications legal or otherwise need minute scrutiny by judiciary or an independent organization. This paper looks into this specific need and intends to scrutinize the law and protection afforded in extra judicial killings to police.

**Keywords:** Encounter killings, rule of law, police, constitution.

## Introduction

'Encounter Killings' or "retaliatory killings" or "extra-legal executions" is the term used to portray extrajudicial killings by the police or the armed forces as far as anyone knows in self-preservation when they encounter the supposed hoodlums or suspected criminals.<sup>1</sup> Critics are incredulous of the police inspiration driving a significant number of these revealed episodes and further grumble that the wide acknowledgment of the practice has prompted occurrences of the police organizing counterfeit encounters to conceal the slaughtering of suspects when they are either in custody or are unarmed

## Aim of the Study

This paper deconstructs the contours of encounter killings and its place, in our constitution and our understanding of constitutionalism. The authors make an attempt to historicize and critically comment on the concept of encounter killings and also attempt to appreciate the jurisprudence behind its place in our legal scholarship.

## History of Encounter Killings

Executing individuals without a second thought and describing the episode as "an encounter where an exchange of fire occurred towards the end of which the police found a few dead bodies" goes back to the early part of the last century. Maybe it was the British who developed this wicked strategy for murdering. A notable occurrence of an alleged experience occurred in May 1924 when Alluri Sitarama Raju, who drove an inborn insubordination to the English was slaughtered. In any case, modern research investigated the truth and appeared that he was contracted and murdered in bug blood with no trade of fire. Afterward, during the 1940s, in excess of 3,000 frameworks furthermore, different people who took an interest in the Telangana laborer outfitted battle (1946-51) were likewise executed in "encounters", a large portion of them being phony.

## Credos behind "Encounter Killings"

A concept of social self-defense is definitely present among police themselves in their public and private discussions of encounters, what are the probable beliefs that guide, such actions are best illustrated through the quotation by an "encounter specialist" police officer in Mumbai named Satyapal Singh: "It is better in the larger interest of society to eliminate a known criminal than to allow him to roam free and kill 100 innocent persons. It is better to destroy evil than to allow it to nurture and spread insociety."<sup>2</sup>

**Rule of Law**

According to rule of law, the state is administered not by the ruler or the assigned agents of the citizens but by the law. To comprehend the importance of rule of law, it implies that no man is above law and furthermore that each individual is dependent upon the jurisdiction of conventional official courtrooms regardless of their position and rank. In 1885, Professor A.V Dicey built upon this idea of Coke and propounded three standards or postulates of rule of law in his exemplary book "The Law of the Constitution"<sup>3</sup> which are as follows:

1. Supremacy of law,
2. Equality before law and
3. Predominance of Legal Spirit

**Supremacy of Law**

According to the primary postulate, rule of law alludes to the lacking of arbitrariness or wide discretionary power. So as to comprehend it basically, every man ought to be administered by law.

**Equity before Law**

As indicated by the second rule of Dicey, equality under the steady gaze of law and equivalent subjection of all classes to the normal law of land to be controlled by the customary law courts and this standard underscore everybody which include government also regardless of their position or rank. An independent investigation needs to be conducted by an independent agency so that guilty could be brought to justice.<sup>4</sup>

**Predominance of Legal Spirit**

As per the third rule of Dicey 'Rule of law' as built up necessitates that each activity of the organization must be sponsored and done as per law.<sup>5</sup>

**Constitutionalism**

Constitutionalism has an assortment of implications. Most by and large, it is "a complex of thoughts, mentalities, and examples of conduct expounding the rule that the authority of government gets from and is restricted by a collection of fundamental law".

For certifiable majority rule governments, constitutions comprise of all-encompassing courses of action that decide the political, legitimate and social structures by which society is to be represented. Constitutional provisions are thusly viewed as central or key law. Under these conditions, if protected law itself is deficient, the idea of democracy and rule of law inside a nation is influenced. The structure of present day countries has been molded with government being partitioned into official, authoritative and legal bodies, with the normally acknowledged idea that these bodies and their forces must be isolated. Obviously, the partition of forces doesn't mean these bodies work alone, rather they work reliant, yet keep up their self-sufficiency. Different fundamentals incorporate restricted government and the supremacy of law. Together, these can be named the idea of constitutionalism.

Louis Henkin<sup>6</sup> characterizes constitutionalism as comprising the accompanying components:

1. Government according to the constitution;
2. Separation of power;

3. Sovereignty of the people and democratic government;
4. Constitutional review;
5. Independent judiciary;
6. Limited government subject to a bill of individual rights;
7. Controlling the police;
8. Civilian control of the military; and
9. No state power, or very limited and strictly circumscribed state power, to suspend the operation of some parts of, or the entire, constitution.<sup>7</sup>

**Euphemism of Encounter**

Encounter, in the event that it is genuine, includes an incidental possibility occurring and by definition it is spontaneous, surprising and accidental and one can't have an experience freely. Be that as it may, police have transformed the noun into a verb of aim and plan and are known for undermining individuals that they will be encountered! The vast majority of the encounters occurred when the expired were captured a couple of hours, if not days, before the alleged experience. A unusual viewpoint that out of a huge number of encounters, not even in a few, the cops were harmed exhibiting the extraordinary and mind-boggling productivity of police in continually murdering their adversaries and without getting wounded once.<sup>8</sup> The Apex Court has observed that, "It is not the duty of the police officers to kill the accused merely because he is a dreaded criminal. Undoubtedly, the police have to arrest the accused and put them up for trial. This Court has repeatedly admonished trigger happy police personnel, who liquidate criminals and project the incident as an encounter. Such killings must be deprecated. They are not recognized as legal by our criminal justice administration system. They amount to State sponsored terrorism."<sup>9</sup>

**Legal Justifications for Encounter Killings**

The NHRC clarified that the main two conditions where such slaughtering would not comprise an offense were (i) "if demise is caused in the exercise of right of private defense", and (ii) under Section 46 of the Criminal Procedure Code (hereinafter referred to as "Cr.P.C."), which "approves the police to utilize power, expanding up to the causing of death, as might be important to capture the individual blamed for an offense culpable with death or detainment forever". In cases where Army or paramilitary forces are involved, the state has invoked considerations of national security, and safeguarding the morale of the forces as an additional justification for not probing encounter deaths. In the case of Om Prakash v. State of Jharkhand through the Secretary, Department of Home, Ranchi-1 Supreme Court said that, "Requirement of sanction to prosecute affords protection to the policemen, who are sometimes required to take drastic action against criminals to protect life and property of the people and to protect themselves against attack."<sup>10</sup> The main reason for this rejoices over Police excesses is attributed to the snail pace and meandering judicial system which according to some is moribund.

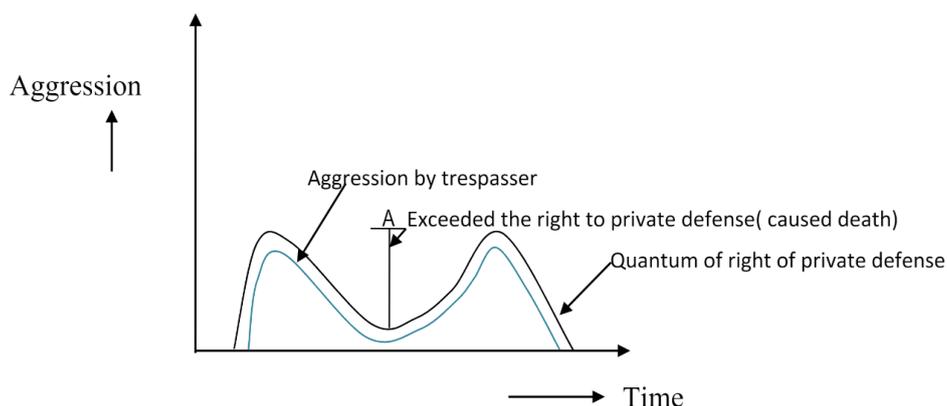
Both the legal justifications i.e. right to private defense and power to use force given to police under sec-46 CrPC are too subjective concepts depending upon the circumstances at the given point of time. First the right to private defense, given from sections 96-106, Indian Penal Code (hereinafter referred to as "IPC") define private defense. No single section defines private defense independently because no universal definition possible and it depends on circumstance whether one will get the defense or not? Section-96 merely declares that acts done in consequence of private defense are not offence. Section-97 provides that the right to private defense extends to defend his own body and body of others and is available only in case of offence (sec-98 is an exception to sec-97).

Section-99 provides that the right is subject to certain limitations such that when a public officer in the exercise of his duty or anyone else in such exercise under the command of public officer does any act, other than which is likely to cause death or grievous hurt, is not an offence. Moreover, the right is not available, if victim had time to recourse to public authority or harm was more than what was necessary for the purpose of defense.

In certain cases of assault when there is an apprehension of death or grievous hurt, or to commit rape includes to satisfy unnatural lust, for kidnapping or abduction and with an intention of wrongfully confining or committing acid attack.<sup>11</sup>

The last important provision in this regard, gleaned from the IPC is section 102 which states that when the right commences, exists and when does it ends as follows:

Once the apprehension of danger to body has arisen the right to private defense commences and it continues as long as the apprehension continues. For the period right to private defense continues, for that period the accused has right to use as much of force as necessary to prevent the harm. If any such force is used by the accused it will be said that he did so in the exercise of right of private defense. However, if he uses such force as was more than what was necessary for private defense than it will be said that he has exceeded his right of private defense (As on point A in the diagram given below). But if he used force either before or after the situation of private defense then it is not exceeding the right rather, it is directly an offence that he has committed.



The mechanics of the above arrangements read alongside Exception 2 to Section 300 IPC will be as per the following:

On the off chance that the demonstration of causing demise is submitted under any of the circumstances falling under either Section 100 or under Section 103 IPC, the demonstration of causing passing isn't an offense taking into account Section 96 IPC. The wrongdoer in such a case whether it be the police or a private individual isn't liable of any offense and is completely secured.

Without any of the circumstances identified under Section 100 or Section 103, if the wrongdoer, rather than obeying Sections 101 or 104 IPC, surpasses the force given to him and causes demise however without deliberation and with no aim of accomplishing more damage than is vital for such protection, his case will fall under Exception 2 to Section 300 IPC and he would be liable of "culpable homicide" not adding up to murder falling under Section 299 IPC and culpable under Section 304 IPC. When once the resistance of experience executing set forward by the Police official can't be legitimately

bolstered, it turns into a "phony encounter" which is out and out "murder" culpable under law.

Accordingly, from the phase of "no offence", his demonstration of causing passing may "grow into murder" or may get diminished to "culpable homicide" contingent upon the presence and absence of above ingredients. As of second protection available under section 46 of Cr.P.C. it can be availed only in exceptional circumstances.<sup>12</sup>

Near the impact points of the above right of private defense is the safeguard of "grave and sudden provocation" falling under Exception 1 to Section 300 IPC. Not at all like on account of a demonstration establishing "private defense" which is pardoned by Section 96 IPC, does the barrier of "grave and sudden provocation" not absolve the guilty party from criminal obligation. The gravity of the act which in any case would have added up to kill under Section 300 IPC, is decreased taking into account the lead to the casualty giving grave and abrupt incitement of such an extent as to deny the wrongdoer of his poise consequently lessening the offense of homicide into at culpable homicide not amounting to murder under Exception 1

to Section 300 IPC. Indeed, even here, the guilty party ought not to be the provocateur and the incitement ought not be one by virtue of the legitimate exercise of his obligations by a public servant or because of the legal exercise of the privilege of private defense by the person in question.<sup>13</sup>

#### **Landmark Judgments**

The Apex Court had occasion to consider whether Police officials submitting encounter killings appreciate the underlying protection by method of indictment endorse and the phase at which the topic of sanction is to be thought of. In *Devinder Singh v. Territory of Punjab through CBI15*, after a thorough investigation of the case law on the point the Apex Court summarized as follows:

1. Protection of authorization is an affirmation to a legit and genuine official to play out his obligation sincerely and as well as could be expected to assist open obligation. Be that as it may, authority can't be covered to perpetrate wrongdoing.
2. When act or oversight has been found to have been submitted by local official in releasing his obligation it must be given liberal and wide development so far its official nature is concerned. Public servant isn't qualified to enjoy crimes. To that degree S.197 Cr.P.C. must be understood barely and in a confined way.
3. Even in realities of a situation when public servant has surpassed in his obligation, if there is sensible association it won't deny him of insurance under S.197 Cr.P.C. There can't be a general standard to decide if there is sensible nexus between the demonstration carried out and official responsibility nor it is conceivable to set down such principle.
4. In case the attack made is characteristically associated with or identified with execution of legitimate obligations assent would be vital under S.197 Cr.P.C., yet such connection to obligation ought not be imagined or be a whimsical case. The offense must be straightforwardly and sensibly associated with authentic obligation to require endorse. It is no piece of authentic obligation to submit offense. On the off chance that offense was fragmented without demonstrating, the official demonstration, usually the arrangements of S.197 Cr.P.C. would apply.
5. In case endorse is vital it must be chosen by skillful power and assent must be given based on sound evaluation. The Court isn't to be an endorsing authority.
6. Ordinarily, question of approval ought to be managed at the phase of taking insight, however in the event that the awareness is taken incorrectly and similar goes to the notification of Court at a later stage, finding with that impact is passable and such a supplication can be taken first time under the watchful eye of Appellate Court. It might emerge at commencement itself. There is no necessity that blamed must hold up till charges are framed.
7. Question of authorization can be raised at the hour of encircling of charge and it very well may be chosen by all appearances based on

allegation. It is available to choose it once more considering proof illustrated after finish of preliminary or at other fitting stage.

8. Question of assent may emerge at any phase of procedures. On a police or legal request or in course of proof during preliminary. Regardless of whether assent is essential or not may be resolved from stage to stage and material welcomed on record contingent on realities of each case. Question of assent can be considered at any phase of the procedures. Need for approval may uncover itself throughout the advancement of the case and it is available to denounced to put material over the span of preliminary for indicating what his obligation was. Blamed has the option to lead proof on the side of his case on merits.
9. For some situation it may not be conceivable to choose the inquiry successfully lastly without offering chance to the guard to illustrate proof. Question of good faith or bad faith may be decided on conclusion of trial."

In *People's Union for Civil Liberties v. Territory of Maharashtra*, 16 the Apex Court seeing that despite the rehashed advices by the Court there had been 99 police encounters bringing about the passing of 135 people between the years 1995 and 1997 in Mumbai alone, gave rules to be followed in issues of examination of such Police encounters. Coming up next are the rules given by the Apex Court:

1. Whenever, the police is in receipt of any insight or tip - off with respect to criminal developments or exercises relating to the commission of grave criminal offense, it will be diminished into writing in some structure (ideally into case journal) or in some electronic structure. Such chronicle need not uncover subtleties of the suspect or the area to which the gathering is going. In the event that such insight or tip - off is gotten by a more significant position authority, the equivalent might be noted in some structure without uncovering subtleties of the suspect or the area.
2. If as per the tip - off or receipt of any knowledge, as above, experience happens and gun is utilized by the police party and because of that, death happens, a FIR with that impact will be enlisted and the equivalent will be sent to the Court under S.157 of the Code immediately. While sending the report under S.157 of the Code, the technique recommended under S.158 of the Code will be followed.
3. An autonomous examination concerning the occurrence/experience will be directed by the CID or police group of another Police Station under the oversight of a senior official (in any event a level over the top of the police party occupied with the encounter). The group directing request/examination will, at the very least, look for:
  1. To recognize the person in question; shading photos of the casualty ought to be taken;
  2. To recuperate and safeguard evidentiary material, including blood - stained earth, hair,

- filaments and strings, and so forth, identified with the passing;
3. To recognize scene observers with complete names, locations and phone numbers and get their announcements (counting the announcements of police work force included) concerning the demise;
  4. To decide the reason, way, area (counting readiness of unpleasant sketch of geography of the scene and, if conceivable, photograph/video of the scene and any physical proof) and time of death just as any example or practice that may have achieved the passing;
  5. It must be guaranteed that unblemished fingerprints of perished are sent for substance investigation. Some other fingerprints ought to be found, created, lifted and sent for substance examination;
  6. Post - mortem must be led by two specialists in the District Hospital, one of them, beyond what many would consider possible, ought to be In-charge/Head of the District Hospital. Post - mortem will be video graphed and saved;
  7. Any proof of weapons, for example, firearms, shots, projectiles and cartridge cases, ought to be taken and saved. Any place appropriate, tests for discharge buildup and follow metal discovery ought to be performed.
  8. The reason for death ought to be discovered, regardless of whether it was normal demise, incidental passing, self destruction or crime.
  4. A Magisterial request under S.176 of the Code should perpetually be held in all instances of death which happen over the span of police terminating and a report thereof should be sent to Judicial Magistrate having ward under S.190 of the Code.
  5. The inclusion of NHRC isn't fundamental except if there is not kidding question about free and unprejudiced examination. Be that as it may, the data of the episode immediately should be sent to NHRC or the State Human Rights Commission, all things considered.
  6. The harmed criminal/casualty ought to be given clinical guide and his/her announcement recorded by the Magistrate or Medical Officer with authentication of wellness.
  7. It ought to be guaranteed that there is no deferral in sending FIR, journal sections, panchnamas, sketch, and so on., to the concerned Court.
  8. After full examination concerning the occurrence, the report ought to be sent to the skillful Court under S.173 of the Code. The preliminary, as per the charge - sheet presented by the Investigating Officer, must be finished up quickly.
  9. in case of death, the closest relative of the supposed criminal/casualty must be educated at the earliest.
  10. Six month to month proclamations of all situations where passings have happened in police terminating must be sent to NHRC by DGPs. It must be guaranteed that the six month to month proclamations reach to NHRC by fifteenth day of January and July, individually. The

announcements might be sent in the accompanying arrangement alongside after death, examination and, any place accessible, the request reports:

1. Date and spot of event.
2. Police Station, District.
3. Circumstances prompting passings-
4. Self resistance in experience.
5. Over the span of dispersal of unlawful get together.
6. Over the span of influencing capture.
7. Brief realities of the occurrence.
8. Criminal Case No.
9. Investigating Agency.
10. Findings of the Magisterial Inquiry/Inquiry by Senior Officers:

Uncovering, specifically, names and assignment of police authorities, whenever discovered liable for the demise; and

Regardless of whether utilization of power was legitimized and activity taken was legitimate.

11. If on the finish of examination the materials/proof having gone ahead record show that passing had happened by utilization of gun adding up to offense under the IPC, disciplinary activity against such official must be speedily started and he be put under suspension.
12. As respects pay to be allowed to the dependents of the casualty who endured demise in a police encounter, the plan gave under S.357A of the Code must be applied.
13. The Police Officer(s) concerned must acquiescence his/her weapons for scientific and ballistic examination, including some other material, as required by the researching group, subject to the rights under Art.20 of the Constitution.
14. An implication about the episode should likewise be sent to the Police Officer's family and should the family need administrations of a legal counselor/guiding, same must be advertised.
15. No out - of - turn advancement or bravery rewards will be presented on the concerned officials not long after the event. It must be guaranteed no matter what that such rewards are given/suggested just when the heroism of the concerned officials is built up certain.
16. If the group of the casualty finds that the above method has not been followed or there exists an example of misuse or absence of free examination or unprejudiced nature by any of the functionaries as previously mentioned, it might submit a question to the Sessions Judge having regional locale over the spot of occurrence. Upon such objection being made, the concerned Sessions Judge will investigate the benefits of the protest and address the complaints raised in that.

#### **Conclusion**

Families of encounter victims want an opportunity to make their agony public. Even as this may appear as vengeance, it is not vengeance at all. It is only a desire for the rule of law and a wish that others would not be allowed to be killed with impunity

by the law-enforcing agencies. A simple request that comes out of all those anguished family members and friends is that any person who killed another should be booked under Section 302 IPC and if the culprit had done that in self-defense, it should be proved in a court of law. The culprit, even if he wears khaki, cannot take the law into his own hands and cannot do the role of perpetrator of the crime, investigator, prosecutor, judge and jury rolled into one.

Through this paper writer sought answers to 2 questions:

1. How can police officer be acquitted without trial?
2. How police officer identifies that the person encountered is the alleged criminal?

The sorry state of affairs is reflected in the statement given by, A HindustanTimes editor, Vir Sanghvi quoted as saying, "We know the vast majority of encounters are fake ... We do not think that this is a perfect situation, but in common with the rest of the middle class we have come to the regrettable conclusion that there is no real alternative".

For an orderly and civilized society, State-sponsored terrorism or mayhem in the form of "Fake encounter" by the Police is certainly not a welcome desideratum, is against rule of law, constitutionalism and can never be a substitute for the eventual punishment through the curial process of fair trial following the procedure established by law.

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