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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

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# **FAKE ENCOUNTER AND THE RELATED LAWS IN INDIA: AN ANALYSIS**

AUTHORED BY - BORNAA BARUAH

## **Abstract**

*Fake encounters or extrajudicial killings orchestrated by police officials under the guise of self-defence or otherwise, have raised critical questions about the efficacy of existing legal mechanisms in ensuring justice and upholding human rights. This article critically analyses the legal landscape surrounding fake encounters in India, scrutinizing the gaps and challenges that allow such practices to persist. Fake encounters, also known as "extrajudicial killings," "extra-legal killings," or "encounter killings," are unlawful or unapproved killings carried out by law enforcement officials while acting in self-defence or in the course of taking down criminals. The phenomena have sparked heated discussion and raised issues with India's law enforcement authorities' accountability, human rights, and the rule of law.*

*The article presents an in-depth analysis of false encounters, including all the factors influencing their prevalence. A detailed examination of relevant Indian laws, guidelines given by the Supreme Court in the case of People's Union for Civil Liberties v. State of Maharashtra, updated guidelines issued by the National Human Rights Commission in 2011, and the existing international framework for the prevention of extrajudicial killings forms the cornerstone of this analysis. The research assesses the extent to which these legal instruments safeguard against abuses of power and ensure accountability among police officials.*

*Justice Ranjana P. Desai in one of the leading cases held that extrajudicial killings amount to "state-sponsored terrorism." Extrajudicial killings crumble the rule of law in our country, eroding the confidence of the public in the Police and undermining the justice system that is already in place. The number of these deaths has increased, but there is currently no legal structure in place to deter law enforcement agencies. Therefore, it is important to bring to light the issue of fake encounters or*

*extrajudicial killings and ensure that the rule of law is upheld. Each person has the fundamental right to be tried and executed lawfully and therefore it is the need of the hour to look into extrajudicial killings.*

## ***Introduction***

From the streets of Mumbai and Uttar Pradesh to the villages of Assam and Manipur, the disturbing increase of police-executed extrajudicial killings, often termed as ‘encounter killings’, have grossly violated the human rights of the citizens of India. Police personnel who commit such murders are frequently commended for their valour and receive rewards, which encourages them to commit further murders. In theory, the interactions appear to be a spontaneous gunfight between the accused criminal and the police, who frequently shoot back in self-defence, killing the accused criminal in the process.<sup>1</sup> This "shoot-out" storyline is frequently followed in the police report. However, it's sometimes overlooked that there is often little real distinction between these lawful killings and "fake encounters."

Alarming frequent complaints emerge about the prevalence of apathy, non-registration of cases, evidence manipulation, custodial crime, and police abuses or brutalities, such as rape, molestation, torture, fake encounters, and deaths in police cells and jails. Reading this kind of news does give the sense that the police are violating people's rights rather than upholding their legal and custody rights. It spreads the false impression that the police force in our nation is made up of callous, violent, and corrupt individuals, although thousands of police officers have sacrificed their lives to defend the nation's integrity and have made significant contributions to the fight against crime by taking down organised crime and providing aid and support to those affected by natural disasters.

In India, fake encounters present significant legal and human rights concerns. Police officers have the legal ability to use force to defend themselves or others,<sup>2</sup> but they should use force proportional to the threat.<sup>3</sup> The Apex Court in *Om Prakash v. State of Jharkhand*<sup>4</sup> stated that “it is not the duty of the

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<sup>1</sup> Editorial, “Extrajudicial Executions: The Supreme Court has failed the citizen on encounter killings” (2015) *Economic and Political Weekly*, 50(15), 7–8 < <http://www.jstor.org/stable/24481873> > accessed 8 January 2024

<sup>2</sup> Indian Penal Code 1860, s 100

<sup>3</sup> National Human Rights Commission, *Manual on Human Rights for Police Officers* (December 2011)

<sup>4</sup> *Om Prakash v. State of Jharkhand* (2012) 12 SCC 72



*police officers to kill the accused merely because he is a dreaded criminal... such killings must be deprecated. They are not recognised as legal by our criminal justice administration system. They amount to State-sponsored terrorism.”*

### ***Defining Extra-judicial or Extra-legal Killings***

The Court in *People’s Union for Civil Liberties v. Union of India and another*<sup>5</sup> called extra-judicial killing or extra-judicial execution is “administrative liquidation”. It shows instances in which the state kills people by using disproportionate or retaliatory force. Extrajudicial killing pertains to the wilful taking of a life through genocide, war crimes, and/or death as a result of executions that occur without due process, torture, or other cruel treatment, as well as the excessive use of force by the army, police, or other state officials.<sup>6</sup> Therefore, extrajudicial/extra-legal killings are also used to describe all formally reported "encounters" as opposed to "fake encounters" as alleged by some.

The International Covenant on Civil and Political Rights (ICCPR) is ratified by India. Under Article 6 of the same,<sup>7</sup> India is legally obligated to guarantee that no one is unjustly deprived of their life and that each citizen has an inherent right to life. Everybody's inherent right to life is guaranteed under Article 3 of the Universal Declaration of Human Rights.<sup>8</sup> Article 3 states; “Everyone has the right to life, liberty and security of person”. The Indian Constitution was influenced by the Universal Declaration of Human Rights of 1948. The Supreme Court in *Kesavananda Bharati v. State of Kerala*<sup>9</sup> observed that “*though the declaration was not legally binding, it did reflect the founding fathers’ understanding of the nature, importance, and necessity of human rights at the time of adopting the constitution.*” The Indian Constitution under Article 21 states that – “no person shall be deprived of his life or personal liberty except according to procedure established by law”.<sup>10</sup> The right to life, which is also protected under international and regional human rights treaties, is described as a “supreme right”, as without its effective guarantee all other human rights are meaningless.<sup>11</sup>

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<sup>5</sup> *People’s Union for Civil Liberties v. Union of India and another* (1997) 3 SCC 433

<sup>6</sup> High Commissioner for Human Rights/ Centre for Human Rights, *Human Rights and Law Enforcement: A Manual on Human Rights Training for the Police*, Professional Training Series 5, United Nations: New York and Geneva, 1997, p88

<sup>7</sup> International Covenant on Civil and Political Rights 1976, Article 6

<sup>8</sup> Universal Declaration of Human Rights 1948, Article 3

<sup>9</sup> *Kesavananda Bharati v. State of Kerala* (1973) 4 SCC 225: AIR 1973 SC 1461

<sup>10</sup> The Constitution of India 1950, Article 21

<sup>11</sup> Office of the United Nations High Commissioner for Human Rights, *Human Rights, Terrorism and Counter-terrorism*, Fact Sheet No. 32, p. 8

Human rights are violated by extrajudicial killings. They infringe on the fundamental human right to life, liberty, and security, which is guaranteed by several international human rights laws and the Indian Constitution. When a police department fabricates an encounter, they become the judge, jury, and executioner of the law. This seriously undermines due process of law, which provides that every individual has the right to a fair trial and legal protection against extrajudicial and arbitrary killings by the state.

The data released by the National Human Rights Commission (hereinafter 'NHRC') and the data offered by the Ministry of Home Affairs in Rajya Sabha showcase that there has been a steady rise in the number of extrajudicial killings over the years. Therefore, it is the need of the hour to examine the laws surrounding extrajudicial killings and mete out justice to the victims of such a killing.

Statement Showing No. of Cases Registered (Data as per CMS)					
Financial Year	2013-2014	2014-2015	2015-2016	2016-2017	2017-2018
Death in Police Encounter (Inc. Code 812)	137	188	179	169	164
Custodial Death (Judicial) (Intimation)(Inc. Code 301)	1577	1588	1668	1616	1636
Custodial Death (Police) (Intimation)(Inc. Code 807)	140	130	151	145	148

Fig 1: Details of the last five years' statement showing the no. of cases registered in the NHRC (as provided in Annual Report 2017-18)

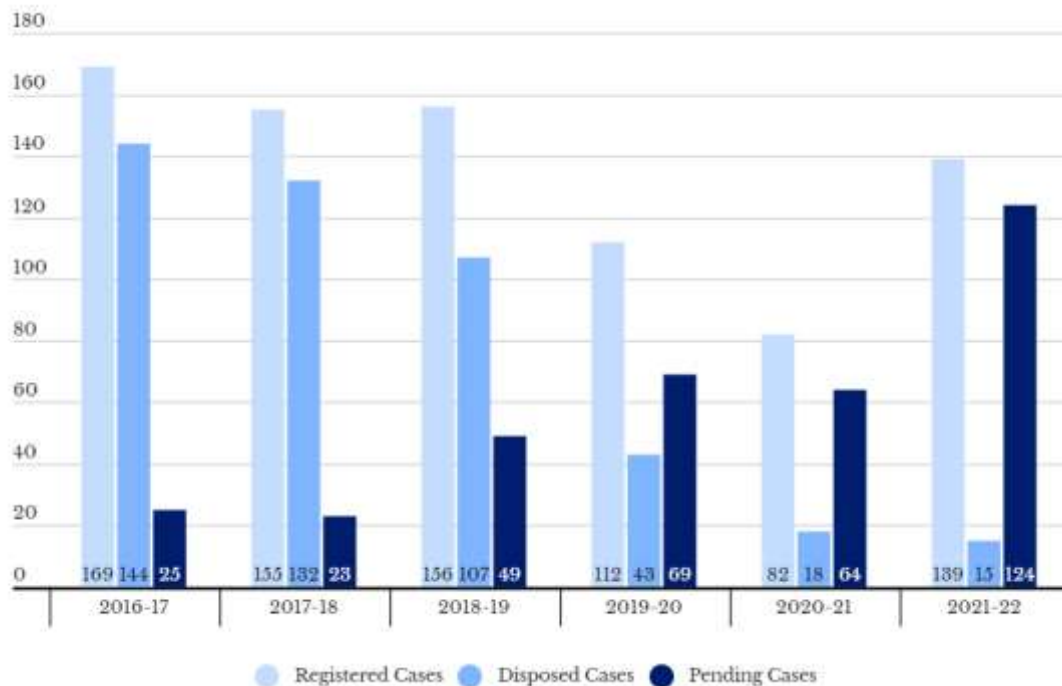


Fig 2: Answer to Unstarred Question No. 2287, Answered on 23<sup>rd</sup> March 2022 by the Ministry of Home Affairs in Rajya Sabha

## ***Factors Contributing to Fake Encounters***

### *I. Political pressure*

The incidence of false encounters in India can be attributed to political pressure, which fosters an environment in which law enforcement agents feel obliged to act quickly to combat crime and meet the demands of their political overlords.<sup>12</sup> Politicians may put pressure on law enforcement to demonstrate their effectiveness in combating criminal activity because they are frequently the target of public scrutiny and demand quick results. To get results quickly and visibly in such circumstances, police personnel may give in to peer pressure and turn to extrajudicial tactics, such as faking encounters. Political intervention can undermine the principles of due process, the rule of law, and human rights. It can also foster an environment in which police officials prioritise political interests over moral and legal commitments, thereby leading to abuses of authority and miscarriages of justice.

<sup>12</sup> National Human Rights Commission, *Manual on Human Rights for Police Officers* (December 2011)

## *II. Police Corruption*

Police corruption can contribute to the occurrence of fake encounters through various channels. When officers engage in corrupt practices, such as accepting bribes or being involved in illegal activities, they may feel the need to cover up their actions or protect criminal associates. This can create a nexus between law enforcement officials and criminals, leading to a situation where fake encounters are staged to eliminate potential threats or rivals. In some cases, corrupt officers may manipulate encounters to frame innocent individuals, using extrajudicial means to further their personal interests or satisfy external pressures. The intertwining of corruption and law enforcement can degrade the police force's credibility, diminish trust in the justice system as a whole, and create to a culture that encourages power abuse, including encounter fabrication.

## *III. Demand for swift justice*

In India, where there is a strong desire for speedy justice, police officials are under great pressure to show results quickly, particularly in high-profile cases or ones involving heinous crimes. This can lead to the incidence of fake encounters. The public is frequently frustrated with what they perceive to be a slow pace of justice in a system characterised by delays and inefficiencies. Law enforcement officers may feel pressured to use extrajudicial tactics, including arranged encounters, in order to demonstrate quick response times and meet public expectations, as a result of this impatience. In these situations, the need for quick justice acts as a trigger for shortcuts that may jeopardise the criminal justice system's integrity. Very often there is connivance of the political bosses and support of the public too.<sup>13</sup>

## *IV. Impunity*

The prevalence of false encounters is greatly encouraged by impunity, which creates an atmosphere in which police officers feel above the law and unaffected by their acts. When there is a lack of accountability, whether as a result of institutional problems, political meddling, or insufficient oversight, the police officers get away after committing extrajudicial killings. In 2012 when the Special Rapporteur on extrajudicial, summary, or arbitrary executions, Christof Heyns visited India,<sup>14</sup> several victims made presentations before him and said that impunity represents a major

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<sup>13</sup> Sankar Sen, *Human Rights and Inhuman Wrongs* (Saujanya Books, 2010)

<sup>14</sup> A/HRC/23/47/Add. 1, “*Special Rapporteur on extrajudicial, summary or arbitrary executions*”, April 2013

challenge in various stages of the accountability process. At the stage of reporting a crime, the security forces refuse to register FIRs and often they threaten the victims. This hardship is mainly faced by the Dalits, the representatives of lower castes, tribes, poorer communities, and women. When there are no consequences for misbehaviour, an atmosphere of impunity flourishes, giving police the impression that they can act illegally without being held accountable. In addition to undermining the values of justice and the rule of law, this sense of immunity feeds a power abuse loop that erodes public confidence in law enforcement agencies.

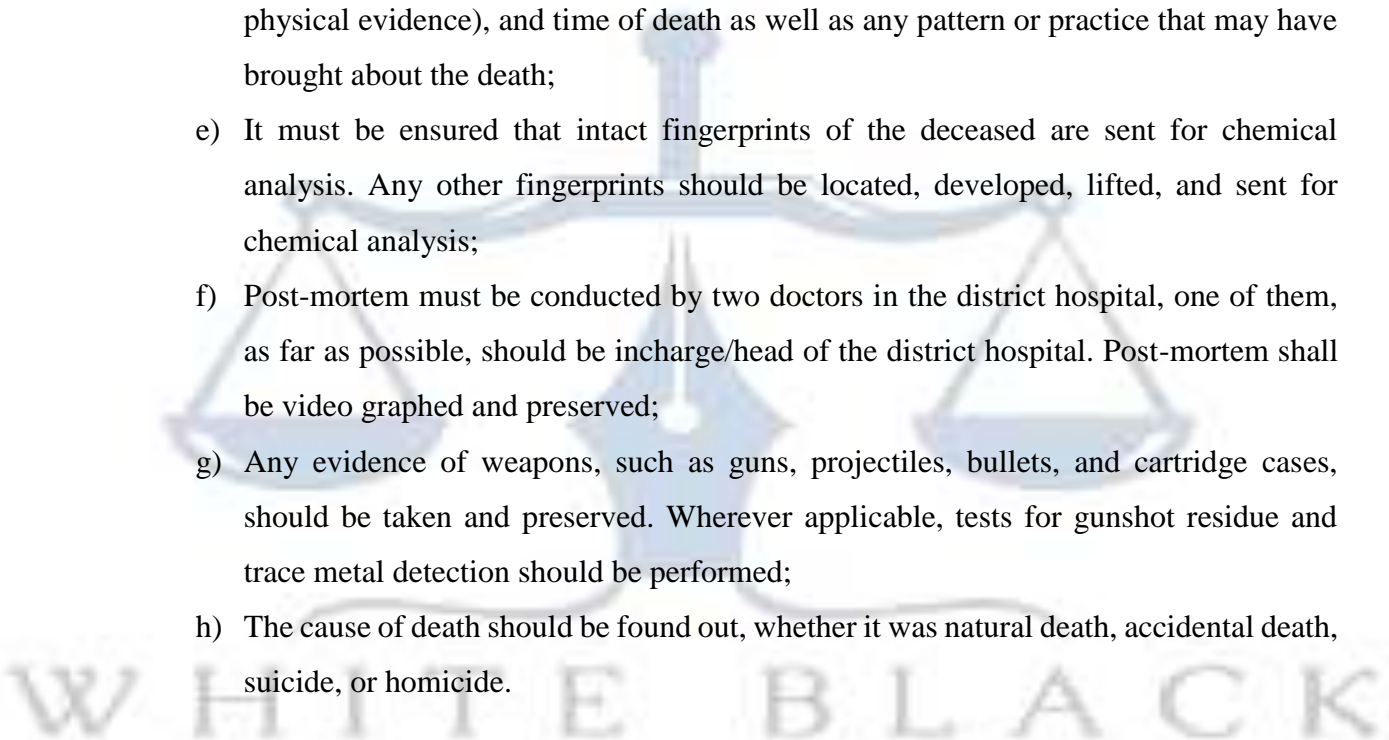
### ***Laws relating to encounters in India***

Although there is no immediate provision in Indian law dealing directly with police encounters, several clauses can be used to widely interpret the execution of such powers. The Supreme Court in *People's Union for Civil Liberties v. State of Maharashtra*<sup>15</sup> established standards for investigating police encounters resulting in death as the standard procedure. They also apply to grievous injury situations in police encounters. The guidelines are as follows:

1. "Whenever the police are 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 the 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:

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<sup>15</sup> *People's Union for Civil Liberties v. State of Maharashtra* (2014) AIR SCW 5940

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- a) To identify the victim; colour photographs of the victim should be taken;
  - b) To recover and preserve evidentiary material, including bloodstained earth, hair, fibres, and threads, etc. related to the death;
  - c) To identify the 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 the rough sketch of the 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 the 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 incharge/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 the 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 court concerned.
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 charge-sheet 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 the NHRC by 15<sup>th</sup> 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 officers:
    - a) disclosing, in particular, names and designation of the 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 the use of firearm amounting to offence under 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 the 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 officers concerned soon after the occurrence. It must be ensured at all costs that such rewards are given/recommended only when the gallantry of the officers concerned 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 the incident. Upon such complaint being made, the Sessions Judge concerned shall look into the merits of the complaint and address the grievances raised therein.”

The Court further stated, “*These requirements/norms must be strictly observed in all cases of death and grievous injury in police encounters by treating them as law declared under Article 141 of the Constitution of India*”.

Section 174<sup>16</sup> of the Code of Criminal Procedure states that whenever a person dies under suspicious circumstances, then such a death has to be investigated by the Police. But Section 176<sup>17</sup> specially empowers the Judicial Magistrate or the Metropolitan Magistrate to investigate the death of a person when in the custody of the Police. Clause (1A) of Section 176 states that where “(a) *any person dies or disappears... while in the custody of the police*”, the Magistrate under the same provision has the power to record evidence in connection to the case,<sup>18</sup> expedite the process of forensic examination of the body to be conducted within twenty-four hours of the deceased,<sup>19</sup> inform the relatives of the deceased, and keep them in the loop during the investigation, if practically feasible.<sup>20</sup> Provisions of

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<sup>16</sup> The Code of Criminal Procedure 1976, s 174

<sup>17</sup> The Code of Criminal Procedure 1976, s 176

<sup>18</sup> The Code of Criminal Procedure 1976, s 176(2)

<sup>19</sup> The Code of Criminal Procedure (Amendment) Act, 2005, s 176(5)

<sup>20</sup> The Code of Criminal Procedure 1976, s 176(4)



Section 176 can be found in the corresponding Section 196 of Bharatiya Nagarik Suraksha Sanhita, 2023. There are no changes to the provision except the exclusion of the Metropolitan Magistrate.

In addition to the aforementioned, the National Human Rights Commission's then-Chairperson, Justice M.N. Venkatachaliah, wrote to the state's chief ministers in 1997 to report that the number of public complaints about police encounters that were fake—in which suspects were killed instead of facing legal proceedings—had increased. He went on to say that neither the laws of our nation nor their policies allow the police to execute justice or take another person's life. And if the police kill someone by doing such a thing, they have committed the crime of culpable homicide. Following this, the NHRC framed certain guidelines to be followed in cases of death caused by police action. This letter was brought to light again in 2010 by the then-National Human Rights Commission's chairperson, Justice Govind P. Mathur, and amended the pre-existing instructions that were established to be implemented in police-related killings. The updated guidelines are –

1. “When the police officer in charge of the Police Station receives information about the death in an encounter with the Police, he shall enter that information in the appropriate register.
  2. Where the police officers belonging to the same Police Station are members of the encounter party, whose action resulted in death, it is desirable that such cases are made over for investigation to some other independent investigating agency, such as State CBCID.
  3. Whenever a specific complaint is made against the police alleging commission of a criminal act on their part, which makes out a cognisable case of culpable homicide, an FIR to this effect must be registered under appropriate sections of the IPC. Such case shall be investigated by the State CBCID or any other specialised investigation agency.
  4. 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. The relatives of the deceased, eye witness, witnesses having information of the circumstances leading to the encounter, police station records, etc. must be examined while conducting such enquiry.
  5. Prompt prosecution and disciplinary action must be initiated against all delinquent officers found guilty in the magisterial enquiry/police investigation.
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6. 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 officer is established beyond doubt.
7. (a) All cases of deaths in police action in the states shall be reported to the Commission by the Senior Superintendent of Police/Superintendent of Police of the District within 48 hours of such death in the following format:
- i. Date and place of occurrence
  - ii. Police station, district
  - iii. Circumstances leading to death:
    - Self-defence in encounter
    - In course of dispersal of unlawful assembly
    - In the course of effecting arrest
    - Any other circumstances
  - iv. Brief facts of the incident
  - v. Criminal Case no.
  - vi. Investigating agency

(b) A second report must be sent in all cases of death in police action in the state by the Sr. Superintendent of Police/Superintendent of Police to the Commission within three months providing the following information:

- i. Post mortem report
- ii. Inquest report
- iii. Findings of the magisterial enquiry/enquiry by senior officers disclosing:
  - Names and designation of police official, if found responsible for the death;
  - Whether use of force was justified and action taken was lawful;
  - Result of the forensic examination of 'handwash' of the deceased to ascertain the presence of residue of gun powder to justify exercise of right of self-defence; and
  - Report of the Ballistic Expert on examination of the weapons alleged to have been used by the deceased and his companions.”

## *International Perspective*

Extrajudicial killings are forbidden by international human rights law, which regards them as flagrant violation of a person's right to life. Article 2 of the Code of Conduct for Law Enforcement Officials<sup>21</sup> states that *“In the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons.”* It places a duty upon the police officials to uphold the rights of the individuals while discharging their duties. An individual's right to life is violated by any kind of extra-legal killing.

The Minnesota Protocol<sup>22</sup> serves as a model for international legal standards for preventing and investigating potentially unlawful deaths. The Protocol establishes the guidelines and medical-legal requirements for the examination and avoidance of extrajudicial killings. The Protocol gives detailed guidance on topics such as investigative procedures, crime scene processing, evidence processing, and so on. The Minnesota Protocol's Section C offers a comprehensive list of necessary actions, such as:

1. “The area in which evidence is located should be closed off to the public;
2. Photographs of the scene and physical evidence located at the scene should be taken in a prompt manner;
3. Weapons such as guns, projectiles, bullets, and cartridge cases should be taken and preserved;
4. All persons at the crime scene should be identified;
5. Fingerprints of relevant persons should be preserved;
6. A report detailing the work of the investigators during their on-site visit should be kept and later disclosed;
7. Tests for gunshot residue and trace metal detection should be performed on the victims’ bodies and the police officers involved;
8. Evidence should be properly collected, handled, packaged, labelled, and placed in safekeeping to prevent contamination and loss of evidence.”

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<sup>21</sup> United Nations General Assembly ‘Code of Conduct for Law Enforcement Officials’ Res 34/169 (17 December 1979)

<sup>22</sup> Economic and Social Council ‘Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions’ resolution 1989/65 (24 May 1989)

In the event of an extrajudicial death, the victim's family has the right to know the truth, as stated by the United Nations High Commissioner for Human Rights during the Human Rights Commission's sixty-second session.<sup>23</sup> Paragraph 8 of a study on the right to the truth states that, while the right originated with enforced disappearances, it has steadily expanded to include extrajudicial killings. This is how the paragraph is written:

*“With the emergence of the practice of enforced disappearances in the 1970s, the concept of the right to the truth became the object of increasing attention from international and regional human rights bodies and special procedures mandate-holders. In particular, the ad hoc working group on human rights in Chile, the Working Group on Enforced or Involuntary Disappearances (WGEID), and the Inter-American Commission on Human Rights (IACHR) developed an important doctrine on this right with regard to the crime of enforced disappearances. These mechanisms initially based the legal source for this right upon articles 32 and 33 of the Additional Protocol to the Geneva Conventions, of 12 August 1949. Commentators have taken the same approach. However, although this right was initially referred to solely within the context of enforced disappearances, it has been gradually extended to other serious human rights violations, such as extrajudicial executions and torture. The Human Rights Committee has urged a State party to the International Covenant on Civil and Political Rights to guarantee that the victims of human rights violations know the truth with respect to the acts committed and know who the perpetrators of such acts were.”*

### ***Use of excessive force: An antithesis of the right of private defence***

The right of private defence is guaranteed to every individual under Section 96-100 of the Indian Penal Code, 1860. Any conduct carried out in the course of exercising private defence is exempt from criminal prosecution under Section 96.<sup>24</sup> According to Section 97,<sup>25</sup> this right can be used to protect one's own body and property, as well as the body and property of others. Section 99<sup>26</sup> warns against using excessive force, and Section 100<sup>27</sup> lists the different scenarios (grievous harm, kidnapping, rape, acid assault, etc.) in which killing someone in self-defence is justified. According to Section 102,<sup>28</sup> a

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<sup>23</sup> Office of the United Nations High Commissioner for Human Rights, Promotion and Protection of Human Rights: Study on the right to the truth, Sixty-second session, UNCHR, 62<sup>nd</sup> Sess, Item 17 of the provisional agenda, E/CN.4/2006/91.

<sup>24</sup> Indian Penal Code 1860, s 96

<sup>25</sup> Indian Penal Code 1860, s 97

<sup>26</sup> Indian Penal Code 1860, s 99

<sup>27</sup> Indian Penal Code 1860, s 100

<sup>28</sup> Indian Penal Code 1860, s 102

person's right to private defence begins as soon as they have a legitimate fear of harm and lasts for as long as they do.<sup>29</sup> In *Yogendra Morarji v. State of Gujarat*,<sup>30</sup> the Supreme Court laid down the principles of the right of self-defence of the body and held that the right of private defence is a defensive right and not a punitive or retributive right. When police officials commit extra-judicial killings, they take the law into their own hands and try to mete out retributive punishment to the victims for their crimes. This action of the police undermines the public's confidence in the legal system of the country and disrupts the very concept of the rule of law.

At this point, a difference must be made between the right to self-defence and the use of disproportionate force by police officers. The right of private defence gives the right to an individual to use force to protect himself and his/her property as well. However, this right forbids the use of disproportionate force or retribution. The Supreme Court in *V. Subramani v. State of Tamil Nadu*<sup>31</sup> said that in the guise of self-preservation, if assault against the original aggressor happens, it will negate the plea of private defence. In *Rohtash Kumar v. State of Haryana*<sup>32</sup> the Court cautioned against the use of retaliatory force even against a dreaded criminal and held that it is not the duty of the police to murder cold-blood even against a dreaded criminal. If the criminal launches a murderous

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<sup>29</sup> *Bihari Rai v. State of Bihar*, (2009) AIR 2009 SC 18

<sup>30</sup> *Yogendra Morarji v. State of Gujarat* (1980) AIR 1980 SC 660: 1980 Cr LJ 459:

“The principles as to the right of private defence of body are as follows –

- (a) there is no right of private defence against an act which is not in itself an offence under the Code;
- (b) the right commences as soon as a reasonable apprehension of danger to the body arises from the attempt or threat to commit some offence. Although the offence may not have been committed, it is co-terminus with the duration of such apprehension;
- (c) it is defensive and not a punitive or retributive right. Therefore, in no case more harm than is necessary to inflict in defence is permissible;
- (d) the right extends to killing of the actual or potential assailant when there is a reasonable and imminent apprehension of the crimes enumerated in the six clauses of section 100 of IPC”

<sup>31</sup> *V. Subramani v. State of Tamil Nadu* (2005) 10 SCC 358:

“Due weightage has to be given to, and hyper technical approach has to be avoided in considering what happens on the spur of the moment on the spot and keeping in view normal human reaction and conduct, where self-preservation is the paramount consideration. But, if the fact situation shows that in the guise of self-preservation, what really has been done is to assault the original aggressor, even after the cause of reasonable apprehension has disappeared, the plea of right of private defence can legitimately be negated. The court dealing with the plea has to weigh the material to conclude whether the plea is acceptable.”

<sup>32</sup> *Rohtash Kumar v. State of Haryana* (2013) 14 SCC 290:

“It also appears that he [the appellant] was declared absconder. But merely because a person is a dreaded criminal or a proclaimed offender, he cannot be killed in cold blood. The police must make an effort to arrest such accused. In a given case if a dreaded criminal launches a murderous attack on the police to prevent them from doing their duty, the police may have to retaliate and, in that retaliation, such a criminal may get killed. That could be a case of genuine encounter. But in the facts of this case, we are unable to draw such a conclusion.”

attack only then the police can retaliate but not in any other circumstance.

It is evident from the above that using excessive force or retaliatory force belongs in one basket and the right to private defence belongs in another. In *Extra Judicial Execution Victim Families Association (EEVFAM) & Anr. v. Union of India & Anr.*,<sup>33</sup> the court stated “while a victim of aggression has a right of private defence or self-defence (recognized by Sections 96 to 106 of the IPC) if that victim exceeds the right of private defence or self-defence by using excessive force or retaliatory measures, he then becomes an aggressor and commits a punishable offence.”

Section 46 of The Code of Criminal Procedure, 1976<sup>34</sup> also addresses a person's death at the hands of the police. According to Section 46(3) of the Code,<sup>35</sup> police officers are not required to be punished for killing someone who is accused of a crime for which the maximum penalty is a life sentence or the death penalty.

### ***The Crumbling Foundation of Rule of Law***

We Indians take pleasure in the fact that we live under a system of laws rather than one governed by the whims of a single individual or group. And this claim means that the government was founded in accordance with the rule of law. Professor A.V. Dicey described the Rule of Law as “*the rule of law means the absolute supremacy or predominance of the regular law as opposed to the influence of arbitrary power and excludes the existence of arbitrariness or even of wide discretionary authority on the part of the government.*”<sup>36</sup> Dicey formulated three principles to enforce the concept of the rule of law –

- a) a) Dicey maintained that the government lacks the discretion to guarantee that justice is carried out but by an established body of regulations. There is an opportunity for arbitrariness when there are no rules (supremacy of law)
- b) Every person should be treated equally by law (equality before law)

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<sup>33</sup> *Extra Judicial Execution Victim Families Association (EEVFAM) & Anr. v. Union of India & Anr* (2012) W.P. (Cri) No. 129/2012

<sup>34</sup> The Code of Criminal Procedure 1976, s 46

<sup>35</sup> The Code of Criminal Procedure 1976, s 46(3)

<sup>36</sup> A.V. Dicey, *The Law of the Constitution* (first published 1915, Oxford University Press 2013)

- c) c) People's rights should be based on norms, conventions, and court decisions, upholding the spirit of the rule of law (predominance of legal spirit)

The rule of law is the cornerstone of the Indian Constitution, and the Supreme Court ruled in *ADM, Jabalpur v. Shivakant Shukla*<sup>37</sup> that there is an “*obligation to act in accordance with rule of law ... is a central feature of our constitutional system and is a basic feature of the Constitution.*” In *Kesavananda Bharati v. State of Kerala*,<sup>38</sup> the Court also declared that the rule of law is an element of the basic structure of the Constitution that the Parliament cannot alter. However, the rule of law is severely compromised when police officers pull out their weapons and carry out extrajudicial killings. Extrajudicial executions undermine established legal procedures and erode public confidence in law enforcement. The police take over and act as both the judge and the jury, rather than allowing the judicial system to consider the evidence, hear the case's facts, and then decide whether or not the accused is guilty. The public's trust in the court system, which is supposed to uphold impartiality, due process, and fairness, tends to be undermined by the police's vigilante behaviour. Because the entire legal system was built to protect people and ensure that justice is done, these killings also set a dangerous precedent that threatened the very tenets of the rule of law.

### ***Conclusion***

*“Having said that we cannot ignore the fact that the country today faces challenges and threats from extremist elements operating from within and outside India. Those dealing with such elements have at times to pay a heavy price by sacrificing their lives in the discharge of their duties. The glory of the constitutional democracy that we have adopted, however, is that whatever be the challenges posed by such dark forces, the country’s commitment to the rule of law remains steadfast. Courts in this country have protected and would continue to protect the ideals of the rights of the citizen being inviolable except in accordance with the procedure established by law.”* – Former Chief Justice T.S. Thakur in *State of Maharashtra v. Saeed Sohail Sheikh*<sup>39</sup>

In a country where the rule of law governs, police abuses, whether inside or outside of jail, are

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<sup>37</sup> *ADM, Jabalpur v. Shivakant Shukla* (1976) 2 SCC 521: AIR 1976 SC 1207

<sup>38</sup> *Kesavananda Bharati v. State of Kerala* (1973) 4 SCC 225: AIR 1973 SC 1461

<sup>39</sup> *State of Maharashtra v. Saeed Sohail Sheikh* (2012) 13 SCC 192, [40]

abhorrent, regardless of whether they are carried out under the pretence of maintaining order or battling anti-national forces.<sup>40</sup> Under Article 21 of the Indian Constitution,<sup>41</sup> the victims of the crime, even though they may be dreaded criminals, are still Indian citizens and are entitled to all fundamental rights, including the right to life. In such cases, there is a duty of care and an even greater need for a thorough investigation. In response to the surge in these kinds of crimes, the prosecution, the police, and the judiciary must cooperate in order to guarantee that the kin of the deceased obtain justice and to uphold the rule of law in our country.

In order to effectively tackle the problem of fake encounters, it is imperative to strengthen accountability systems, augment transparency, and guarantee that those accountable for any misconduct are held accountable for their actions. Restoring trust in law enforcement and addressing the underlying causes of fake encounters require addressing police corruption and impunity. The State governments must make certain that the directives from the Supreme Court and the National Human Rights Commission are adhered to strictly, and that a comprehensive and impartial inquiry is carried out following each reported extrajudicial killing. Ensuring the rule of law is respected and public trust in our nation's legal system is upheld is the responsibility of the Government and the Courts. Lord Hewart CJ in the case of *R v. Sussex Justices, ex parte McCarthy*<sup>42</sup> had rightly said that “***not only must justice be done; it must also be seen to be done.***”

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<sup>40</sup> *State of Maharashtra v. Saeed Sohail Sheikh* (2012) 13 SCC 192

<sup>41</sup> Constitution of India 1950, article 21

<sup>42</sup> *R v. Sussex Justices, ex parte McCarthy* (1924) 1 KB 256