

LEGALITY OF ENCOUNTER KILLING IN INDIA**Anna Mary Mathew****CHAPTER 1****Introduction**

“We are in bondage to the law in order that we may be free” was a statement made by Cicero. He was referring to the idea that law ensures there is peace and order. Therefore, in a situation where there is no law the natural corollary is that there will be chaos.

Encounter killing is a term used in India to depict extrajudicial killing by the police or the armed forces under the pretext of private defence. The first recorded case of encounter killing was in Andhra Pradesh. It was the killing of Alluri Sitarama Raju in the year 1922 and during the Telangana movement the police killed around 3000 people in the name of encounter killing.¹ From this the number of cases registered against encounter killing has tremendously increased.

Since 1993 the National Human Rights Commission (NHRC) has registered 2,560 cases of encounter killing and out of this 1,224 were found to be fake, which means nearly half the cases were found to be fake.² The recent, Vikas Dubey’s case is the 119th encounter killing case that has been reported since March 2017.³ In 2021, the number of cases registered for encounter killing is 10 and the number of pending cases is 410.⁴

In 1993, realising the tendency of these cases, it was anticipated by the National Human Rights Commission (NHRC) that the number of cases were bound to increase, hence they issued the general guidelines. In 1997, the then chairperson of the NHRC M.N. Venkatachalaiah in a letter to the chief ministers had informed them that if any policeman is found to be responsible for a death within his custody, then he should be treated as a common man and no special privileges should be given to him.

The truth about these encounters are that they are not actually encounters rather they are just cold-blooded murders committed by the police under the cloak of private defence. Justice

¹ N Venugopal, *Fake Encounters: Story from Andhra Pradesh*, 42, *JSTOR*. 4106, 4106–4111 (2007).

² NHRC REGISTERED 1,782 FAKE ENCOUNTERS, <https://www.firstpost.com> (last visited May. 3, 2021).

³ VIKAS DUBEY’S DEATH MARKS 119TH ENCOUNTER KILLING, <https://www.firstpost.com> (last visited May. 3, 2011).

⁴ HUMAN RIGHTS CASES STATISTICS, <https://nhrc.nic.in> (last visited May. 4, 2011).

A.N Mulla had stated in the case of *State of UP V. Mohammad Naim*⁵ that “*there is no single lawless group in the country whose record of crime come anywhere near that of a single organised group called the Indian Police Force*”. Normalising these encounter killings has shown us the degrading tendency of people’s thinking towards the sanctity of life.

Research Question

1. Whether encounter killing is legal?
2. Whether private defence can be used to justify encounter killing?

Hypothesis

If private defence can be used to justify encounter killing, then all cases of encounter killings are not illegal.

Research Objective

- To understand the legality of encounter killing.
- To understand the extent to which encounter killing can be justifiable.
- To look into why cases of encounter killing receive public adulation.

CHAPTER 2

Legality of encounter killing – a legislative exposition

No law in India directly allows encounter killing however there are situations by which a killing of this nature would not be considered as an homicide, these situations include:

1. Incases of private defenceas mentioned under Section 100⁶.
2. Section 46 of Criminal Procedure Code⁷.

Private defence

Encounter killing is frequently justified by considering it as an act which is a result of private defence. Section 100 of IPC⁸ lays down the circumstances in which the right of private defence can be extended to scenarios which leads to death, in such circumstances the police

⁵ (2010) 2 UPLBEC 1652.

⁶Pen.Code §100.

⁷Code Crim. Proc. §46.

⁸*Supra* note 6.

and civilians can kill an individual without facing homicide charges provided it is a clear case of private defence.

Private defence is the normal defence that a police official resorts to, to justify his acts of encounter killing. However, according to Section 99 of the Indian Penal Code,⁹ the cases of private defence cannot be justified if there is no apprehension of hurt. Furthermore, the right of private defence should not exceed the limit of harm that is caused.

Public servant exercising his duty

Section 46 of CrPC¹⁰ provides that if the usage of force including causing of death is necessary for arresting an accused who is charged for cases relating to imprisonment for life or death penalty then the act of the police is justified. However, there is a proviso in this section that, this section cannot be used as a defence if the alleged individual is not charged for an offence relating to imprisonment for life or death penalty.

Additionally in Section 300 exception 3 of the Indian Penal Code¹¹, it is provided that if a public servant while exercising his duty exceeds his power and causes the death of an individual in good faith, believes it to be necessary and required for ensuring justice then the culpable homicide will not be considered as murder.

However, this is not a panacea that can be availed by the authorities to justify encounter killing and term it as a mere act of private defence or that it was necessary to fulfil the duty. There is a caveat here, that is, if any act of encounter killing is found to be mala fide or with a dishonest motive and if it falls beyond the scope of NHRC Guideline 2010¹² then it will be considered as a crime and the police officer will be charged.

NHRC Guidelines 2010

National Human Rights Commission or NHRC in 2010¹³ has laid down certain guidelines to look into cases of encounter killing. Such as:

⁹Pen.Code. §99.

¹⁰*Supra* note 7.

¹¹Pen.Code. §300 exception 3.

¹²GUIDELINES REGARDING CONDUCTING OF MAGESTERIAL ENQUIRY IN CASES OF DEATH IN CUSTODY OR IN COURSE OF POLICE ACTION, <https://nhrc.nic.in> (last visited May. 6, 2021).

¹³*Id.*

- Upon receiving the news about the death in a police encounter, the officer in charge of the police station should enter the details of the encounter killing in the register.
- An information of death is enough to start the investigation.
- The investigation can be headed by the State CID.
- If the police officer is convicted the compensation for the family of the victim should also be looked into.
- Whenever a complaint is made against a police officer if it can be considered as a case of culpable homicide then an FIR has to be registered.
- A magisterial enquiry has to be conducted within 3 months.
- All death cases under the hands of the police should be reported to the SI of the district within 48 hours.

A classic example of a fake encounter is:

The Hyderabad rape case of a 25 year old veterinarian, Dr. Priyanka Reddy. The police alleged 4 people as guilty. Later they were remanded in judicial custody for 7 days. Subsequently the police took them to the scene of the crime to reconstruct it for taking evidence. During that period, according to the police officer the perpetrators had tried to snatch their weapon and fire at the police team because of which they had no other option other than to shoot them.¹⁴ This was the official statement made by the police officers. Additionally, he had stated that 2 cops had suffered head injuries but none had bullet wounds.

The only section the police officials can avail in this scenario is Section 99¹⁵ and 100 of the Indian Penal Code¹⁶ and this section refers to private defence available for police officers during the discharge of his duty. There are certain criteria that has to be fulfilled to avail private defence, these include:

1. There should be an **apprehension of danger**
2. The offense done should be in **proportion to the harm caused**

In the case at hand, even though there is an apprehension of danger, as they have claimed and even if the alleged perpetrators are charged with an offence which can constitute a death penalty or life imprisonment. The offence so done by the police, which is homicide is not in

¹⁴HYDERABAD RAPE ACCUSED MISLED US, <https://www.indiatoday.in> (last visited May. 7, 2021).

¹⁵*Supra* note 9.

¹⁶*Supra* note 6.

proportion to the harm caused, this can be understood simply by looking into the injuries sustained by the police officers. They were merely left with light head injuries whereas the other 4 individuals are dead.

Therefore, this is a clear case of fake encounter killing. The police officials do not have any right to take the law into their own hands and pronounce the alleged perpetrators as guilty.

Constitutional aspects violated by encounter killing

Article 22¹⁷ is outrightly violated. This article speaks about the accused's right to have an advocate of his/her own choice, the same is mentioned under Section 303 of CrPC.¹⁸ This is said to be violated because the police officials themselves decide if an individual is guilty or not. Thereby denying the individual his right to have a fair trial and also denying him his right to have an advocate of his choice.

The weapon used during the encounter should be submitted for ballistic examination, this is based on the rights present under Article 20 of the Indian Constitution¹⁹, this has been laid down through the case of *People's union for civil liberties & Anr. V. State of Maharashtra & Ors.*²⁰

Article 21 of the Indian Constitution²¹ provides that "a person cannot be deprived of his life and liberty except on the basis of *the procedure established by law*" and there is a procedure established by law which provides that an individual is entitled to a fair trial according to the procedure guaranteed in the Criminal Procedure Code (CrPC). In fact the guarantee of a fair trial is a facet to the right to life mentioned under Article 21.²² The court in the case of *Ratiaram V. State of Madhya Pradesh*²³ had stated that not ensuring fair trial would be a case of denial of human rights as fair trial is a right which flows from Article 21. It is also protected by the virtue of the constitution.

Principles of a fair trial violated by encounter killing

¹⁷India Const. art. 22.

¹⁸Code Crim. Proc. §303.

¹⁹India Const. art. 20.

²⁰(1999) 4 Bom CR 608.

²¹India Const. art. 21.

²²Mohd. Hussain V. The State (Govt. of Nct), 2016 SCC OnLine Del 273.

²³(2012) 4 SCC 516.

<u>Principles of fair trial</u>	<u>Violated by encounter killing</u>
<p>The first and foremost principle under the concept of fair trial is the “adversary trial system”, in this system it is mandated that the onus to produce the evidence falls on the prosecution and the judges will oversee it impartially. Another aspect is that, it obligates the investigators to produce the alleged wrongdoers but these wrongdoers have the right to assign a counsel of their choice to defend their case.</p>	<p>Encounter killing outrightly violates this system as the investigating officials, who under this principle are bound to collect evidence and produce the wrongdoer before the court, does this act of encounter killing. It is also provided in this principle that the court is the one who decides whether an individual is guilty or not, as it can give out an impartial verdict. Whereas, it is very obvious to assume that if an investigating agency decides if an individual is guilty or not, the decision is bound to be prejudicial.</p>
<p>The second principle is that there is a “presumption of innocence”. According to this principle the accused is to be presumed to be innocent until it is proved beyond reasonable doubt. In this scenario the burden of proof is on the prosecution to show that the accused has committed the offense.</p>	<p>In case of encounter killing there is a clear violation of this principle as the investigating agency upon <i>prima facie</i> understanding of the case arrests the accused and on the pretext of self-defence will kill them.</p>
<p>The basic principle which is intrinsic to the right of fair hearing is that the procedure has to be heard by a “competent, independent and impartial” judge. In fact Section 479 of CrP^{C24} prohibits trial to be conducted by a judge who has any personal interest with the trial carried out.</p>	<p>In case of encounter killing the person who judges is not an actual judge but the judgement is taken by the investigators themselves, this in nosense can be considered as impartial and competent.</p>

²⁴Code Crim. Proc. §479.

From this it can be understood that the system of encounter killing violates the principles of fair trial. Supreme Court has provided in the case of *Himanshu Singh Sabharwa v. State of M.P and Ors*, that, if the court has any reason to believe that a fair trial has not been imparted then the magistrate under Crpc section 311²⁵ can seek for evidence directly by calling for the material witness and seek relevant documents²⁶. However, in case of encounters, these steps are circumvented and the police themselves are deciding a death sentence for the alleged individuals. This is utterly illegal.

Chapter 3

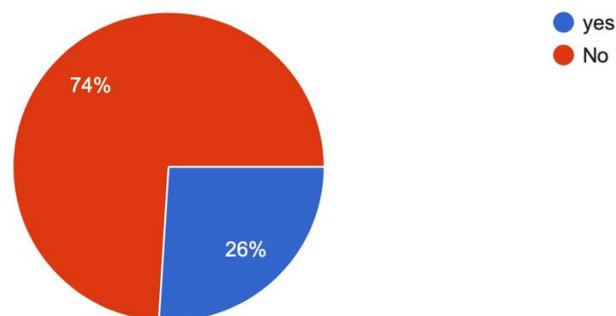
Increase in the cases of encounter killing – failure of the judicial process?

To understand if the number of cases dealing with encounter killings is due to a failure of judicial process an online survey was conducted and has been put out in this research paper. A total of 50 responses were recorded, which comprised of 25 legal and 25 non-legal students, between the age of 18-25, to avoid any arbitrary opinion.

Survey Question 1:

Do you think the justice system in India is sufficient?

50 responses



The first question that was asked was if the people felt that the justice system in India was sufficient or not. 74% of the total response, that is 37 people had responded as no. This shows that majority do not think that the current justice system is sufficient to meet the offences that occur. However, this was an expected response as the crime rates in India are increasing

²⁵ Code Crim. Proc. §311.

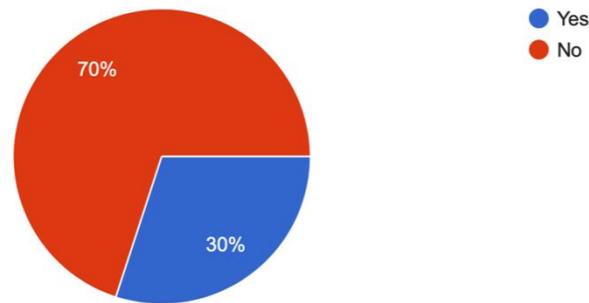
²⁶ MANU/SC/1193/2008.

tremendously. In 2017, it was 237.9 cases per one lakh population and in 2019 it increased to 241.2 cases per one lakh population.²⁷

Survey Question 2:

Do you think with the existing laws, the criminals will deter from committing crimes?

50 responses



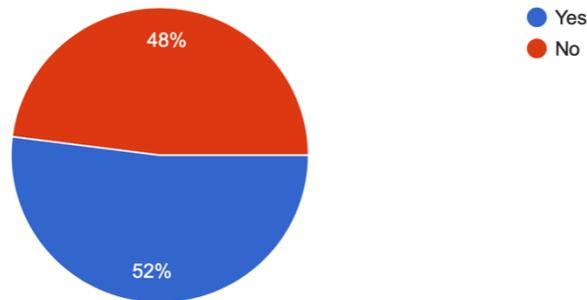
The second question was, if with the current laws will the criminals deter from committing crimes. 70% of the total responses were no, this is 35 responses. Here, the strange fact is that, there were 37 people who thought the system was not sufficient but there are 2 people from the 37 who felt that even though the system is not sufficient the existing laws are sufficient for the criminals to deter from committing crimes. Therefore, from this it could be understood that they were referring to the insufficient execution of these laws.

Survey Question 3:

²⁷CRIME RATE IN STATE SEES A MARGINAL DECLINE, <https://mumbaimirror.indiatimes.com> (last visited May. 11, 2021).

Do you think if a case of rape arises, it is better if the police take the cases into their own hands and kill the individuals rather than going through the whole judicial process?

50 responses

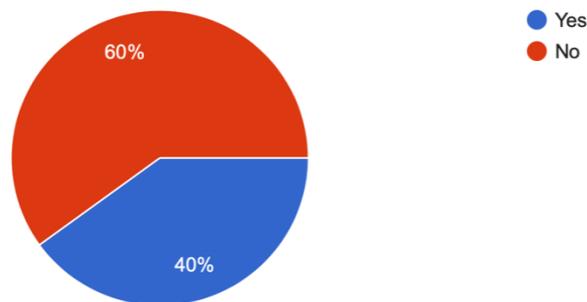


The third question was that, if a case of rape is brought up to the police, should they start taking it into their own hands. 52% of the total responded positively. Which means, out of the total 50, 26 responses were positive. This is very unsurprising as people are clearly sceptical about giving the authority to the officials to determine if a person is guilty or not as this would lead to law lessness but still they are also at a point where they feel that the only way to reduce the number of cases is by giving the authority to the police.

Survey Question 4:

If you find that a police official has killed a person who has been alleged to have committed rape, would you charge the police official?

50 responses



The fourth question was that, if a police official kills a person who has raped a girl should that official be charged. 60 % of the total responses, was that he should not be charged. This shows that people want more police officials to react to atrocities like rape by mechanisms

like taking the lives of alleged rapists. Additionally, this also shows their lack of trust towards the efficiency of the judiciary.

In addition to this question there was also another question, wherein it was asked as to *if anyone was of the opinion that the police should not be charged, why?* Multiple answers had come up, one opinion was that, there were various people who were willing to help these criminals escape the charges and if an immediate action is not taken then the criminals might have a chance to actually go scot-free. Another opinion was that, even abstaining from charging the police official or giving them the authority to take the law into their own hands will not help reduce the crime rates. This shows that people are aware of the fact that by giving the authority to the police it will lead to lawlessness. However, they do not know how to overcome this situation as the crime rates are increasing and no remedies are sought by the officials. They are in a very confused state.

The major takeaways from the analysis is that people do know that it is unlawful to give the police officials the final authority to determine if an individual is guilty or not. This is very dangerous, they can misuse this power to take out personal vendettas.

India has reached to that level where the public starts to praise the police for their audacity to take the lives of the alleged criminals. However, when these acts of the police are analysed in a legal perspective it is absolutely wrong but how do they gather multitudes of support from the general public. The answer is simple, it is the fault of our judicial system, the lacuna in the law are the major causes of it. As people believe their lives are safe by these drastic acts taken by the police they support it ardently. This shows us that there is an urgent need to revamp these laws as immediately as possible.

The Unnao rape victim being set ablaze while on her way to testify in the court²⁸, this is a disgrace to the Indian judicial system as a whole, as a witness does not receive sufficient protection. This is a typical reason as to why the police is taking the law into their own hands and the common people are supporting it. Witness protection was emphasised on by the court in the case of *Zahira Habibullah Sheikh and anr V. state of Gujarat and ors.*²⁹ But it is very evident that this has not been incorporated, who is to be blamed here the judiciary, the

²⁸UNNAO RAPE VICTIM WHO WAS SET ABLAZE DIES DUE TO CARDIAC ARREST AT DELHI HOSPITAL, <https://m.economictimes.com> (last visited May. 12, 2021).

²⁹(2004) 4 SCC 158.

executive comprising of the legislatures who are elected by us, Or are we supposed to blame ourselves?

In the Unnao rape case, the victim's father had reacted to the media by saying that *what we need in this case is encounter killing*³⁰. This might seem ideal, however, this is creating a bad precedent as the people are losing their trust in the judiciary and is providing adulations to the police officials.

Other than some part of the population, majority of people are now of the opinion that if these perpetrators are taken to the judiciary they will somehow find a way to escape with very little charges and they will find their way back into the society, to retard this and to set an apprehension in the mind of the public not to commit acts like these encounter killings are being supported by the public.

The slow pace at which the justice system is carrying on is what provokes the individuals to take justice onto their own hands. This predicament is well known to everyone in fact on 02-12-2019, the Union minister for Home Affairs, G. Kishan Reddy had promised that the government would amend the Indian Penal Code (IPC) and the Criminal Procedural Code (CrPC) in order to ensure that speedy justice is guaranteed.³¹ However, very little has changed till date.

Chapter 4

Conclusion

The Supreme Court in the case of *Prakash Kadam V. Ramprasad Vishwanath Gupta*³² had referred to encounter killings as cold-blooded murders and whoever commits such acts must be charged for death penalty. The court had also pointed out that encounter killing should fall under the category of 'rarest of rarest cases'. This is an adequate way to interpret it, as the law in itself is very choosy when it comes to charging an individual with death penalty and it only charges death penalty when it believes it is absolutely necessary, in the sense if it truly believes the issue comes under the head of rarest of rarest cases. But look at the audacity of

³⁰UNNAO RAPE VICTIM'S FATHER DEMANDS HYD-LIKE KILLING, <https://www.news18.com> (last visited May. 12 2021).

³¹HYDERBAD RAPE-MURDER CASE, <https://www.indiatoday.in> (last visited May. 13, 2021).

³²(2011) 6 SCC 189.

these police officials to take the law into their own hands and kill individuals who have been contested by them to have committed certain acts. In an area where the law itself is very cautious about taking the lives of individuals, the police officials are lavishly taking the lives of individuals under the pretext of private defence.

The general public will often try to justify the acts of the police by stating that these are the only methods that can save their lives. As firstly, people are often scared to testify against the alleged perpetrators and secondly, people believe that these perpetrators will never be charged by the court. However, this is a very dangerous method to resort to because, if this is justified then it would mean that the law is in the hands of the police and they can take arbitrary acts with that power. If these police officials develop a grudge towards someone then they can murder that person and cover it up in the name of an encounter. This would lead to lawlessness.

Encounter killing brings us back to the age-old question of which should be given an upper hand "*morality or law*". Through the eyes of the public, the acts done by the police officials are considered as moral because now they can live a life without fear. However, through the eyes of laws, the acts committed by the police is outright illegal as they have no authority to take the law into their own hands.

Only one alternative can be resort to, this is also a suggestion made through this research paper. It is high time that the laws are revamped so as to include more expedient procedures to ensure that speedy and fair trials are guaranteed, this is a major fault found by the people. Additionally, the officials who commit these kind of acts, should be charged and should not be allowed to hide under their official uniforms.