

ENCOUNTER KILLINGS: A CRITICAL ANALYSIS WITH SPECIAL REFERENCE TO VICTIMS OF POLICE BRUTALITIES AND ENCOUNTERS

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Abstract

Police brutality violates right to life and liberty. This abuse can either be verbal or physical to the extent of killing amounting to police misconduct. Encounter killing under the umbrella head of police brutalities is a crime committed by the agency which is supposed to maintain law and order in the state. 'Encounter killing' can be defined as an occurrence between the accused criminal and civil security forces which result in the killing of the criminal. Encounter killings violate the human right to fair trial and audi alteram partem of victims. In an encounter the police not only take law into its own hands but also tend to twist the facts in a manner where they are let-go without any accountability of the crime. This results in the failure of the criminal justice system. The paper raises questions about the compensatory aspect of police excesses and encounter killings. It is a doctrinal research. The primary sources of data collection are statutes. Secondary data like, book, reports, case laws have been utilized. The study is a comprehensive analysis of the compensatory facet of violation of the fundamental right to life. It is comprehensive analysis of the landmark judgements to the current ones where compensation has been provided. The study also deals with a brief analysis on encounter killings and rule of law but is limited to the physical excesses of power committed by police officials..

Key words: Police Brutalities, Encounter Killings, Constitutional Remedy, Rule of Law and Victim Compensation

Introduction

Encounter Killings are described as incidents in which there are allegations of individuals being arrested before their killing or abducted and their bodies; when recovered, bear the signs of torture (WIRE, 2019). Encounter Killings can also be defined as the act of killing police officers usually conducted without the permission of the governmental authorities. Police officers claim that the alleged criminal was trying to decamp and in order to contain them they had to fire, or in order to evade arrest the accused fires at them and the officers fire in self-defense (Pillai, 2019).

The constitution of India in its preamble resolves to establish India into a republic and democratic state. The notion of rule of law is also ingrained in the law-making authorities and agencies dutybound to maintain law and order in the state. The citizens of the country have submitted themselves to the constitution and elect a representative to govern them. Encounter killings, a form of police immunity tend to destroy the key principle of "democracy" and violate the right to fair trial of the victim/s.

Encounter killings are a euphemism used by police officers for multifarious reasons. Factors like snail pace of the trial procedure, the increase in crime rates, and the ability of the officials to tamper with the internal investigation tend to further the act of encounter killings. Contrary to the popular belief encounter killings that are conducted genuinely are considered as the appropriate usage of the right to self-defense.

Even in cases where the killings are justifiable then can the officer be cleared of the charges by justifying his act through any means without as much as facing a trial? If the answer to the above question is in affirmative then the current justice system of the country is in shambles; as in cases of police encounters the police officer assume the roles of the judge, the complainant, the executor and the investigator. (Kumar, 2020).

A total of 44 encounters have taken place from 2017 till 1st January 2019 with the maximum number of encounters in Odisha (04) between 2016-17 and Uttar Pradesh (06) in 2017-2018 (Sabha, 2019). On the other

hand, the statistical data given by a few independent agencies portray a different image altogether. From 2017 till December 2019, 5,178 encounters have taken place in Uttar Pradesh out of which a police official takes the credit of killing 103 victims (WEEK, 2019). The amount of pride that this official takes in committing so many encounters displays a grim image of the impunity of the police officials and the gravity of the situation.

Under United Nations 'Global Goals' Goal no. 16 is 'Peace Justice and Strong Institutions' Target 16.1 intends to reduce all forms of violence and Target no. 16.3 aims to ensure equal access to justice and promote rule of law (Goals, 2015). The promotion of rule of law being a target under the S. D. G's entails that there are still certain discrepancies in the system. In 2018, India was ranked 41st on The Economist Intelligence Units Annual Global Democracy Index (Intelligence Unit, 2018) and in 2019 the India's position is 51st which shows a decline by 10 numbers (Intelligence Unit, 2019). India stands on 68th position of the World Justice Project Rule of Law Index 2019 (Project, 2019). In 2020 the position of India has degraded to 69th position (Project, 2020).

The democracy index is created after considering a lot of factors, for example political culture and civil liberties among others. The Rule of Law Index considers factors like order and security, regulatory enforcement and fundamental rights. The sheer drop in the rankings show that the rights of the citizens of the state have been violated resultantly pointing towards the lawlessness in the state and lack of civil liberties for the citizens.

Rule of Law and principles of Natural justice

The term "rule of law" entails a situation in a state where everything is done according to the law. Under rule of law the government cannot act arbitrarily and there are legislative safeguards laid down to protect the rights of the citizens (Yadav, 2017). According to Prof. A. V. Dicey there are three tenets of Rule of Law a) Supremacy of Law; b) Equality before Law; and c) Predominance of Legal Spirit. The Supremacy of law upholds law in the highest regard and attempts to deter the authorities from being arbitrary while using their discretionary powers. Equality before law entails that no man, be it a government official, the crown, or a common man is above the law. The punishment for an act would be the same for anyone of them. Meaning thereby, all classes of persons would be subjected to the same law.

However, in reality there are several instances of excesses powers by the governments and the its officials to secure their position in the state and violate human rights of people who have raised voices against the tyranny (Commission, 2016). Safety of the public can only be ensured if rule of law is imbibed in the democracy. This also includes the periodic review of laws and control of the parliament to avoid abuse of power by the state agencies. The cases of encounter killing affect the fair application of the principle of Rule of Law. As per Rule of Law no one is considered to be above the law. However, when an encounter occurs the police not only take law into their own hands but also tend to twist the facts in a manner where they are acquitted of all charges without any accountability of the crime, failing the criminal justice system as a result.

The concept of natural justice encompasses two principles a) Rule against bias which means no one should be a judge in his own cause and b) Rule of fair hearing which entails that all the parties must be given a fair chance of being heard. Regarding the principle of rule against bias, the police officials who commit an encounter killing become the judges of that very cause. The accused/victim never gets a chance to explain the actual occurrence or the sequence of events that took place. The police begin with the very mindset that the victim has to be obliterated. Therefore, in a fake encounter the truth is never revealed. The tenets of Audi alteram partem under the concept of natural justice pave way for rights of the accused to be heard when arrested. After being arrested he should be informed of the reasons of his arrest and must also be provided with a lawyer if he is unable to afford one. He must be given a chance to put forth his point/s so that he is not convicted of the crime/s he did not commit. The acts of arbitrary encounters tend to prove these principles ineffective. Even if the police doubt that a suspect is/was involved in some terrorist activity or is associated with a terrorist organization then as per the rights of the accused the police must arrest the person and not just terminate him then and there.

Fake Encounters are rampant in India. Given the circumstances of every case it is difficult to identify if these cases are genuine encounters or fake encounters blatantly violating human rights. The various factors that encourage encounter killings are the glacial pace of the judiciary, the non-professional behavior of the police,

conducting an examination poorly are not only permit encounter killings but lead to miscarriage of justice. It is believed that encounter killings are not the solution but the problems itself (Weekly, 2014). These factors make it difficult to identify if the police official had misused his power or not. The practice of encounter killings in India violates principles of international law, human rights, and the basic conceptions of justice. The primary issue surrounding encounter killings is the lack of witnesses. As per the common practice the accused/s are apprehended during the wee hours of the morning resulting in the absence of any eye witnesses. For example, the most recent encounter conducted in Hyderabad occurred at 03:00 a.m. (Pandey, 2019). The lack of functioning CCTV Cameras, credible witnesses or any other detailed information regarding the encounter makes it more difficult for the investigating agency to collect evidences against the alleged outrageous act. Resultantly, the police officer who follows the accused exceeds his powers and causes death of accused ends up doing more harm than necessary can be held guilty of murder falling under Section 300 (Murder) of the Indian Penal Code (PUCL and PUDR, 2004). The Supreme Court has frequently reprimanded the non-conformant police officers who execute criminals and portray the incident as an encounter killing. These killings have to be combated as they are not justified or recognized as valid acts under the criminal justice system (*Om Prakash v. Jharkhand*, 2012).

Section 96 deals with acts done in private defense. The section lays down that any act which is done in private defense would not be an offence (Indian Penal Code, 1860). Section 99 entails that for any act where there is no reasonable cause for the apprehension of life to a person then a death caused in this scenario will be punishable. But the extent to which the right of private defense cannot utilized by inflicting more harm than necessary. It must be in proportion to the imminent danger (Indian Penal Code, 1860). On a comparative note, the former defines the power of a police officer but the latter limits the power, paving way for punishment when the power is exceeded. Police personnel are not expected to go beyond their power to arrest someone especially when it costs a citizen his/her life. The very basis of the argument lies in the reasonableness of the force used at the time of conducting the arrest.

Who is a victim?

A 'victim/s' is denoted as a person or group or agency who has suffered injury or damage due to the unlawful activity of another person (Paranjape, 2014). An act or an omission of an act which is not punishable under criminal law per say is entitled as 'Abuse of power', but such an act or omission is usually against the common norms of the society and violate the human right of a person. Any person who suffers losses like physical, monetary, permanent disability due to the ultra-vires act of another person (usually in a position of power) is considered to be a victim of Power. The judgment of (*People's Union for Civil Liberties v. State of Maharashtra*, 2014), first time ever the phrase 'victim/criminal' i.e. the criminal who is killed is actually killed in an encounter is recognized as a victim of the encounter in the eyes of judiciary.

Primary, Secondary and Tertiary Victim

The person who suffers immediate and direct harm is called the primary victim. A secondary victim is one who suffers injury or harm as a result of injury or harm to the primary victim. For example, the wife of a person deceased in a fake encounter. The act of the criminal offender also affects a tertiary victim by causing him harm or injury, tertiary victims being the children or parents of the primary victims in most cases. In these cases of encounter killings, the secondary and tertiary victims come into play as the primary victim is the main suspect and later the deceased.

Constitutional safeguards and Judicial trends

The basic laws of a democratic state lay down that in any case where a man's basic rights like the right to life and liberty have been wronged, he must be provided a remedy most commonly (compensation) for his suffering. Police officials misusing their powers is a blatant violation of human rights. Resultantly the state becomes

vicariously liable for providing compensation to the next of kin of the deceased or injured. Just declaring the acts of custodial violence invalid or illegal would never be sufficient in acting as a remedy for someone whose fundamental right has been violated. There is a need take many steps in this direction (Randhawa, 2011). The same principle has been upheld by the Supreme Court in various judgements.

Article 21 of Constitution of India guarantees right to life and personal liberty entailing that under no circumstances can a citizen be deprived of his right to life by any official. In a fake encounter, when an accused is killed by the police then he is deprived of his right to life without a plausible reason. It was held by the Supreme Court that right to life is a basic human right and is guaranteed to every person and even the authorities working for the state or the State itself has no power to violate it under any circumstances. In (*People Union for Democratic Rights v. Police Commissioner*, 1989), under Article 32 of the Constitution compensation was awarded to victims of Police Atrocities. In (*Saheli, A Women's Resource Centre through Mrs. Nalini Bhanot v. Commissioner of Police, Delhi Police*, 1990), the victim died in police custody due to beating the officer-in-charge of that Police Station. Therefore, the mother was paid compensation of Rs. 75,000.

It was laid down in (*Gauri Shanker Sharma v. State of Uttar Pradesh*, 1990), that if a person dies in custody because of the usage of third-degree methods by police officials it would amount of miscarriage of justice. In the said case the petitioner alleged that two people were rounded up by the police and killed at a far-flung location. The court reprimanded the police officials and instructed them that they couldn't abuse their power just to gather requisite information about the terrorist. Even if they doubted the victim/accused of being a terrorist it was mandatory for the police to follow the standard procedures of arrest and detention. As a result, the compensation of Rs. 1 lakh was to be paid by the Government. In (*Nilabati Behera v. State of Orissa*, 1993), a mother was paid a compensation of Rs. 1,50,000 as her son was arrested on account of theft and soon after his body was found at the railway track.

In the landmark judgement of (*D.K. Basu v. State of West Bengal*, 1997) the court not only paid compensation to the victim's family for custodial torture but also laid down 11 guidelines describing the procedure of arrest, detention and interrogation of the accused. In (*Mohd. Zahid v. Govt. of NCT of Delhi*, 1998), the appellant had been a victim of unlawful detention by the police personnel so the court allowed the appeal and also paid him compensation Rs. 50,000. (*A.V. Janaki Amma And Ors. v. Union of India*, 2004) the court upheld the norm that if any official, state, public authority violates the fundamental rights of any individual enshrined under Article 21 will be held liable to pay compensation.

In the case of (*Beenu Rawat & Others v. Union of India & Others*, 2013), The members of a political party were carrying out a peaceful protest. In order to disperse the crowd, the police conducted a lathi charge even though the facts of the case state that the protesters had no criminal background and were unarmed. The police took the defence of the protestors indulging in rioting and resultantly damaging public property which is why the police had to use force. The Supreme Court ordered the establishment of a Special Investigation Team for conducting the inquiry and prescribe punishment according to the law.

In the landmark judgement of (*Extra Judicial Execution Victim Families Association (EEVFAM) & Others v. Union of India & Others*, 2013), the Supreme Court iterated that every time a situation arises where the fundamental rights of a citizens are violated especially the right to life; either by the agencies working under the orders of the state or the state itself, then the court will *suo moto* take cognizance of the matter. The court also ordered that compensation must be provided to the families of the victims of fake encounters. It was held in (*People's Union for Civil Liberties v. State of Maharashtra*, 2014) the compensation to the next of kin of the victim of an encounter must be granted in accordance with the scheme under Sec. 357 A of the Code of Criminal Procedure. It was also held in this judgement that the officer accused of encounter killing must not be given any gallantry awards or promotion and must be provided with legal aid if required.

In (*State v. Sajjan Kumar*, 2019) the Supreme Court observed that merely by awarding compensation to the dependents of the victim of encounter killings is not enough to let them overcome the loss and consider

rehabilitation. The agony and the suffering are unimaginable. The provision of compensation should not be considered as an alternate to punishment as compensation would be a way out for the most heinous crimes across the globe without any punishment whatsoever. In spite of years and years of independence police is considered as an instrument of oppression and harassment (*Arnesh Kumar v. State of Bihar*, 2014). Common man has never been able to consider police as their friend; even though the concept of police-mitr (friend of police) has been introduced in various cities. The entire plethora of judgements above describes that though state has made multiple attempts to ensure safety of citizens and attempting to rehabilitate the victims of encounter killings by paying them compensation there is still a lot of distrust among the citizens.

Conclusion

As per Cesare Beccaria, the Italian philosopher every human being has certain basic qualities instilled in him like ability of rational thought, free will, manipulability and power to have self-interested thoughts (Beccaria, 2019). As per Beccaria the power to have selfish thoughts makes people not value the greater good of the community and commit crimes. He believed that many of acts or criminal behaviours can be predicted therefore, it is imperative for the society to prevent these crimes and deter the people from committing them by punishing the convicts. When a police official commits an encounter killing, he makes a selfish choice of serving quick justice and thereby, basking in the glory of committing that act. Based on this theory, the justice system can anticipate this move and take pre-emptive measure by:

- 1) Conducting sensitization workshops and trainings for police officials.
- 2) The powers of the police force must be laid down clearly.
- 3) The senior most official of the police station must keep the record of behaviour of the officials working under him so that the problematic behaviour can be noticed in advance and can be sent to a counsellor if required. The counselling must continue for as long as required.
- 4) A zero-tolerance policy must be formulated for police brutalities.

Regarding compensation, the mechanism through which the compensation is passed on to the next of kin must be reformulated so as to ensure no delay takes place and the victims of encounters receive the money timely. As the saying goes justice delayed is justice denied. The loss of a family member is irrevocable and moreover of receiving compensation after an unaccountable period of time would hamper the rehabilitation of the family too

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