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**ENCOUNTER POLITICS: A SERIES VIOLATION OF HUMAN RIGHTS**

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**Abstract**

*Extrajudicial killings in India are generally termed as the Execution of terrorist and cold-hearted criminals by the police or armed force without any judicial sanction. Generally, these killings are termed as “Police Encounters”. The police or armed forces are claiming that they are killing these criminals as an act of self-defense to protect themselves from the attacks of criminals. There are certain instances where police use Their self-defense right as a shield to kill the accused ones and other instances where they kill innocent ones for political and monetary benefit. Police are not made accountable for these crimes. This paper is dealing with the politics behind these entire atrocities. Encounters became a great concern for the judicial system in the country as it deprives the accused of one's right to have a free and fair trial. The right to a free and fair trial is said to be the sine qua non of Article 21 which guarantees the Right to life and personal liberty as a fundamental right under the Indian Constitution. Fake encounters conducted by police for serving “instant justice” are in violation of Human Rights and they cannot be entertained because the same will pose a threat to the Rule of Law and judiciary.*

**I. INTRODUCTION**

The constitution of India ensures that every citizen of India is entitled to exercise certain rights. These rights are incorporated in part three of the Indian constitution and these rights are fundamental rights of every Indian citizen. Any violation of these rights can be challenged in the high court under article 226 and the honorable supreme court under article 32 of the Indian constitution. Extrajudicial killing is a mechanism used by the state against a citizen without the

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sanction of the judiciary. The state will execute this mechanism through the executive organs namely the police. Extrajudicial killing is generally termed as Encounter Attack in India. There are no explicit provisions to execute an alleged criminal but there are some provisions in the Indian Penal Code 1860, and the code of criminal Procedure, 1973 which allows the police to use force against the alleged criminal. The police will use this provision as a shield from the eye of the law. Police will claim that they shoot dead these criminals in order to save themselves from the retaliation from the alleged criminals. They will also claim in most of the cases that they were exercising their right of private defence. Whether these claims are genuine? Whether these are fake encounters? Whether there is any politics behind these? Whether these encounters are challenging the judiciary? This paper is dealing with the aforesaid questions and tries to unravel the truth behind these encounter attacks.

These are nothing but staged encounters where the police will execute the alleged criminals under the order of the state or superior authority. There will be clear motivation for these fake encounters and these fake encounters are committed by the police in order to not present the alleged criminals before the judiciary. The right to a free and fair trial is said to be the sine qua non of Article 21 which guarantees the Right to life and personal liberty as a fundamental right under the Indian Constitution.

“fake encounters by the police are nothing but cold-blooded murders, and those committing them must be given death sentence, treating them in the category of ‘rarest of rare cases and Trigger happy policemen who think they can kill people in the name of ‘encounter’ and get away with it should know that the gallows await them.” Said the honorable supreme court. As of now, there is no accountability to the police who are committing this murder. No provision in the law makes the police accountable for their wrongful action apart from this on the other hand there are circumstances that the state will give impunity to these police officers. Fake encounters which are sponsored by the state are a pure violation of the basic human rights of a citizen and it is a major threat to the Rule of Law. These violations of human rights are gradually affecting the democratic nature of the country. The government is using this Encounter mechanism in order to curb the crimes in the state. For that state like UP are practicing Zero tolerance policy<sup>2</sup> and executing criminals under Encounter attack.<sup>3</sup>

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<sup>2</sup>Maulshreeseth, ‘UP govt’s zero-tolerance policy towards crime showed positive results in last 4 years: CM Yogi’ *The Indian Express* (Lucknow, 20 March 2021) < <https://indianexpress.com/article/cities/lucknow/yogi-adityanath-up-govts-zero-tolerance-policy-7235642/>> accessed 29 January 2022

<sup>3</sup>Ayaskant Das, ‘Criminals will be jailed or killed in Encounters: CM Yogi Adityanath’ *The Times Of India* (Ghaziabad, 19 November 2017) < <https://timesofindia.indiatimes.com/city/ghaziabad/criminals-will-be-jailed-or-killed-in-encounters-cm-yogi->

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India as a democratic country is following a reformatory theory of punishment but the state without any authority taking the law in hand and executing the alleged criminals, showing a retributive theory of punishment which derived in Code of Hammurabi's *lex talionis*, which stands for 'an eye for an eye and a tooth for a tooth.

## II. EXTRA-JUDICIAL KILLINGS AND ITS ROOT IN INDIA

Extrajudicial killings are an event where the government/state decides to execute their citizens with the help of police or any other law enforcement agents without any sanction from the judicial system. Generally, it is termed as a police encounter In India. The encounter between the police and the criminals is generally termed as encounter attack. Police will shoot dead the suspected criminals under controversial circumstances, which may even include their personal gains.

The culture of encounter attack started in the early 1970s when the Naxalites-Maoist insurgency began. The initial stages were regarding the land reforms but later on, it turned into a revolt against the state. The government of eastern states implemented these encounter mechanisms to tackle the situation.<sup>4</sup> the mechanism was again implemented in the mid of 1980s. The Punjab insurgency which began in 1980s was an armed attack by the Sikh militant nationalist called the Khalistan movement.<sup>5</sup> This Khalistan movement created a huge tension between the rural Sikh and the government. To make an end to this movement the government implemented the encounter mechanism with the help of the Indian army.<sup>6</sup> Operation Bluestar, operation wood rose and operation black thunder are the codenames given for these encounter attacks.

In 1924, the first occurrence of an encounter was documented. Alluri Sitarama Raju, a leader of the 1922 Rampa rebellion, a tribal insurrection against British forces in Visakhapatnam, was killed. During the Telangana peasant uprising, moreover 3,000 persons were killed in clashes between 1946 and 1951.<sup>7</sup> In the most recent encounter death, Cyberabad police shot and killed

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adityanath/articleshow/61707953.cms?utm\_source=twitter.com&utm\_medium=social&utm\_campaign=TOIDesktop> accessed 29 January 2022

<sup>4</sup>Anup Kumar Pahari, *The Maoist Insurgency in Nepal: Revolution in the Twenty-first Century* (Routledge, 2010)

<sup>5</sup>Jayanta Kumar Ray, *Aspects of India's International Relations, 1700 to 2000: South Asia and the World* (Pearson Longman, 2007)

<sup>6</sup>Asit jolly, 'The Man Who Saw Bhindranwale Dead: Col Gurinder Singh Ghuman' *India Today* (Punjab, 15 June 2012) <<https://www.indiatoday.in/magazine/the-big-story/story/20120625-jarnail-singh-bhindranwale-col-ghuman-758812-2012-06-15>> accessed 31 January 2022

<sup>7</sup>Mithun MK, 'From 1924, a look at the history of encounter killings in the two Telugu states' *The News Minute* (Telangana, 9 December 2019) <<https://www.thenewsminute.com/article/1924-look-history-encounter-killings-two-telugu-states-113734>> accessed 31 January 2022

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all four suspects in the gang rape and murder of a Hyderabad veterinarian on December 6. The four accused, who were truck drivers and cleaners by trade, allegedly ganged up and pelted stones at the ten trained police officers, according to the police. They then snatched two firearms from the officers and began firing at them. All four of them were slain in the retaliation fire. The alleged altercation occurred at 3 a.m. when the accused was brought to the station for evidence collection. The four accused were shot dead in an agricultural field barely 500 meters from where they allegedly burnt the veterinarian's body. The reported crossfire took place between 5.45 am and 6.15 am. In the police press conference that followed, questions as to how two of the four accused managed to get hold of the pistols in the presence of 10 armed police officers went unasked. There was no reply from the police regarding the logical question from the reporter.<sup>8</sup> The police of Nizam oh Hyderabad passed on some traditions of police execution to the state of Andhra Pradesh at Independence in 1947. During the Telangana movement, the State government used encounter killing as the explanation for killing more than 3000 people. From the 1960s, the culture of using encounter killings has developed into a tolerated practice in Telangana.<sup>9</sup>

The killing of ManoharSurve, also known as Manyasurve, in Wadala, north-central Mumbai on January 11, 1982, was the first record of killing by Mumbai police. Manyasurve, who was involved in dozens of murders and blackmail cases, was detained in Jerawada prison. He escaped from prison on November 14, 1979, and returned to the city of Mumbai. Manyasurve is said to have been killed because he was involved in the murder of Don Dawood's brother. The number of face-to-face murders increased in the late 1980s and continued to increase after the bombing in Mumbai on March 12, 1993. Between 1982 and 2004, about 622 suspects were killed in a police clash. The late K.P. Medhekar was a Mumbai police officer at the time. Meanwhile, the story of the encounter continued. Police officers Raja Tambat and IsaqueBagwan acted as conference experts..<sup>10</sup> At the time, the encounter policy was not only unquestioned, but it was also heartily embraced as a critical step toward breaking the back of the underworld. These events were witnessed by a new class of police officers hired in 1983. Officers like Vijay Salaskar, Pradeep Sharma, PrafulBhosle, RavindraAngre, and VinayakSaude were part of the '83 batch, which rose to prominence in the mid- to late 1990s. They were to be known as "encounter specialists"

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<sup>8</sup>Mithun MK, 'From 1924, a look at the history of encounter killings in the two Telugu states' *The News Minute* (Telengana,9 December 2019) <<https://www.thenewsminute.com/article/1924-look-history-encounter-killings-two-telugu-states-113734>> accessed 31 January 2022

<sup>9</sup> N Venugopal, 'fake encounters: Story from Andhra Pradesh' (2007) 42(41) *Economic and Political weekly* <<https://www.jstor.org/stable/40276541>>

<sup>10</sup>RajuVernekar, 'The Rise and Fall Of "Encounter Specialist" Maharashtra Police Officer SachinVaze' *India Tomorrow* (Mumbai, 25 March 2021) accessed 2 February 2022

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for the most part.<sup>11</sup>

### III. SHIELD OF LAW

There is no explicit statute or provision under Indian law which authorizes the police officers to encounter the citizens but there are some provisions that enable the police officers to use force against the citizen. The police officers use this provision as a shield protecting themselves from the eye of the law. For that, they claim themselves that they had shot dead the criminals in order to save themselves from the attack of alleged criminals which is in their exercise of private defense. The law related to the right of private defense is explained from sections 96 to 106 of the Indian Penal Code. Section 100 of the Indian Penal Code explains about when one person can exercise his/her right of private defense to cause the death of another person.

#### A. *Section 100 of Indian Penal Code, 1860*

When the right of private defense of the body extends to causing death. The right of private defense of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant, if the offense which occasions the exercise of the right be of any of the descriptions hereinafter enumerated, namely:

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- 1 — Such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault;
  - 2 — Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault;
  - 3 — An assault with the intention of committing rape;
  - 4 — An assault with the intention of gratifying unnatural lust;
  - 5 — An assault with the intention of kidnapping or abducting;
  - 6 — An assault with the intention of wrongfully confining a person, under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release.<sup>12</sup>

Here, the police officers will take the defense of first and second instance that they were apprehending either their death or occurring themselves some grievous hurt and for tackling this

<sup>11</sup>Debasishpanigrahi, 'Rise of the '83 'encounter' batch' *Hindustan Times* (Mumbai, 24 may2012) <<https://www.hindustantimes.com/mumbai/rise-of-the-83-encounter-batch/story-6wXcPUxs2hXCeCNDmCVgWK.html>> accessed 2 February 2022

<sup>12</sup> Indian Penal Code 1860, s 100

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and saving themselves from the attack they were exercising their right of private defense and causing the death of alleged criminals. Thereafter the police officers will defend their actions by claiming and coupling two more sections from different codes to defend themselves from the offense of murder. Section 46 of the criminal procedure code, 1973 and Section 300 of the Indian Penal code, 1860 are those two sections claimed by the police for defending their actions as a lawful act.

*B. Section 46 in The Code Of Criminal Procedure, 1973*

Arrest how made.

1. In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action.
2. If such person forcibly resists the endeavour to arrest him, or attempts to evade the arrest, such police officer or other person may use all means necessary to effect the arrest.
3. Nothing in this section gives a right to cause the death of a person who is not accused of an offence punishable with death or with imprisonment for life.<sup>13</sup>

Here, the police officer who executed the alleged criminal will claim that they were in honest exercising of their right to arrest the evading alleged criminals and in the meantime the criminals were charging them with firing of gun or another murderous act.

*C. Section 300 of the Indian penal Code, 1860*

Exception 3, culpable homicide is not murder if the offender, being a public servant acting for the advancement of public justice exceeds the power given to him by law and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the discharge of his duty and without ill-will towards the person whose death is caused.<sup>14</sup>

The police officer will claim section 300 of the Indian penal code and defend himself/herself that he /she was doing his/her duty in good faith which was given by the law and he/she believes that causing the death is lawful and necessary for discharging their duty.

#### **IV. VIOLATION OF HUMAN RIGHTS AND RULE OF LAW**

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<sup>13</sup> The code of criminal procedure 1973, s 46

<sup>14</sup> Indian penal Code 1860, s 300

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“Human rights are the basic, inherent, immutable and inalienable rights to which a person is entitled simply by virtue of his being born a human. They are such rights which are to be made available as a matter of right. The Constitution and legislations of a civilised country recognise them since they are so quintessentially part of every human being. That is why every democratic country committed to the rule of law put into force mechanisms for their enforcement and protection.”<sup>15</sup>

Article 3 of Universal Declaration of Human Rights and Article 6 of ICCPR explains and ensures that ‘Everyone has the right to life, liberty and the security of person, every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life. The Right to Life is incorporated in Article 21 of the Indian Constitution. The deprivation of life and liberty in any form is a violation of Human Rights. Article 21 of the Constitution of India enshrines the right to life: “No person shall be deprived of his life or personal liberty except according to procedure established by law”.<sup>16</sup> The Honourable supreme court held that “There is no doubt that the rule of law has been placed on a pedestal ever since the time of Aristotle. More recently Dicey has also expounded on the constituents of the rule of law and it is now expected that all modern democratic jurisdictions accept the rule of law as the guiding light and a shield available to the people against arbitrary executive action. As far as we are concerned, the rule of law has also been accepted as a part of the basic structure of our constitutional jurisprudence. Undoubtedly, the protection and preservation of human rights is one of the most important aspects of the rule of law.”<sup>17</sup>

The Honourable Supreme Court has further clarified the argument in the case People's Union For Civil Liberties vs Union Of India And Another that there can be no exceptions to Article 21 and held that “Where a citizen has been deprived of his life, or liberty, otherwise than in accordance with the procedure prescribed by law, it is no answer to say that the said deprivation was brought about while the officials of the State were acting in discharge of the sovereign functions of the State.”. the honourable supreme court in addition to this held that "The fundamental rights are sacrosanct. They have been variously described as basis, inalienable and indefeasible. The founding-fathers incorporated the exceptions in the articles themselves - wherever they were found advisable, or appropriate. No such exception has been incorporated in Article 21, and we are not prepared to read the archaic concept of immunity of sovereign functions, incorporated in Article 300(1), as an exception to Article 21. True it is that the

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<sup>15</sup> Ram Deo Chauhan v. Bani Kanta Das, (2010) 14 SCC 209

<sup>16</sup> The Constitution of India 1950, art 21

<sup>17</sup> Extra-Judicial Execution Victim Families Assn. v. Union of India, (2013) 2 SCC 493

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Constitution must be read as an integrated whole; but, since the right guaranteed by Article 21 is too fundamental and basis to admit of any compromise, we are not prepared to read any exception into it by a process of interpretation. We must presume that, if the founding-fathers intended to provide any exception, they would have said so specifically in Part III itself<sup>18</sup>. The Supreme Court has further denounced extrajudicial killings as having no place in a legal system governed by the rule of law. It describes the impunity enjoyed by security forces when they commit acts inconsistent with the rule of law.<sup>19</sup>

The state has a responsibility to ensure that every citizen of the country receives a free and fair inquiry and trial. In that unrestricted access to the form of justice is linked to the core right to equality, which is viewed as a key element of our Constitution, the preamble and the constitution are obligatory rather than facultative. As a result, such a right is both a constitutional and a fundamental right. Depending on the details of the case, such a right cannot be limited to just the accused but also to the victim. As a result, such a right is both a constitutional and a human right. Any procedure that obstructs a party's right to a fair trial is a breach of Article 14 of the Constitution.<sup>20</sup> But The Reality is that the police will encounter these alleged criminals and will not allow the judicial system to look over the respected case, the police will take the law in their hand and execute the alleged criminals and thereby violates the alleged criminal's Fundamental right to have a free and fair trial which is said to be the sine qua non of Article 21 of Indian constitution. On December 18, 1997, the Supreme Court delivered a landmark judgment aimed at insulating the Central Bureau of Investigation and the Directorate of Enforcement from outside influences so that they could function efficiently and impartially, to serve the rule of law.<sup>21</sup> The Judgment also declared null and void, the Single Directive, which required the CBI to seek permission from the government before undertaking any inquiry or investigation against senior civil servants of the rank of Joint Secretary and above. However, the government has succeeded in diluting the effect of this judgment by passing a law, which has brought the Single Directive back and put it on the statute book.<sup>22</sup>

## V. LACK OF ACCOUNTABILITY

<sup>18</sup> People's Union for Civil Liberties v. Union of India, (1997) 3 SCC 433

<sup>19</sup>Jaspal Singh Gosain v. CBI, 2018 SCC OnLine Del 6988

<sup>20</sup>SathyavaniPonrani v. Samuel Raj, 2010 SCC OnLine Mad 3758

<sup>21</sup>Vineetnarain v. Union of India (1998) 1 SCC 226

<sup>22</sup>G P joshi, 'Police Accountability in India, Commonwealth Human Rights Initiative' (29 April 2005), < [https://gpjoshionpolice.blogspot.com/2005/04/police-accountability\\_29.html](https://gpjoshionpolice.blogspot.com/2005/04/police-accountability_29.html) > accessed 7 February 2022

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In most of the fake encounter cases, police officers who were participated in the encounters used to save themselves from any legal conviction by pleading the right of self-defense and other

provisions like section 46 of the code of criminal procedure,1973. Apart from the guidelines of the supreme court and guidelines of NHRC, there is no explicit law for convicting these police officers who are responsible for the murder of alleged criminals. The police officers who are responsible for this cold-blooded murder are not convicted under our Indian law instead they are worshipped and glorified as a hero in our country. The Delhi High court held that there are two barriers in prosecuting those involved in extrajudicial killings including fake encounters are 'impunity' and 'immunity'. When the law enforcement agencies refuse to register a complaint, or neglect to register and prosecute a case of extra-judicial killing, the State is seen as clothing the offender with impunity. 'Immunity' represents the statutory or legal protection that is available to law enforcers like policemen who cannot be prosecuted without the sanction of the executive government. When such sanction to prosecute is refused, the victims cannot hope to bring the guilty officials to criminal justice.<sup>23</sup>

A report by the YHRD regarding the 17 Encounter death in Uttar Pradesh unravels the mischievous police techniques used to get away from accountability. The encounters Spread across six districts in western UP and these killings took place between March 2017 and March 2018.

"Agar apradhkareng to thokdiyejayenge" (if you commit a crime, you will be knocked off), This was the first announcement given by the Yogi Adithyanath after becoming the chief minister of UP in 2017. He also informed a journalist in January that more than 3000 encounters had taken place in his state in which 69 criminals were gunned down, 838 sustained injuries, and 7,043 were arrested. And as the government completed two years in office, as many as 11,981 criminals got their bails canceled and surrendered in court.<sup>24</sup>

The magisterial investigations into the 74 cases of police counter-attacks in Uttar Pradesh were finished as of July 2020. All of the cops involved in the encounter attacks received a clean chit from the police. In addition, the police had filed a closure report to end the investigation into 61 instances, which the courts had accepted. The victim, i.e., the family of the individual killed by police, was never given the notice. The Magistrates issued notice to the relevant police officer from the "encounter" team on whose statement the FIR was recorded, not to the victim's family

<sup>23</sup>Jaspal Singh Gosain v. CBI, 2018 SCC OnLine Del 6988

<sup>24</sup> IANS, 'Why Yogi is the 'encounter man' in UP?' *The New Indian Express* (lucknow, 22 July 2019) accessed 8 February 2022

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because the deceased persons were designated as "accused" and the police were named as "victims" in the FIR. The complainant in the FIR was officially this police officer. This officer wrote to the Magistrate in these cases, noting that he had "no problem" with the Closure Reports. The Magistrate took notice of this "no objection letter" and accepted the police's Closure Report, putting a dead end to the investigation into the fatality caused by the police shooting.

#### *A. Non-Registration of FIR against Police*

the 17 cases studied in the report show that none of the police officers who were involved in the encounter attack were registered by a FIR. The absence of an immediate FIR after the incident will help the police to create a version of their own, tamper with the evidence, and intimidate any public witness. Usually, encounter attacks are conducted at night and early morning to avoid public attention. The investigation into the role of the police team is not set in motion in the absence of a FIR against them. The non-registration of a FIR against the police pushes the family of the victim outside the system, unable to access any information or documents. It takes away their right to witness protection or compensation from the state.<sup>25</sup>

#### *B. FIR Filed against the Deceased*

None of the police officers were registered by a FIR instead all the FIRs were registered against the deceased ones. Two to three fir were registered against the same deceased person in a single incident of extrajudicial killing. A total of 45 FIRs were registered against the deceased ones and their alleged accomplices.

It is written in all the 17 FIRs, that the police had fired in self-defense in response to the constant firing from the alleged criminals. In all of the FIRs, it is stated that the police used "indomitable daring and valor" in firing at the criminals while using the bare minimum of force. According to all 17 FIRs, while one criminal is hurt as a result of a police shooting, the other criminals managed to flee. Furthermore, each of the escaping accomplices leaves behind their vehicles and, in many cases, their guns. The absence of any witnesses to the alleged shootout is also a repeating theme in 16 of the 17 FIRs. Since the crime occurred late at night or early in the morning, the police have claimed that they were unable to locate any public witnesses. The

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<sup>25</sup>ManglaVerma, Vipul Kumar and RatnaAppnender, 'Extinguishing Law and Life - Police Killings and Cover Up in Uttar Pradesh' (YHRD, 9 october 2021) < <https://yhrd.in/documents/wp-content/uploads/2021/10/up-final-export.pdf> > accessed 8 February 2022

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police made every attempt to catch the offenders, according to all of the FIRs. However, the crooks attacked the police team, forcing the officers to retaliate in self-defense. These details serve a dual purpose: first, to demonstrate that the use of lethal force was justified in self-defense, and second, to bring the shootout within the scope of Section 46 of the Code of Criminal Procedure, 1973, which allows the use of lethal force up to the point of death while attempting to arrest an accused person.

The accomplice who survives the police shootout serves numerous roles as well. It enables the police to maintain an FIR against an "unknown accused" while yet claiming that the force employed was not "extreme" (as other alleged criminals managed to get away). It also instills public anxiety that criminals are free to roam the state, allowing them to justify their own conduct. Multiple FIRs have been filed by UP police for a single extrajudicial death. The cops have filed three FIRs in many of the 17 cases. One for the attempted assassination of police officers, as well as other IPC offenses against the slain victim and the unknown fugitive. The same people are the subject of a second FIR for carrying unregistered arms/guns in violation of the Arms Act of 1959. Frequently, a third FIR is filed for theft or concealment of stolen property, or some other crime that the murdered victim and the unknown escapee are accused of committing before the police encounter attack.<sup>26</sup>

The honorable supreme court held that it is found odd that a FIR under section 307 of IPC for an attempt to murder and other offenses was registered against the four people killed in a police shootout in Hyderabad. The court held that "it is obvious that no prosecution is contemplated against dead persons who can neither be tried nor convicted".<sup>27</sup>

## VI. NATIONAL HUMAN RIGHT COMMISSION: A TOOTHLESS TIGER

NHRC the So-Called savior of human rights in our country is not an actual savior in real life it has its flaws in its function. These flaws have their own reasons, the reasons are the barriers for NHRC in achieving its objectives. These barriers are found from the very first formation of the committee to the latest committee. In order to achieve the objectives and thereby function the commission to the fullest extent then These barriers must be struck downed.

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<sup>26</sup>ManglaVerma, Vipul Kumar and RatnaAppnender, 'Extinguishing Law and Life - Police Killings and Cover Up in Uttar Pradesh' (YHRD, 9 october 2021) < <https://yhrd.in/documents/wp-content/uploads/2021/10/up-final-export.pdf> > accessed 8 February 2022

<sup>27</sup> G.S. Mani v. Union of India, 2019 SCC OnLine SC 2079

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National Human Rights Commission (NHRC) former chairman Justice H L Dattu said that the rights watchdog needed some teeth to enforce its orders on remedial measures in cases relating to violations.

"NHRC is a toothless tiger. We painstakingly investigate human rights violation cases, sometimes in remote areas, with our limited resources. The evidence collected is put to forensic judicial adjudication by its chairman and members, who are former judges. But at the end, when NHRC arrives at a finding, it can only recommend remedial measures or direct the state concerned to pay compensation," in addition he said "We keep writing letters to the authorities concerned to implement our recommendations. But it is the sweet will of the authorities whether or not to implement NHRC recommendations. It is for Parliament to decide whether to confer NHRC with some kind of contempt powers to make authorities implement its recommendations,".<sup>28</sup>

A. *The major barriers*

a) *Government Influence in the selection committee and Appointment of members*

The Selection Committee consists of the Prime Minister. The presence of the Prime Minister will have political influence on the selection committee. He/she will try to appoint the members who satisfy the needs of his political party and he will appoint the members who may be always loyal to the state and abstain from accusing the state in any case of human rights violation by the state. There is no transparency in the appointment of a member. The manner and the procedure in which the members of the selection committee will appoint the members is not prescribed and hence it is arbitrary.

When it comes to the National Human Rights Commission's functioning, the most contentious issue has been the commission's composition and appointment system. Because of its approach of promoting highly successful retired members of the judiciary and government officials, the commission's claimed purpose of becoming the guardian of humanity has come under investigation. The exclusion of any activists or jurists who have consistently battled for the protection of human rights on a national and international level has sparked outrage on both domestic and international platforms. According to Paris Principle<sup>29</sup> NHRI committee should consist the members from the following fields:

<sup>28</sup>DhanajayMahapatra, 'NHRC a Toothless Tiger: Panel chief' *The Times Of India* (New Delhi, 2 June 2016), <<https://timesofindia.indiatimes.com/india/NHRC-a-toothless-tiger-Panel-chief/articleshow/52544350.cms>> accessed 9 February 2022

<sup>29</sup> Paris principles

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1. Non-governmental organizations responsible for human rights and efforts to combat racial discrimination, trade unions, concerned social and professional organizations, for example, associations of lawyers, doctors, journalists and eminent scientists
2. Trends in philosophical or religious thoughts.
3. Universities or qualified experts.
4. Members of Parliament
5. Government departments (if these are included their representatives should participate in the deliberations only in an advisory capacity).

It is important to emphasize, however, that the composition of India's NHRI is clearly in violation of the Paris Principles. The committee must be chaired by a Chief Justice or Judge of India or a judge, according to section 3(2) of the protection of human rights (Amendment) Act 2019. One member of a six-person committee must be or have been a Supreme Court judge. One of the members must be or have previously served as Chief Justice of the High Court. Finally, three members will be selected from among those with knowledge of or practical experience in human rights issues, one of whom must be a woman. Aside from that, members of the National Commission for Minorities, National Commission for Scheduled Tribes, National Commission for Scheduled Castes, and National Commission for Women shall be termed, members. But such representation as provided by the statute is not in accordance with Paris Principles and the sad reality is that as of now there are only five members in the committee in which three members are from the legal fraternity and in remaining two members, one member is from the intelligence bureau and the other member is from Indian foreign service. In 2011, GANHRI deferred India's application for 'A' accreditation, based on the report and recommendation of SCA, mostly due to non-compliance with the Paris Principles for the composition and selection of NHRI members. Some members are deemed inert, there is no independent cadre of jurists and academicians, there is no criterion for the appointment of judges, and there is no relationship with other human rights stakeholders. The commission was re-accredited in 2018, although the statute continues to be in violation of Paris Principle restrictions.

b) *Absence of power to address issues against paramilitary forces*

The military forces have exceptional protection from any complaint brought against them under

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Section 19 of the Protection of National Human Rights Act. It states that the Commission may seek a report from the Central Government on its own initiative or in response to a complaint and that upon receipt of the report from the Central Government, the Commission may either not proceed with the complaint or, in either case, make recommendations to that Government. Within three months, or as long as the Commission allows, the government must tell the Commission of the actions it has taken in response to the recommendations. The Commission's report, as well as its recommendations to the Central Government and the actions taken by the governments, may be published. To put it another way, without a report from the center, the NHRC can only begin an investigation once the Central government recommends it, and till that report is submitted to the commission, the commission is not allowed to summon any witnesses. The situation of State commissions, on the other hand, are not permitted to request a report from the Central Government, therefore depriving them of the authority to investigate human rights violations committed by armed forces.

c) *Absence of Power to implement its recommendations*

The Commission's mandate is to assess the constitutional guarantees and existing laws having a human rights component and to provide recommendations for revisions and actions to ensure their effective implementation. Although the Human Rights Act does not directly grant the Commission the authority to design new laws, the powers placed in the Commission imply this capacity. The NHRC and other government-created tribunals are no more pure than the politics that gave birth to them. They have a striking appearance but are deviously engineered to be devoid of critical powers—even if they have a vast mandate. Due to its inability to provide any practical redress to the offended party, the National Human Rights Commission has been dubbed "India's tickling illusion" by Soli Sorabjee, the former Attorney-General of India. The NHRC's overall position is that its communications and guidelines should be implemented, as well as the directives passed by the commission and there must be serious consideration to be given to the recommendations made by the NHRC for the efficient functioning of the commission.

The Human Rights Act does not expressly bind the Commission's recommendations to the concerned government or authority. It does, however, set a deadline (one month) for the government or authority to answer to the Commission regarding the actions it has taken in response to the Commission's recommendations. On the one hand, Section 2(d) of the Protection of Human Rights Act, 1993 defines these rights as enforceable by a court of law, and

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Section 13(5) provides that every proceeding before the Commission shall be deemed to be a judicial proceeding, and the Commission has also been equipped with the powers of a Civil Court while enquiring a complaint, as per Section 13(1), but when it is concluded that human rights have been violated, and remedial measures should be taken, the powers of the Commission as per Section 18(c) of the Protection of Human Rights Act, 1993<sup>30</sup> are confined to only suggest recommendations to the government. The government are at their liberty to accept it or not moreover it's left to the ambit of their sweet will whether to enforce the recommendation or not

d) *Shortage of fund and Staff*

The Consolidated Fund of India provides funding to the National Human Rights Commission. "The Central Government shall, after due appropriation made by Parliament by law, pay to the Commission by way of grants such sums of money as the Central Government may think fit for being utilized for the purposes of the Act," according to the Protection of Human Rights Act 1993, which bestows powers on the Commission and governs its functioning.

The National Human Rights Commission (NHRC), which embodies the country's interest for human rights protection and promotion, is fighting alone to defend its own rights. The NHRC has full functional autonomy and its own investigation team to investigate complaints of human rights abuses because it is a statutory entity. However, in this scenario, it can only be a helpless bystander as the government restricts its financial independence. According to reliable sources, the NHRC is facing challenges. "From an allocation of Rs.24 crore, it has gone down to Rs.18 crore for 2010-11," the sources said. Allocation for the NHRC is approved by an expenditure committee, which is headed by the Commission's Chairperson and includes the Secretary (Expenditure). Sources said that though the panel recommended an allocation of Rs.24.10 crore for 2010-11, the government slashed it to Rs.18 crore.<sup>31</sup>

According to the Paris principle<sup>32</sup>, every NHRI should have an adequate infrastructure that will help the institution to function inefficiently and should have an adequate resource that includes sufficient staffing and sufficient fund. Only if these conditions or demands are met, then only the commission/institution can effectively and efficiently function and deliver justice to the

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<sup>30</sup> Protection of Human Rights Act 1993

<sup>31</sup> Vinaykumar, 'Autonomous NHRC has no say over funds allocation' *The Hindu* (New Delhi, 20 June 2010) <<https://www.thehindu.com/news/national/Autonomous-NHRC-has-no-say-over-funds-allocation/article16259698.ece>> accessed 10 February 2022

<sup>32</sup> Paris principles

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victims. The proper funding and staffing will help the commission to become independent from the government so that the commission can function as its own and without any influence from the government.

“the NHRC receives a very large number of complaints on a daily basis and quite frequently as many as 450 complaints are received in one day. The NHRC has been requesting an adequate number of trained staff but, instead of additional staff being provided, the staff strength is depleting. This has resulted in overburdening the existing staff. Asserted by the commission in a landmark case *Extra Judicial Execution Victim families Assnvs Union Of India*, and in reply to this honorable supreme court held that “Considering that such a high powered body has brought out its difficulties through affidavits and written submissions filed in this Court, we have no doubt that it has been most unfortunately reduced to a toothless tiger. We are of the clear opinion that any request made by the NHRC in this regard must be expeditiously and favorably respected and considered by the Union of India otherwise it would become impossible for the NHRC to function effectively and would also invite avoidable criticism regarding respect for human rights in our country. We direct the Union of India to take note of the concerns of the NHRC and remedy them at the earliest and with a positive outlook”.<sup>33</sup>

e) No Case against Private Parties

The commission has no authority to move legally against the private parties who are engaged in any wrongful act and which are violative of Human rights. According to the Protection of Human Rights Act, 1993 there is no provision as of now to move legally against the private parties.

The former chairman Justice HL Dattu said that “ the Act does not categorically empower the NHRC to act when human rights violation through private parties take place. A private company had acquired a large tract of land in Odisha but had not taken steps to rehabilitate or compensate the erstwhile landowners. NHRC had stepped in and directed the private company to do the needful. But the company moved the High Court and NHRCs direction were stayed by the high court on the ground that the NHRC could not have taken up the case as there was no involvement of official machinery in the alleged human rights violation.” He said (justice HL Dattu)<sup>34</sup>

<sup>33</sup> Extra-Judicial Execution Victim Families Assn. v. Union of India, (2013) 2 SCC 493

<sup>34</sup>DhanajayMahapatra, ‘NHRC a Toothless Tiger: Panel chief’ *The Times Of India* (New Delhi, 2 June 2016), <<https://timesofindia.indiatimes.com/india/NHRC-a-toothless-tiger-Panel-chief/articleshow/52544350.cms>> accessed 11 February 2022

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## VII. MOTIVATION FOR FAKE ENCOUNTERS

criminals in the state will “either be sent to jail or killed in police encounters”.<sup>35</sup> Said Yogi AdityaNath, Chief Minister of UP.

Encounters are not so suddenly and unpredictably happening in our country as the police claim. There are strong motivations behind these fake encounters. The political pressure, mistrust in the judiciary, superior orders, government policy, instant justice are those reasons for the fake encounters. The states like UP which is practicing ‘Zero Tolerance Policy’ are endorsing the legal right to kill the alleged criminals so that they can curb the crime in the state.<sup>36</sup> We now have a politicised and politically polarised police force. Because it's been reduced to a pawn in the hands of its masters. In exchange, the cops receive political favours, which have become critical to their existence.

Most of the time the staged encounters are from the orders of superior authority and the state. The state will have a misconception about the authority to punish the criminals in their own capacity and due to this authority, the state will endorse the police the right to execute the criminals. But the truth is that the state has got no authority to punish the criminals and the duty of the police to arrest the criminals and present them before the judiciary. There are instances in the police officers encounter criminals in order to serve instant justice.<sup>37</sup> The public cry for justice is the reason for instant justice served by the police. In the case of instant justice, the dreaded criminals are killed by the police in staged encounters due to the pressure from the public to the state government. The alleged criminals are whether innocent or not the state has got no power to punish and if so, the state is doing then the same is against the Rule of Law and purely unconstitutional.

“I want performance results. I want you to take a vow that you will create a dhamaka (explosion) in the state. If noted criminals can be liquidated in encounters, do it. If you take the life of one person who has taken the lives of 10 others, then people will praise you. And I am

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<sup>35</sup>Ayaskant Das, ‘Criminals will be jailed or killed in encounters: CM Yogi Adityanath’ *The Times Of India* (Ghaziabad, 19 november 2017) < [https://timesofindia.indiatimes.com/city/ghaziabad/criminals-will-be-jailed-or-killed-in-encounters-cm-yogi-adityanath/articleshow/61707953.cms?utm\\_source=twitter.com&utm\\_medium=social&utm\\_campaign=TOIDesktop](https://timesofindia.indiatimes.com/city/ghaziabad/criminals-will-be-jailed-or-killed-in-encounters-cm-yogi-adityanath/articleshow/61707953.cms?utm_source=twitter.com&utm_medium=social&utm_campaign=TOIDesktop)> accessed 11 February 2022

<sup>36</sup>Manglaverma and Vipulkumar, ‘In the Fight Between Encounter Policy and Rule of Law, It's Clear Who Is Winning’ *The Wire* (Kanpur, 15 july 2020) < <https://thewire.in/government/uttar-pradesh-yogi-adityanath-encounter-vikas-dubey>> accessed 12 February 2022

<sup>37</sup> NC Asthana, ‘Why Revenge Killings and Instant Justice Should Never Be the Answers We Want’ *The Wire* (Kanpur, 14 july 2020) < <https://thewire.in/law/vikas-dubey-encounter-instance-justice>> accessed 12 February 2022

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here to protect you.”<sup>38</sup>

There are instances that police believe the accused of being guilty but the court will somehow give the accused bail due to the insufficient evidence to prove the accused of being guilty. In those instances, the police will lose the trust in the judiciary and this mistrust in the judiciary ignites the police to take the law in their hand and execute the criminals.<sup>39</sup> The sad reality is that the police officers who committed these cold-blooded murders are glorified and worshipped like a hero. They are also got portrayed in movies and celebrated.<sup>40</sup>

## VIII. CONCLUSION

India as a democratic country strictly compliant with the Indian constitution can't tolerate this Extra Judicial Killing as a method for serving justice by the state. It's the most brutal way of serving justice moreover innocents are being killed due to the absence of effective trial by the judiciary. A person being guilt will be decided by the judiciary and the punishment will be served in accordance with the law and if he is not being guilty then the same judiciary will acquit the accused. Apart from this procedure any method used for serving justice like encounter attacks are in pure violation of the constitution and rule of law. This barbaric tradition followed by the state governments in order to curb the crimes in the state and serving instant justice is arbitrary and in violation of the basic human rights of a citizen.

The rule of law must prevail over this barbaric tradition in order to put an end to these inhuman practices. There must be adequate legislation to be made for making the police accountable for their wrongful action. They are not doing their duty under order from their superior officers or state but killing alleged criminals cold-bloodedly by taking law in their hands and by abusing the same. For reinstating the system of law and governance which in compliance with the constitution then there must be the declination of impunity given to the police officers who are responsible for encounters by the law enforcement agencies. The law enforcement agencies like the police will abstain to register or refuse to investigate a prosecution of an encounter attack which involves their co-worker who committed the crime and thereby state conferring impunity towards the wrongdoer officers.

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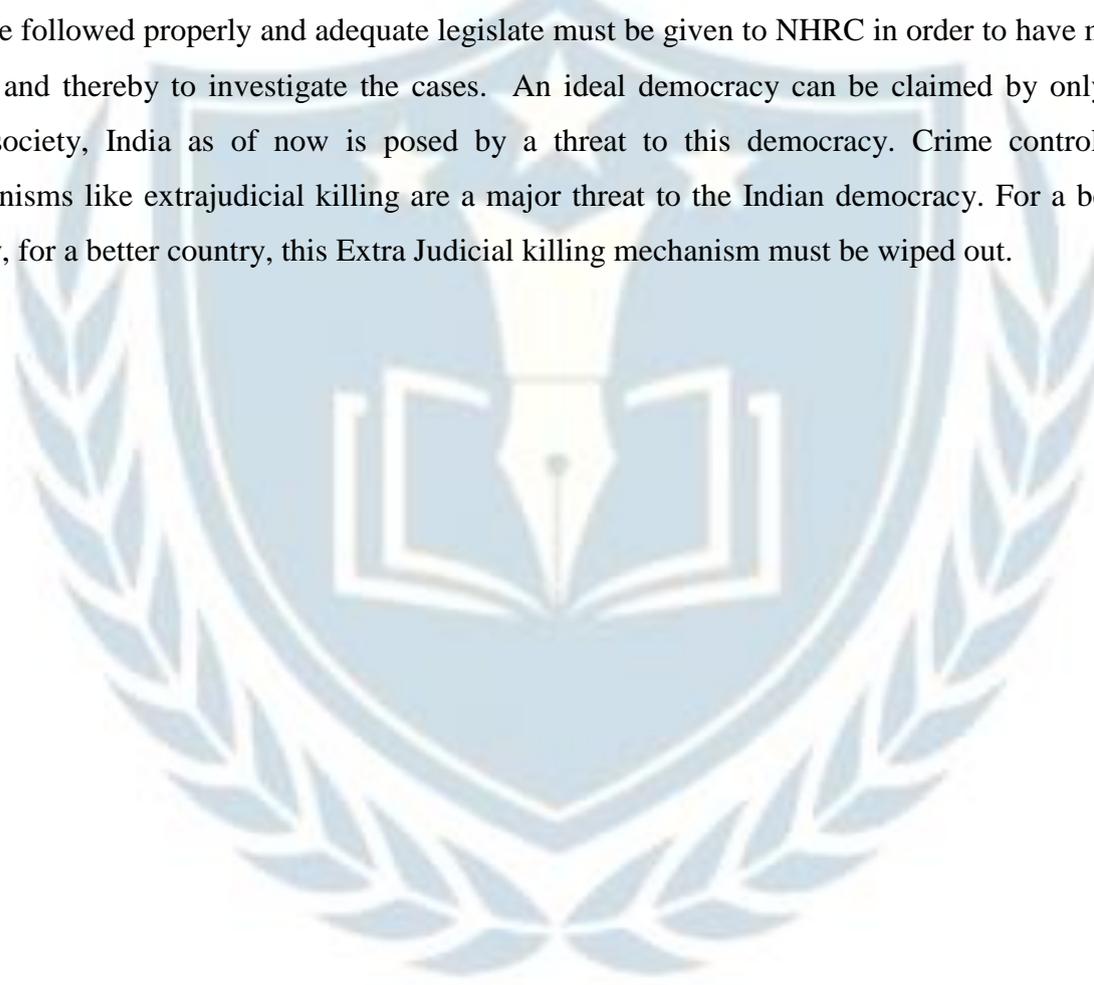
<sup>38</sup> G P joshi, 'Police Accountability in India, Commonwealth Human Rights Initiative' (29 April 2005), < [https://gpjoshionpolice.blogspot.com/2005/04/police-accountability\\_29.html](https://gpjoshionpolice.blogspot.com/2005/04/police-accountability_29.html) > accessed 13 February 2022

<sup>39</sup> Javeedahmad, 'Powering Kanpur gangster VikasDubey's arrogance, a political-police nexus that gave him free rein' *Scroll.in* (Kanpur, 6 July 2020) < <https://scroll.in/article/966584/powering-kanpur-gangster-vikas-dubey-s-arrogance-a-political-police-nexus-that-gave-him-free-rein> > accessed 13 February 2022

<sup>40</sup> Dinesh thakur, 'many encounter-specialists including sachinwaze have made films' *patrika* (Mumbai, 23 March 2021) < <https://www.patrika.com/bollywood-news/bollywood-movies-on-encounter-specialists-including-sachin-waze-6761377/> > accessed 13 February 2022

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The state has no authority to execute the alleged criminals in the claim of the public cry for justice. How heinous crimes though committed by the alleged criminals, the law enforcement agencies must present the alleged criminals before the judiciary. Retributive theory of punishment is not an ideal punishment, the judiciary is more focused on the reformatory theory. As justice V.R Krishna Iyer said “*Every saint has a past and every sinner has a future*” apart from sentencing straight to death there is a scope for reforming the criminals. But there may be instances where the criminals must be sentenced to death, there is no need for enquiring the scope of the reformatory theory of punishment at that instance. The supreme court guidelines must be followed properly and adequate legislature must be given to NHRC in order to have more power and thereby to investigate the cases. An ideal democracy can be claimed by only an ideal society, India as of now is posed by a threat to this democracy. Crime controlling Mechanisms like extrajudicial killing are a major threat to the Indian democracy. For a better society, for a better country, this Extra Judicial killing mechanism must be wiped out.



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