

The State of Encounter
Killings in India



TARGET
DETAIN
TORTURE
EXECUTE



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GLOSSARY

AASU	All Assam Students Union
ACP	Assistant Commissioner of Police
AFSPA	Armed Forces (Special Powers) Acts
APCLC	Andhra Pradesh Civil Liberties Committee
APIC	Andhra Pradesh Information Commission
AR	Assam Rifles
ASI	Assistant Sub Inspector
ASP	Additional Superintendent of Police
ATS	Anti Terror Squad
BSF	Border Security Force
CBCID	Crime-Branch Crime Investigation Department
CBI	Central Bureau of Investigation
CFSL	Central Forensic Science Laboratory
CID	Criminal Investigation Department
CJM	Chief Judicial Magistrate
CMP	Country Made Pistol
CO	Circle Officer
Cr.P.C.	Criminal Procedure Code
CRPF	Central Reserve Police Force
DG	Director General
DGP	Director General of Police
DSP	Deputy Superintendent of Police
FIR	First Information Report
FSL	Forensic Science Laboratory
GCM	General Court Martial
GOC	General Officer Commanding
IO	Investigation Officer
IPC	Indian Penal Code
IPS	Indian Police Service

J&K	Jammu & Kashmir
JCOs	Junior Commissioned Officers
JIC	Judicial Inquiry Commission
LWE	Left Wing Extremist
MER	Magisterial Enquiry Report
MHA	Ministry of Home Affairs
MULTA	Muslim United Liberation Tigers Association
NCOs	Non-Commissioned Officers
NDFB	National Democratic Front of Bodoland
NGOs	Non-Governmental Organisations
NHRC	National Human Rights Commission
NJDG	National Judicial Data Grid
NSCN	National Socialist Council of Nagaland
PBOR	Persons Below Officer Rank
PHRA	Protection of Human Rights Act
PIL	Public Interest Litigation
PUCL	People's Union for Civil Liberties
PWG	Peoples War Group
RPC	Ranbir Penal Code
RR	Rashtriya Rifles
SHO	Station House Officer
SHRC	State Human Rights Commission
SI	Sub-Inspector
SIT	Special Investigation Team
SLPs	Special Leave Petitions
SOG	Special Operations Group
SPP	Special Public Prosecutor
SSP	Senior Superintendent of Police
STF	Special Task Force
UDHR	Universal Declaration of Human Rights
ULFA	United Liberation Front of Asom

1. Executive summary

“I felt betrayed by then PM Chandra Sekhar after 21 Khalistani militants I arranged to surrender were killed. Never spoke to him after that.” - Current Chief Minister of Punjab, Captain Amrinder Singh wrote in a tweet on 17 May 2017 on fake encounter killings during the insurgency in Punjab from 1985 to 1995.¹

A classic case of “Target, Detain, Torture and Execute” policy

On 9 October 2018, the Summary General Court Martial of the Indian Army held at the 2nd Infantry Mountain Division at Dinjan in Dibrugarh district of Assam sentenced seven convicted army personnel viz Major General A K Lal, Colonels Thomas Mathew and R S Sibiren, and junior commissioned officers (JCOs) and non-commissioned officers (NCOs) Dilip Singh, Jagdeo Singh, Albindar Singh and Shivendar Singh to life imprisonment for torture and extra-judicial killing of five leaders of the All Assam Students Union (AASU) in a fake encounter on 22 February 1994.² Following the killing of Rameshwar Singh, general manager of the Assam Frontier Tea Limited at the Talap Tea Estate by the cadres of the outlawed United Liberation Front of Asom (ULFA), troops of the 18th Punjab Regiment based at Dhola in Tinsukia, Assam had picked up nine innocent youths from their houses in Tinsukia district’s Talap area on the mid-night of 17 February 1994 ostensibly to extract information about the ULFA.³ A habeas corpus petition was filed before the Gauhati High Court on 22 February 1994 which directed the army to produce the nine youths immediately before the nearest magistrate.⁴ However, the Army had brutally tortured five out of nine youths viz Prabin Sonowal, Pradip Dutta, Debajit Biswas, Akhil Sonowal and Bhaben Moran with their tongues sliced, eyes gouged out and kneecaps smashed, and bodies

¹. Amrinder Singh’s fake encounter tweet: On DSGMC’s complaint NHRC demands clarity from Punjab Government, 6 July 2017 available at <https://sikhsiyasat.net/2017/07/06/amarinder-singhs-fake-encounter-tweet-dsgmcs-complaint-nhrc-demands-clarity-punjab-govt/>

². Three officers, four soldiers sentenced to life for 1994 fake encounter in Assam, Times of India, 15 October 2018; available at : <https://timesofindia.indiatimes.com/india/assam-fake-encounters-maj-gen-among-7-given-life-sentence-by-army-court/articleshow/66206571.cms>

³. Life term for army men in Assam ‘fake counter’, Deccan Herald, 14 October 2018; available at : <https://www.deccanherald.com/national/life-term-army-men-assam-fake-697949.html>

⁴. Ibid

bearing evidence of electric shocks as per the post mortem reports.⁵ As the five youths could not be produced before the nearest magistrate following brutal torture, the army personnel shot them dead in order to hide the torture, released the remaining four youths in different locations of the district and handed over the dead bodies to the Dhola Police Station alleging to be the dead bodies of the members of the ULFA killed in an encounter along with certain arms and ammunitions shown to have been recovered from these youths.⁶

The inquiries by Assam Police, the Army Court of Enquiry and two Magistrates of the Assam government found the version of the accused Army personnel to be true and that ‘the counter insurgency operation was done in exercise of the official duty’.⁷ However, the inquiry by the Central Bureau of Investigation (CBI) under the direction of the Gauhati High Court brought out the truth⁸ and led to filing of the chargesheet against 7 (seven) Army personnel in the Court of Special Judicial Magistrate, Kamrup under Section 302/201 read with Section 109 of the Indian Penal Code, 1860 (IPC) in 2002.⁹ The competent Authority in the Army sought immunity under the Armed Forces Special Powers Act, 1958 (AFSPA) which was denied by the Special Judicial Magistrate on 10.11.2003 and the Gauhati High Court on 28.3.2005 and an appeal was filed before the Supreme Court against the order of the High Court. On 1 May 2012, the Supreme Court in its judgment directed the competent authority in the Army to “take a decision within a period of eight weeks as to whether the trial would be by the criminal court or by a court-martial and communicate the same to the Chief Judicial Magistrate concerned immediately

⁵. 1994 Assam fake encounter: Major General, six others get life term, The Hindu, 14 OCTOBER 2018 available at <https://www.thehindu.com/news/national/1994-assam-fake-encounter-major-general-six-others-get-life-term/article25221579.ece>

⁶. Judgment of the Supreme Court of India dated 1 May 2012 in Criminal Appeal No. 257 of 2011 with Criminal Appeal No.55 of 2006 in General Officer Commanding Versus CBI & Anr

⁷. Ibid

⁸. Three officers, four soldiers sentenced to life for 1994 fake encounter in Assam, Times of India, 15 October 2018; available at : <https://timesofindia.indiatimes.com/india/assam-fake-encounters-maj-gen-among-7-given-life-sentence-by-army-court/articleshow/66206571.cms>

⁹. Judgment of the Supreme Court of India dated 1 May 2012 in Criminal Appeal No. 257 of 2011 with Criminal Appeal No.55 of 2006 in General Officer Commanding Versus CBI & Anr

¹⁰. Ibid

thereafter”.¹⁰ The Army decided to try them under military law through a court martial.¹¹ The court-martial proceedings began on 16 July 2018 and concluded on 27 July 2018. The quantum of punishment was pronounced on 13 October 2018.¹²

Fake encounters are part of the unofficial State policy: NHRC

India faces serious armed conflicts and not all encounters are fake. At the same time, fake encounter killing has been the undeclared official State policy irrespective of whichever party is governing at the Centre or at the State and the same has been recognized by the National Human Rights Commission (NHRC), the High Courts and the Supreme Court. In 2004, the NHRC stated, *“The Commission’s directive for an inquiry into encounter deaths by State police officers does not inspire confidence since such extra-judicial killings have virtually become a part of unofficial State policy”*.¹³

The State actually justifies fake encounter. India’s capital Delhi does not face any insurgency or major law and order issues. Yet, with respect to the fake encounter death of alleged criminals viz Ayub, Aslam, Manoj, Sanjay and Shehzad Babu at the hands of the Delhi Police on 5 May 2006 after being picked up from their respective homes, the Lieutenant Governor of Delhi declined permission for a CBI enquiry after the Magisterial Enquiry Report (MER) raised doubts over the genuineness of the encounter and recommended a CBI enquiry. The Ministry of Home Affairs (MHA) also declined permission for a CBI enquiry on the ground that *“a CBI enquiry was not needed as the said criminals were involved in 74 heinous crimes before said encounter”*. Further, when the NHRC reluctantly accepted the denial of the CBI inquiry but asked as to why monetary compensation to the next kin of the victims not be paid, the MHA *“opposed award of compensation on the ground that the persons who were killed had serious criminal records and providing relief to the next of kin of such dreaded criminals would amount to providing incentive for such criminal activities and send a wrong signal”*. Rejecting the contention of the MHA, the NHRC vide its proceedings dated 5 February 2014 reminded the MHA that under the Indian laws, criminals cannot be summarily executed and *“the*

¹¹. Three officers, four soldiers sentenced to life for 1994 fake encounter in Assam, Times of India, 15 October 2018; available at: <https://timesofindia.indiatimes.com/india/assam-fake-encounters-maj-gen-among-7-given-life-sentence-by-army-court/articleshow/66206571.cms>

¹². Ibid

¹³. National Human Rights Commission (NHRC), Report on Prevention of Atrocities Against Scheduled Castes & Scheduled Tribes, 2004, p.106 available at <http://nhrc.nic.in/documents/publications/reportkbsaxena.pdf>

¹⁴. National Human Rights Commission, Annual Report 2013-2014

*only criminal activity that had been plausibly established in this case was the murder of five men by policemen appointed to uphold the law, not to break it”.*¹⁴

If that is the position of the Government of India with respect to proven fake encounter of the alleged criminals in Delhi, one can imagine the situation in armed conflict situations which relates to national security and territorial integrity. The State actually had incentivised encounter killings by giving out of turn promotions for encounter killings, prohibited following the Supreme Court judgment in 2014.¹⁵

Independent India follows colonial British policy to authorise extrajudicial executions

On 15 August 1942, colonial British government promulgated the Armed Forces Special Powers (Ordinance) authorising “Commissioned Officers not below the rank of Captain in the army, to use force if necessary to the extent of causing death of a person who fails to halt when challenged by a sentry or who attempts to destroy property which the Officer has been deputed to protect”¹⁶ to suppress the Quit India Movement launched by Mahatama Gandhi a week earlier.¹⁷ On the day of independence on 15 August 1947 the Governor General of India issued Disturbed Areas (Special Powers of Armed forces) Ordinance in Bengal, Assam, East Punjab and Delhi to authorize “*any commissioned officer, warrant officer or non-commissioned officer to fire upon or otherwise use force, even to the causing of death*” to quell the riots that took place during the partition. These Ordinances were replaced by the Armed Forces Special Powers Act of 1948 and the 1948 Act remained in force till 1957.¹⁸ A year later in 1958, India enacted the Armed Forces [Assam and Manipur] Special Powers Act to deal with the Naga insurgency.

¹⁵. Judgment dated 23 September 2014 in People’s Union for Civil Liberties Versus State of Maharashtra (Criminal Appeal No.1255 of 1999)

¹⁶. Armed Forces Special Power Act 1958 and Human Rights Abuses in Nagaland, Shodhganga, http://shodhganga.inflibnet.ac.in/bitstream/10603/60432/10/10_chapter%203.pdf

¹⁷. The Armed Forces Special Powers Act: A brief history, Aljazeera America, 8 March 2014 available at <http://america.aljazeera.com/articles/2014/3/8/armed-forces-specialpowersactabriefhistory.html>

¹⁸. Supreme Court of India’s judgment dated 27 November 1997 in Naga Peoples Movement for Human Rights Vs Union of India available at <https://indiankanoon.org/doc/1072165/?type=print>

¹⁹. Ibid

Fake encounters in insurgency situations

The phrase “to fire upon or otherwise use force, even to the causing of death”¹⁹ has come to mean giving licence to kill. As insurgency that started with the ethnic Nagas spread to Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland and Tripura in the North East by late 1970s and Punjab and Jammu & Kashmir by the 1980s, the AFSPA was promulgated in all these States.

However, encounter killings are carried out not only in the areas declared to be “disturbed” under the AFSPA but in Naxal affected areas as well. The response to the killing of police inspector Sonam Wang Di in Naxalbari under Darjeeling district of West Bengal during a raid in April 1967 was killing of 11 civilians by the Assam Rifles in fake encounters.²⁰ The West Bengal government executed thousands of alleged Naxalites in fake-encounters in 1960s and 70s and the ultra-left wing extremism in India came to be known as the Naxalism.

Fake encounter killings became the undeclared policy of the State in conflict situations but there are no official statistics as the State always justified all encounters as genuine. Anecdotal evidence suggests that thousands have been killed in fake encounters in independent India. In the Naxal conflict in West Bengal in 1960s and 1970s, according to official figures, “65 constables were killed and over 3,500 youths, sympathizers, family members died in police firings, encounters, and political clashes”.²¹ In a letter dated 22 July 1999, the Director General and Inspector General of Police of Andhra Pradesh wrote to the NHRC suggesting that the encounter death cases of Andhra Pradesh may be got investigated by the officers of the rank of Inspectors of other districts, instead of the CID as “nearly 250 encounters take place each year in Andhra Pradesh and that the State CID would not be able to cope with this additional burden with the available staff”.²² The NHRC examined “illegal killing and disappearances” which culminated in the cremation of 2,097 bodies in Amritsar, Majitha and Tarn Taran districts between 1984 and 1994 during insurgency in Punjab.²³ The Supreme Court has been hearing a PIL seeking

²⁰. Ashis K Biswas, *Embers Of A Revolt* Thirty years on, the Naxal movement is lost in its place of origin, *The Outlook*, 11 June 1997 available at <https://www.outlookindia.com/magazine/story/embers-of-a-revolt/203689>

²¹. Ibid

²². National Human Rights Commission, *Annual Report 1999-2000*

²³. Punjab Mass Cremation Case: NHRC Orders Relief, *The Outlook*, 3rd April 2012, <https://www.outlookindia.com/newswire/story/punjab-mass-cremation-case-nhrc-orders-relief/758349>

probe and compensation in the alleged 1,528 extra-judicial killings in Manipur from 2000 to 2012 by security forces and police.²⁴ J&K also witnessed unprecedented extrajudicial executions since late 1980s. Even the Joint Special Task Force of State of Karnataka and Tamil Nadu formed for apprehending Veerappan, a sandalwood smuggler, killed “36 persons allegedly in “suspicious encounters” as per the NHRC.²⁵

Fake encounters to deal with peacetime law and order situation

Indeed, encounter killings have become routine to deal with crimes in peacetime situations. The three writ petitions filed before the Bombay High Court by the People’s Union for Civil Liberties questioned genuineness or otherwise of nearly 99 encounters between the Mumbai police and the alleged criminals resulting in death of about 135 persons between 1995 and 1997.²⁶

The NHRC started recording encounter deaths from 1997 onwards. In the last two decades i.e. from 1 April 1998 to 31 March 2018, the NHRC registered a total of 2,955 complaints of encounter deaths i.e. an encounter almost every second day. The largest number of encounter deaths during this period took place in Uttar Pradesh with 1,004 encounter killings i.e. 34% of the total cases, followed by Assam with 521 encounter cases i.e. 18% of the total cases, Chhattisgarh (239), Maharashtra (148), Andhra Pradesh (127), Jharkhand (108), Meghalaya (89), Orissa (71), Delhi (64), Manipur (62), West Bengal (61), Uttarakhand (59), Rajasthan (54), Haryana (50), Karnataka and Bihar (48 each), Tamil Nadu (38), Arunachal Pradesh (25), Punjab (22), Gujarat (14), Jammu and Kashmir (10), Tripura and Telangana (6 each), Kerala (5), Himachal Pradesh (2), and Andaman & Nicobar (1). Indeed, top 10 States with encounter killing have reported 2,494 cases of encounter deaths constituting over 84% of the cases. States such as Uttarakhand, Rajasthan, Haryana, Karnataka and Bihar, Tamil Nadu, Punjab and Gujarat which witnessed high incidents of encounter deaths did not face insurgency in the last two decades.²⁷ In fact, Delhi had more encounter killings than West Bengal.

²⁴. SC orders CBI probe into Manipur extra-judicial killings, The Hindu, 14 July 2017 <https://www.thehindu.com/news/national/supreme-court-order-cbi-probe-into-manipur-extra-judicial-killings/article19276650.ece>

²⁵. National Human Rights Commission, Annual Report 2006-2007

²⁶. Judgment dated 23 September 2014 in People’s Union for Civil Liberties Versus State of Maharashtra (Criminal Appeal No.1255 of 1999)

²⁷. Rights & Risks Analysis Group, “Press Release: 2,955 Police Encounter Deaths Registered During 1998-2018, RRAG Calls For National Commission Of Inquiry Into Encounter Deaths”, 1 October 2018 available at <http://www.rightsrisks.org/press-release/2955-police-encounter-deaths-during-1998-2018-call-for-national-commission-of-inquiry/>

Further, only 10 encounter deaths being reported from J&K during 1998-1999 to 2017-2018 expose the limitations of the data collated by the NHRC.²⁸

Modus operandi of fake encounters

In overwhelming majority of cases, the victims of fake encounter deaths are first targeted either as insurgent/terrorist, sympathiser or supporter of insurgents/ terrorists or as wanted criminals with bounty on their heads. The targets are detained or taken into custody, interrogated and tortured to extract confession or leads, and thereafter, killed in a staged encounter, often by planting a weapon on the persons killed to show the firing in self defense or to prevent fleeing. Fake encounters are also carried out for revenge, settle rivalries or disputes, not giving bribe, promotion or gallantry awards or simply trigger happy nature of the law enforcement personnel.

Fake encounters are staged at odd hours, in the most desolate places without any witness and where witnesses exist they are subjected to threat and intimidation. It is the law enforcement personnel who are executioners, witnesses and complainants in the FIRs filed against the persons executed. Proper and impartial investigation seldom takes place and in a number of cases as cited in this report, the State is willing to provide compensation instead of allowing impartial investigation by the CBI such as the rejection of NHRC's recommendation for the CBI inquiry in fake encounter death of four persons in Dehradun, Uttarakhand on 24 August 2006²⁹ and in the fake encounter death of Ayub, Aslam, Manoj, Sanjay and Shehzad Babu in Delhi on 5 May 2006.³⁰ Where proper and impartial investigation takes place, the State protects the culprits by denying permission under Section 197 of the Criminal Procedure Code or Section 6 of the AFSPA to prosecute the accused law enforcement personnel.

Supreme reluctance to decisively address fake encounter killings

The NHRC way back in 1996-1997 stated that it *“considers the practice of “fake encounters” to be unconscionable”*. The NHRC also stated, *“It cannot permit the right to private defense, spelt out in Chapter IV of the Indian Penal Code, to be manipulated to justify “fake encounters”, or the procedures of Section 46(3) of the Code of Criminal Procedure to be subverted to, serve such an end.”*³¹

²⁸. Ibid

²⁹. National Human Rights Commission, Annual Report 2013-2014

³⁰. Ibid

³¹. National Human Rights Commission, Annual Report 1996-97

The Supreme Court in a judgment on 13 May 2011 while upholding the cancellation of bail to police officers arrested for fake encounter killing stated, *“in cases where a fake encounter is proved against policemen in a trial, they must be given death sentence, treating it as the rarest of rare cases. Fake ‘encounters’ are nothing but cold blooded, brutal murder by persons who are supposed to uphold the law. In our opinion if crimes are committed by ordinary people, ordinary punishment should be given, but if the offence is committed by policemen much harsher punishment should be given to them because they do an act totally contrary to their duties.”* The apex court held that those who execute in fake encounter based on illegal orders must also be charged for murder, and if found guilty be sentenced to death. The apex court also held that *“The ‘encounter’ philosophy is a criminal philosophy, and all policemen must know this. 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”*.³²

Despite such observations, the fake encounters continue unabated because of the failure of the NHRC and the Supreme Court to act decisively.

In hundreds of cases of fake encounters, the NHRC recommended to the authorities for payment of compensation to the next kin of the victims³³ but it failed to intervene with the courts for prosecution of the accused either on its own motion or with permission of the court with its findings and opinion.³⁴ While the State governments regularly challenged the orders of the NHRC before the High Courts and the Supreme Court, the NHRC failed to challenge the decision of the governments to reject inquiry by the CBI in proven cases of fake encounters such as the fake encounter death of four persons in Dehradun, Uttarakhand on 24 August 2006³⁵ and the killing of Ayub, Aslam, Manoj, Sanjay and Shehzad Babu in alleged fake encounters by the Delhi Police on 5 May 2006.³⁶ The NHRC’s measures have therefore been half-hearted.

³². Supreme Court judgment in Prakash Kadam & Etc. Etc vs Ramprasad Vishwanath Gupta & Anr on 13 May 2011 in Criminal Appeal Nos.1174-1178 of 2011 arising out of SLP (Criminal) Nos. 3865-69 of 2011

³³. In December 2012, the NHRC informed the Supreme Court that it had awarded compensation in 191 cases of fake encounter killings during 2007-2012, see The Times of India, “191 fake encounters in last five years, NHRC tells Supreme Court”, 5.12.2012 <http://timesofindia.indiatimes.com/india/191-fake-encounters-in-last-five-years-NHRC-tells-Supreme-Court/articleshow/17486080.cms>

³⁴. Section 12(b) of the Protection of Human Rights Act empowers the NHRC to “intervene in any proceeding involving any allegation of violation of human rights pending before a court with the approval of such court.”

³⁵. National Human Rights Commission, Annual Report 2013-2014

³⁶. Ibid

Similarly, the Supreme Court despite declaring its 16-point requirements / norms to be followed in “all cases of death and grievous injury in police encounters” in *People’s Union for Civil Liberties & Anr Vs State of Maharashtra & Ors*³⁷ as the law under Article 141 of the Constitution of India had actually failed to decisively tackle the menace of killing in fake encounters and has delivered regressive judgments.

First, the full bench of the Andhra Pradesh High Court delivered its historic judgment³⁸ on 6th February 2009 making it mandatory for registration of an FIR “where a police officer causes death of a person, acting or purporting to act in discharge of official duties or in self-defense as the case may be”. However, a three-judge Bench of the Supreme Court stayed the judgment on 4 March 2009 on an appeal³⁹ filed by the Andhra Pradesh Police Officers’ Association. The appeal was part heard on 08.04.2016 and thereafter the appeal was not listed for hearing. The appeal is yet to be adjudicated almost one decade after filing.⁴⁰

Second, the Supreme Court delivered its judgment in *People’s Union for Civil Liberties & Anr Vs State of Maharashtra & Ors*⁴¹ on 23 September 2014 and issued 16-point guidelines to deal with encounter death cases. Though in the said judgment, the Supreme Court held that fake encounter killings “amount to State-sponsored terrorism”, it accepted the argument of the State to direct merely registration of an FIR instead of directing to file the FIRs against policemen involved in the encounter. This meant justifying the current practice i.e. registration of the FIR against the dead person on the charge of attempted murder of police officers and as the accused is already dead, s/he cannot defend and police exonerate themselves.⁴² Further, the apex court directed that the encounter killings be investigated by the CID or a police team from another police station

³⁷. *People’s Union for Civil Liberties & Anr Vs State of Maharashtra & Ors*, 23.09.2014, available at : <http://supremecourtindia.nic.in/outtoday/ar12551999.pdf>

³⁸. *A.P. Civil Liberties Committee (APCLC) Vs The Government of A.P & others* WRIT PETITION Nos : 15419 of 2006; 26358 of 1999; 7906 of 2000; 14475 of 2002; 440 of 2003 and 857 of 2008

³⁹. *Special Leave to Appeal (C) Petition No. 5933/2009, A P Police Officers Association Versus A P Civil Liberties Committee*

⁴⁰. For the case status the Supreme Court website was accessed on 15.10.2018.

⁴¹. *People’s Union for Civil Liberties & Anr Vs State of Maharashtra & Ors*, 23.09.2014, available at : <http://supremecourtindia.nic.in/outtoday/ar12551999.pdf>

⁴². See “*Showing weak judgment*” by Colin Gonsalves, *The Indian Express*, 25.9.2014, <http://indianexpress.com/article/opinion/columns/showing-weak-judgment/>, & “Not enough, Your Honour!”, *Deccan Herald*, 5.10.2014, <http://www.deccanherald.com/content/434202/not-enough-your-honour.html>

despite apex court itself in numerous decisions handing over the investigation to the CBI.⁴³ The order also restricted the authority and scope of the NHRC and empowered the police to choose to send the immediate information either to the NHRC or the State Human Rights Commission (SHRC) with most SHRCs being non-functional and having little capacity to adjudicate on such cases.⁴⁴ The Supreme Court further stated that the intervention of the NHRC is not necessary unless there is serious doubt about the independence and impartiality of the investigation. Having no alternative, the NHRC filed a Writ Petition⁴⁵ on 1 December 2014 before the Supreme Court challenging the judgment dated 23 September 2014 but the petition is yet to be heard.

The stay of the judgment of the Andhra Pradesh High Court⁴⁶ dated 6th February 2009 means effective stay on the mandatory registration of FIRs against police personnel causing the death of a person. The failure to adjudicate the Writ Petition filed by the NHRC in December 2014⁴⁷ also means limiting the mandate and role of the NHRC only to cases where 'there is serious doubt about the independence and impartiality of the investigation. Uttar Pradesh with no insurgency or national security threats had recorded the highest number of encounter killings in India in the last two decades with no impact on the crime rate but it has effectively adopted encounter killing as the State policy since March 2017. The result has been cold blooded murder of executive of Apple, Mr Vivek Tiwari⁴⁸ in the early morning of 30th September 2018 and inviting media persons to witness the encounter between alleged criminals and the police at Aligarh's Harduaganj on 21 September 2018 in which two alleged criminals were shot dead,⁴⁹ raising serious questions about the genuineness of the encounter.

⁴³. Ibid

⁴⁴. "Of encounter killings, SC & human rights", By Satyabrata Pal, The Tribune, 2.10.2014, <http://www.tribuneindia.com/2014/20141002/edit.htm#>

⁴⁵. W.P.(C).001012/2014 National Human Rights Commission Vs Union of India and others

⁴⁶. Special Leave to Appeal (C) Petition No. 5933/2009, A P Police Officers Association Versus A P Civil Liberties Committee

⁴⁷. W.P.(C).001012/2014 National Human Rights Commission Vs Union of India and others

⁴⁸. Constable in UP shoots dead Apple executive in cold blood, The Indian Express, 30 September 2018 <https://indianexpress.com/article/india/apple-executive-shot-dead-gomtinagar-up-police-5379136/>

⁴⁹. Aligarh Encounter Victims' Family Allegedly Faces 'House Arrest' and 'Sexual Harassment', Newslick, 11 October 2018 available at <https://www.newslick.in/we-are-facing-house-arrest-sexual-harassment-says-aligarh-encounter-victims-family>

Recommendations

In order to effectively deal with the menace of fake encounter killings, Asian Centre for Human Rights recommends the following to the Government of India:

- Amend the Code of Criminal Procedure to provide for mandatory registration of the First Information Report (FIR) where a public servant causes death of a person, acting or purporting to act in discharge of official duties or in self-defense as the case may be;
- Ratify the UN Convention Against Torture and place the Prevention of Torture Bill of 2017 drafted by the Law Commission of India on 30 October 2017 on reference from the Ministry of Law & Justice, Government of India before the parliament for its immediate enactment;
- Repeal and/or amend the Armed Forces Special Powers Act 1958 to delete “use force if necessary to the extent of causing death of a person”;
- Review Section 46 of the Code of Criminal Procedure and similar legislation in all states regarding use of force, including the exceptional use of lethal force, by all security officers to ensure compliance with international human rights law principles of proportionality and necessity;
- Amend Section 197 of the Code of Criminal Procedure and Section 6 of the Armed Forces Special Powers Act or its analogous provision applicable to Jammu and Kashmir, to make every decision on the denial of prior sanction from the government before cognizance can be taken of any offence by a public servant for criminal prosecution subject to judicial review; and - Place a mechanism of regular review and monitoring of the status of implementation of the directives of the Supreme Court and the NHRC on fake encounter deaths.

2. The history and scale of encounter deaths in India

2.1 History of encounter killings in India

On 15 August 1942, Lord Linlithgow, the viceroy of India, promulgated the Armed Forces Special Powers (Ordinance) to suppress the Quit India Movement launched by Mahatma Gandhi a week earlier⁵⁰ against the colonial British. The Ordinance authorised “Commissioned Officers not below the rank of Captain in the army, to use force if necessary to the extent of causing death of a person who fails to halt when challenged by a sentry or who attempts to destroy property which the Officer has been deputed to protect”.⁵¹ The colonial British authorized extrajudicial executions of the non-violent protestors.

On the day of independence on 15 August 1947 the Governor General of India issued four Ordinances, namely, the Bengal Disturbed Areas (Special Powers of Armed forces) Ordinance, 1947; the Assam Disturbed Areas (Special Powers of Armed Forces) Ordinance, 1947; the East Punjab and Delhi Disturbed Areas (Special Powers of Armed Forces) Ordinance, 1947 to deal with the situation with the partition of India. These Ordinances empowered “*any commissioned officer, warrant officer or non-commissioned officer of His Majesty’s Military or air forces to fire upon or otherwise use force, even to the causing of death, against any person who is acting in contravention of any law or order for the time being in force in the said area prohibiting the assembly of five or more persons or the carrying of weapons or of things capable of being used as weapons*”. The competent authority to “use force if necessary to the extent of causing death” had been reduced from the rank of captain in the British army to non-commissioned officers in independent India. These Ordinances meant to remain in operation for one year were replaced by the Armed Forces (Special Powers) Act, 1948 being Act 3 of 1948 and the Act was repealed only by Act 36 of 1957.⁵²

⁵⁰. The Armed Forces Special Powers Act: A brief history, Aljazeera America, 8 March 2014 available at <http://america.aljazeera.com/articles/2014/3/8/armed-forces-specialpowersactabriefhistory.html>

⁵¹. Armed Forces Special Power Act 1958 and Human Rights Abuses in Nagaland, Shodhganga, http://shodhganga.inflibnet.ac.in/bitstream/10603/60432/10/10_chapter%203.pdf

⁵². Supreme Court of India’s judgment dated 27 November 1997 in Naga Peoples Movement for Human Rights Vs Union of India available at <https://indiankanoon.org/doc/1072165/?type=print>

⁵³. Ibid

2.2 Encounter killings in insurgency affected areas

In mid 1950s, ethnic Nagas resorted to armed rebellion in Assam and Manipur demanding independence and the immediate response of the Government of India was to promulgate the Armed Forces [Assam and Manipur] Special Powers Ordinance and it was enacted into an Act in 1958.⁵³ The armed forces used the power to “fire upon or otherwise use force, even to the causing of death” for summary executions.

In late 1960s, India witnessed armed rebellion by the ultra-leftists who organised themselves first through the formation of the Naxalbari O Krishak Sangram Sahayak Samiti, followed by the All-India Co-ordination Committee of Communist Revolutionaries during 1968-69. The armed rebellion by the ultra-leftists was launched “by the symbolic killing of police inspector Sonam Wang Di in Naxalbari in Darjeeling district during a raid in April 1967”. In retaliation, the Assam Rifles had killed 11 people, including two children and seven women.⁵⁴ The West Bengal government executed hundreds of alleged Naxalites in fake-encounters in 1960s and 1970s. According to official figures, “65 constables were killed and over 3,500 youths, sympathisers, family members died in police firings, encounters, and political clashes”.⁵⁵ However, some unofficial sources put the toll at 7,000.⁵⁶

The rest is history as the ultra-left wing extremism in India subsequently came to be known as the Naxalism. In due course the Naxalite movement spread “into parts of Bihar, Orissa, Andhra Pradesh and bordering districts of Tamil Nadu, Madhya Pradesh and Maharashtra. The Naxalites got divided into different groups - sometimes known by their faith and at other times going by the names of their leaders. In Andhra Pradesh, though initially known as Naxalites, they came to have their identity under the nomenclature of “Peoples War Group” (PWG) by 1980.”⁵⁷ In response to the NHRC’s directives to get all cases of ‘encounter deaths’ investigated by the State CID, the Director General and Inspector General of Police of Andhra Pradesh wrote to the NHRC on 22 July 1999 suggesting that

⁵⁴. Ashis K Biswas, Embers Of A Revolt Thirty years on, the Naxal movement is lost in its place of origin, The Outlook, 11 June 1997 available at <https://www.outlookindia.com/magazine/story/embers-of-a-revolt/203689>

⁵⁵. Ibid

⁵⁶. Ibid

⁵⁷. Judgment of the Andhra Pradesh High Court in A.P. Civil Liberties Committee and ors Vs. Government of Andhra Pradesh dated 6 February 2009 in Writ Petition Nos. 15419 of 2006 reported in 2009(1)ALT754

⁵⁸. National Human Rights Commission, Annual Report 1999-2000

the encounter death cases of Andhra Pradesh may be got investigated by the officers of the rank of Inspectors of other districts instead of the State CID “on the ground that nearly 250 encounters take place each year in Andhra Pradesh and that the State CID would not be able to cope with this additional burden with the available staff”.⁵⁸

By 2005, the Naxalites spread to Chhattisgarh and neighbouring States, and encounter killings became a regular feature of the left wing extremist (LWE)-affected districts. As of April 2016, a total of 90 districts in 11 states were listed as left wing extremist (LWE) - affected districts. Of these 19 are in Jharkhand, 16 in Bihar, 15 in Odisha, 14 in Chhattisgarh, 8 in Telangana, 6 in Andhra Pradesh, 3 each in Maharashtra, Kerala and Uttar Pradesh, 2 in Madhya Pradesh and 1 in West Bengal.⁵⁹ Among the most-affected districts - which now total 30 - 13 are in Jharkhand, 8 in Chhattisgarh, 4 in Bihar, 2 in Odisha and 1 each in Andhra Pradesh, Telangana and Maharashtra.⁶⁰ As per the Ministry of Home Affairs, government of India, in the Naxalite conflict, about 7,755 persons were killed during 2004-2017.⁶¹ While the State justifies each encounter killing as genuine, a large number of encounters are also fake.

The insurgency started by the Nagas in 1950s spread to Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland and Tripura of the North East by late 1970s. Punjab also witnessed insurgency from 1985 to 1995 while Jammu & Kashmir has been facing insurgency since late 1980s. The AFSPA had been promulgated in all these States and encounter killings were made an integral part of counter-insurgency operations.

Yet, there are no official estimates of fake encounter deaths in armed conflict situations as the State justifies all encounters as genuine.

On fake encounter killings at Oinam village in Senapati district of Manipur following attacks on the Oinam Assam Rifles post, next to Oinam village on 9 July 1987 by a group of insurgents believed to belong to the National Socialist Council of Nagaland in which nine soldiers were killed, the Assam Rifles sealed off the area and on 11 July began an extensive combing operation, code named “Operation Bluebird”, in October 1990, Amnesty International reported,

⁵⁹. Centre removes 44 districts from list of Maoist-hit areas, Times of India, 16 April 2018; available at: <https://timesofindia.indiatimes.com/india/centre-removes-44-districts-from-list-of-maoist-hit-areas/articleshow/63787192.cms>

⁶⁰. Ibid

⁶¹. MHA Annual Reports from 2004-2017

“There is strong evidence that at least eleven and possibly fifteen men were deliberately killed by the Assam Rifles after torture. They were P. Sanglong, Chairman of Oinam Village Authority, and A. Wa and Th. Wakhao, gaonburas of Oinam, P.L. Ring, headmaster of Oinam High School; L. Zamo, headman of Khongdei Khuman; K. Sunai, R. Khova, and M. Esou, all gaonburas of Khongdei Khuman; R. Mathotmi, member of the Ngari village authority; P. Rangkhuiwo, Ngari village headman; N. Thava, member of Khongdei Khuman Village Authority. Less clear were the circumstances in which S. Sosang, a farmer from Ngamju village, Mr Seva of Thingba Khunou, Mr Lokho of Mao Pudunamei; and Mr Sangdua of Oinam village were shot, but they may also have been victims of torture and extrajudicial executions. Several of the victims were elderly men over sixty years of age. The Assam Rifles maintain that these men were either killed in “encounters” between them and the NSCN or that they were shot while “trying to escape”. But eye-witnesses have testified that they saw eleven of these men in custody with severe injuries apparently caused by torture. One woman testified that her husband, whom the Assam Rifles said was “shot while running away”, was so badly tortured that he was unable to walk. Others testified that men the Assam Rifles claimed to have shot in an armed “encounter” were on the day of their death taken away by the Assam Rifles, who had to drag them out of the army camp because the men were unable to sit up by themselves. One witness said he saw three of the men being taken away by the Assam Rifles at night, one by one, to a lonely spot in the jungle. He said on each occasion he heard gun shots several minutes later and the Assam Rifles returned without the man they had taken away (this witness said he himself had in fact escaped and so survived being shot). Another witness said he found the body of the victim – whom the Assam Rifles claim was shot while guiding the NSCN - lying on the ground with hands tied behind his back and eyes blindfolded. The eye-witness accounts corroborate each other”.⁶²

During the insurgency in Punjab between 1985 and 1995, thousands were killed in fake encounter, and the extent and patterns of fake encounter killing were exemplified by the Punjab Mass Cremation case which was considered by the Supreme Court of India. The NHRC pursuant to the

⁶². INDIA: “OPERATION BLUEBIRD” - A CASE STUDY OF TORTURE AND EXTRAJUDICIAL EXECUTIONS IN MANIPUR, October 1990 available at <https://www.amnesty.org/download/Documents/ASA200171990ENGLISH.PDF>

directions of the Supreme Court investigated and recorded that “illegal killing and disappearances” which culminated in the cremation of 2,097 bodies in Amritsar, Majitha and Tarn Taran districts between 1984 and 1994. Out of the 2,097 cases, only 1,513 could be identified including 195 cases, where the deceased were in deemed police custody and 1,318 others whose bodies were cremated by the Punjab Police.⁶³ These were fraction of the total encounter deaths in Punjab openly justified by then Director General of Punjab Police late KPS Gill.

Manipur had witnessed unprecedented number of extrajudicial executions. The Supreme Court has been hearing a PIL seeking probe and compensation in the alleged 1,528 extra-judicial killings committed by the Indian Army and Manipur Police from 2000 to 2012.⁶⁴

As of October 2018, the AFSPA remains in force in Tirap, Changlang and Longding and some areas of West Kameng, East Kameng, Namsai, Papumpare, Lower Dibang Valley and Lohit districts of Arunachal Pradesh⁶⁵, entire Assam,⁶⁶ Nagaland⁶⁷, Manipur with the exception of Imphal Municipal area,⁶⁸ 10 Km wide belt in the state of Meghalaya bordering the state of Assam and 20 out of 22 districts in Jammu and Kashmir.⁶⁹

As per the Ministry of Home Affairs, government of India, during 2004-2017 about 1,927 security forces were killed in armed conflicts. Of these, 1,325 security forces were killed in Jammu & Kashmir and 602 were

⁶³. Punjab Mass Cremation Case: NHRC Orders Relief, The Outlook, 3rd April 2012, <https://www.outlookindia.com/newswire/story/punjab-mass-cremation-case-nhrc-orders-relief/758349>

⁶⁴. SC orders CBI probe into Manipur extra-judicial killings, The Hindu, 14 July 2017 <https://www.thehindu.com/news/national/supreme-court-order-cbi-probe-into-manipur-extra-judicial-killings/article19276650.ece>

⁶⁵. Notification No.3841 dated 1 October 2018, NE Division, Ministry of Home Affairs, Government of India; https://mha.gov.in/sites/default/files/noticeNE_10082018405.pdf

⁶⁶. AFSPA extended for 6 months in Assam, The Hindustan Times, 29 August 2018; available at: <https://www.hindustantimes.com/india-news/afspa-extended-for-6-months-in-assam/story-HJHuCrh1zQFaAFcUc5brDN.html>

⁶⁷. Notification No.2425 dated 30 June 2018, NE Division, Ministry of Home Affairs, Government of India; <https://mha.gov.in/sites/default/files/NE060720181246.pdf>

⁶⁸. AFSPA to be extended by another year in Manipur, UNI, 2 December 2017 available at <http://www.uniindia.com/afspa-to-be-extended-by-another-one-year-in-manipur/other/news/1064024.html>

⁶⁹. Asian Centre for Human Rights, Nobody’s children: Juveniles of Conflict Affected Districts of India, March 2013

killed in North East India. The security forces claimed to have killed 4,564 alleged terrorists/extremists in J&K and at least 2,920 extremists in the North East during 2007 to 2017.⁷⁰ Many of those killed by the security forces were executed in fake encounters.

However, it is not only while countering the insurgents that fake encounter killing was used. Encounter killing has been used even to deal with the dacoits. The NHRC with respect to the atrocities committed by Joint Special Task Force of State of Karnataka and Tamilnadu for apprehending Veerappan, sandalwood smuggler, constituted two-member panel of inquiry comprising Hon'ble Mr. Justice A.J. Sadashiva, former Judge of Karnataka High Court as Chairman and Mr. C.V. Narasimhan, former CBI Director. Vide proceedings dated 15 January 2007, the NHRC recommended immediate interim relief to 89 victims amounting to Rs. 2 crore and 80 lakhs including those who suffered permanent disability as a result of torture, persons unlawfully detained as well as "36 persons allegedly killed in suspicious encounters by the Special Task Force".⁷¹

2.3 Encounter killings by the police during 1998 to 2018

Encounter killings have also become routine to deal with ordinary crimes in peacetime situations. In the three writ petitions filed before the Bombay High Court, the People's Union for Civil Liberties (PUCL) questioned genuineness or otherwise of nearly 99 encounters between the Mumbai police and the alleged criminals resulting in death of around 135 persons between 1995 and 1997. Encounters deaths have been eulogized and popularized in many Bollywood films such as *Encounter: The Killing* (2003), *Ab Tak Chhappan* (2004) and its sequel, *Ab Tak Chhappan 2* (2015), *Shootout at Lokhandwala* (2007), *Shootout at Wadala* (2013) etc.

In the last two decades i.e. from 1 April 1998 to 31 March 2018, the NHRC registered a total of 2,955 complaints of encounter deaths i.e. an encounter death almost every second day. These included 76 cases in 1998-99, 85 cases in 1999-00, 110 cases in 2000-01, 58 cases in 2001-02, 83 cases in 2002-03, 114 cases in 2003-04, 122 cases in 2004-05, 157 cases in 2005-06, 301 cases in 2006-07, 177 cases in 2007-08, 132 cases in 2008-09, 111 cases in 2009-10, 199 cases in 2010-11, 179 cases in 2011-12, 181 cases in 2012-13, 148 cases in 2013-14, 192 cases in 2014-15, 206 cases in 2015-16, 169 cases in 2016-17, and 155 cases in 2017-18.

⁷⁰. Annual Reports of the MHA from 2004-2017

⁷¹. National Human Rights Commission, Annual Report 2006-2007

Table 1 : Encounter deaths recorded by the NHRC during 1998 to 2018⁷²

Sl NO.	State	1998-1999	1999-2000	2001-2002	2002-2003	2003-2004	2004-2005	2005-2006	2006-2007	2007-2008	2008-2009	2009-2010	2010-2011	2011-2012	2012-2013	2013-2014	2014-2015	2015-2016	2016-2017	2017-2018	Total	
1	ANDHRA PRADESH	2	1	7	2	7	9	18	3	15	20	2	2	11	8	5	2	4	5	3	1	127
2	ARUNACHAL PRADESH	0	0	0	0	0	0	0	0	1	1	0	0	1	1	2	6	4	3	3	4	25
3	ASSAM	1	1	1	0	2	2	1	5	6	22	15	31	54	87	55	58	84	49	31	16	521
4	BIHAR	2	1	3	2	4	5	0	1	3	0	2	7	2	2	7	0	3	4	0	48	
5	CHATTISGARH	0	0	0	0	0	1	1	1	1	0	0	0	8	3	19	18	23	50	75	40	239
6	GOA	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
7	GUJARAT	1	4	1	0	1	0	2	0	0	1	0	1	1	2	0	0	0	0	0	0	14
8	HARYANA	0	0	3	0	1	2	1	5	2	7	3	1	1	2	2	5	2	9	0	4	50
9	HIMACHAL PRADESH	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2	0	2	0
10	JAMMU & KASHMIR	0	0	0	1	0	1	0	0	1	2	1	0	2	0	0	0	2	0	0	10	10
11	JHARKHAND	0	0	3	0	1	2	1	0	2	5	6	5	7	9	12	10	17	7	10	108	
12	KARNATAKA	0	0	1	0	2	2	6	6	6	2	8	1	3	2	1	1	2	2	2	48	
13	KERALA	2	0	0	0	1	0	0	0	0	0	0	0	1	0	0	0	0	1	0	5	
14	MADHYA PRADESH	1	0	8	1	1	4	5	4	6	3	4	2	4	5	10	4	6	3	1	73	
15	MAHARASHTRA	2	7	15	3	10	4	5	8	15	10	14	8	8	1	5	1	11	3	8	10	148
16	MANIPUR	0	1	1	0	0	1	1	0	1	3	0	4	17	15	3	1	9	3	2	62	
17	MEGHALAYA	0	0	0	0	1	0	0	1	0	0	0	0	6	5	17	7	22	16	10	4	89
18	MIZORAM	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
19	NAGALAND	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
20	ORISSA	0	0	0	0	0	0	4	1	1	1	0	1	10	5	8	12	6	8	9	6	71
21	PUNJAB	0	0	1	0	1	0	2	2	2	2	2	0	2	0	1	2	2	2	1	22	22
22	RAJASTHAN	1	0	34	0	1	0	0	2	0	1	0	5	3	3	0	0	0	0	4	54	54
23	SIKKIM	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
24	TAMILNADU	1	1	0	2	3	1	0	4	1	6	4	4	2	3	1	0	1	2	2	38	38
25	TRIPURA	0	0	0	0	3	0	1	0	0	0	0	0	1	1	0	0	0	0	0	6	6
26	UTTAR PRADESH	62	64	31	42	41	68	66	96	201	84	69	47	42	19	8	4	7	5	4	44	1004
27	UTTARAKHAND	1	2	2	0	2	6	7	8	19	3	3	4	1	0	0	0	0	0	1	59	59
28	WEST BENGAL	0	2	1	0	2	0	2	1	3	0	1	12	5	7	1	5	15	1	1	61	61
29	ANDAMAN & NICOBAR	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	1	1
30	CHANDIGARH	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
31	DADRA & NAGAR HAVELI	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
32	DAMAN & DIU	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
33	DELHI	0	1	2	3	6	1	9	11	16	2	1	0	0	3	3	2	2	1	1	64	64
34	LAKSHADWEEP	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
35	PUDUCHERRY	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
36	TELANGANA																					
	GRAND TOTAL	76	85	110	58	83	114	122	157	301	177	132	111	199	179	181	148	192	206	169	155	2955

⁷². Source: Annual Reports of the NHRC and Rajya Sabha Starred Question No.86 answered on 25.07.2018

As the Table 1 shows, the largest number of encounter deaths during 1998-1999 to 2017-2018 took place in Uttar Pradesh with 1,004 encounter killings i.e. 34% of the total cases, followed by Assam with 521 encounter cases i.e. 18% of the total cases, Chhattisgarh (239), Maharashtra (148), Andhra Pradesh (127), Jharkhand (108), Meghalaya (89), Orissa (71), Delhi (64), Manipur (62), and West Bengal (61), Uttarakhand (59), Rajasthan (54), Haryana (50), Karnataka and Bihar (48 each), Tamil Nadu (38), Arunachal Pradesh (25), Punjab (22), Gujarat (14), Jammu and Kashmir (10), Tripura and Telangana (6 each), Kerala (5), Himachal Pradesh (2), and Andaman & Nicobar (1). No case of encounter killing was recorded in Goa, Mizoram, Nagaland, Sikkim, Chandigarh, Dadra & Nagar Haveli, Daman & Diu, Lakshadweep and Puducherry. Indeed, top 10 States with encounter killings have reported 2,494 cases of encounter deaths constituting over 84% of the cases.

The fact that Delhi with a population of 168 million had more encounter killings (64) than West Bengal (61) with 920 million populations as per 2011 census is an issue of concern. Further, only 10 encounter deaths being reported from J&K during 1998-1999 to 2017-2018 expose the limitations of the data collated by the NHRC on the subject.

3. Modus operandi: Target, detain, torture and execute without any witness

While there are genuine encounters, a large number of them are fake encounters as confirmed by the NHRC. In December 2012, the NHRC informed the Supreme Court that it had awarded compensation in 191 cases of fake encounter killings during 2007-2012.⁷³

In overwhelming number of cases, the victims of fake encounter deaths are first targeted either as insurgent/terrorist, sympathiser or supporter of insurgents/ terrorists or as wanted criminals with bounty on their heads. The targets are detained or taken into custody, interrogated and tortured to extract confession or leads, and thereafter, killed in a staged encounter, often by planting a weapon on the persons killed to show the firing in self defense or to prevent fleeing of the detainees. Fake encounters are also carried out for revenge, to settle rivalries or disputes or extract bribe, for promotion or gallantry awards or simply trigger happy nature of the law enforcement personnel.

3.1 Target and detain

The law enforcement personnel often claim that encounter takes place on receipt of intelligence or tip-off regarding criminal movements or activities pertaining to the commission of grave criminal offence. The recent encounter deaths in Uttar Pradesh show that the police had already identified the targets by announcing monetary reward on alleged criminals who were killed in encounters subsequently.

The criminals who were already wanted by the police and executed in either fake or genuine encounters in Uttar Pradesh, included Nadeem who was killed in an alleged encounter at Muzaffarnagar on 8 September 2017 carried Rs 15,000 reward against his name; Shamshad killed in an alleged encounter at Saharanpur on 10-11 September 2017 carried Rs 12,000 reward against his name; Furqan killed in an alleged encounter on 22 September 2017 at Muzaffarnagar had Rs 50,000 bounty on him; Vikas a.k.a Khujli killed in an alleged encounter at Aligarh on 28 September 2017 had Rs 50,000 bounty on him; Nur Mohammad alias Haseen Mota killed in an alleged encounter at Partapur, Meerut on 30 December 2017 carried a Rs 50,000 reward against his name; Shameem killed in an alleged encounter at Muzaffarnagar on 30 December 2017

⁷³. The Times of India, "191 fake encounters in last five years, NHRC tells Supreme Court", 5.12.2012 <http://timesofindia.indiatimes.com/india/191-fake-encounters-in-last-five-years-NHRC-tells-Supreme-Court/articleshow/17486080.cms>

had a reward of Rs 50,000 against his name; Bagga Singh killed in an encounter at Dulhipurva, Lakhimpur Kheri on 17 January 2018 carried a reward of Rs 1 lakh against his name; Akbar killed in an alleged encounter at Jhinjhana, Shamli district on 3 February 2018 carried a reward of Rs 50,000 against his name; Vikas killed in an alleged encounter at Muzaffarnagar on 6 February 2018 carried a reward of Rs 50,000 against him and Rehaan killed in an alleged encounter at Muzaffarnagar-Thana Bhawan road on 3 May 2018 carried a reward of Rs 50,000 against his name.⁷⁴

Even in the heart of Delhi, the police usually pick up and detain their targets and executed them in fake encounters. In the case of fake encounter death of Ayub, Aslam, Manoj, Sanjay and Shehzad Babu at the hands of the Delhi Police, it was alleged that the police took away Ayub, Aslam, Manoj, Sanjay and Shehzad Babu from their houses on 5 May 2006 and killed them in a fake encounter within the jurisdiction of Police Station Khajuri Khas, Delhi. The NHRC in its proceedings noted that there were several discrepancies with regard to the raid as well as the subsequent lack of forensic examination of equipment from the site. No police party was deployed in the ‘Khadar’ area, which was an open and deserted area beside the site of incident and reason for non-deployment at that strategic area was not explained by the Delhi Police. The post mortem report stated that the victims were tortured before being shot dead.⁷⁵

Similarly, in the fake encounter death of Yashvir Singh by the Delhi Police on 20 December 2006, the CBI which conducted the inquiry on the direction of the NHRC recorded that the deceased was with his friend Yogesh and Navneet in the morning of 20 December 2006. However, when Yashvir was taken away by the officers to Special Cell of Delhi Police, it was reasonable to presume that Delhi Police would take all the criminals present at one place instead of arresting the persons by pick and choose method. The CBI concluded that the victim remained in the custody of the Police till the night of 20 December 2006 and was shown as killed in encounter in the night of 20 December 2006.⁷⁶

If this is the pattern of encounter killing in the heart of capital Delhi, it is not hard to imagine the scale and patterns of the encounter killings in insurgency affected areas.

⁷⁴. Uttar Pradesh | Copycat encounters: 21 deaths, 20 similar FIRs, same sequence of events, 22 August 2018, <https://indianexpress.com/article/india/uttar-pradesh-encounters-21-deaths-20-similar-firs-same-keywords-yogi-adityanath-up-police-5316609/>

⁷⁵. National Human Rights Commission, Annual Report 2013-2014

⁷⁶. National Human Rights Commission, Annual Report 2011-2012

In the rape and encounter killing of Thangjam Manorama Devi, Manipur in the intervening night of 10-11 July 2004, she was arrested by a team of the 17th Assam Rifles (AR) on the charge of being a member of a banned outfit from her house at Bamon Kampu Mayai Leikai under Irilbung police station in Imphal East District of Manipur. Thereafter, multiple bullet-ridden dead body of Manorama Devi was found on a roadside near Yaiphorok village on the morning of 11 July. The AR claimed that Manorama Devi was shot dead when she attempted to escape from their custody. However, the judicial Inquiry Commission constituted by the State Government of Manipur revealed torture including sexual assault suffered by Manorama Devi before being killed while in the custody of the AR personnel. The report stated that the “escape theory” and “firing at her legs” claimed by the AR was a “naked lie” as there were no injuries on the legs.⁷⁷

Similarly, Md. Azad Khan (about 12 years), son of Mohd. Wahid Ali was picked up at about 11.50 am on 4 March 2009 by a group of security personnel who came to their house and dragged him into a field and subjected him to torture. Following the torture, Md. Azad Khan fell down and the security personnel shot him dead and a pistol was thrown near his body.⁷⁸

Elangbam Kiranjit, son of E Ibohal Singh, was killed by the combined force of the Manipur Police Commandos and personnel of the 23rd AR in an alleged encounter at Laikot Ching under Lamlai police station in Imphal East district of Manipur on 24 April 2009. The security forces claimed that Elangbam Kiranjit was a cadre of proscribed Kangleipak Communist Party (MC). However, the family members of the deceased said that Elangbam Kiranjit was innocent and killed in a fake encounter after being picked up by the Manipur Police Commandos on 23 April at around 3.30 pm while he had gone out to search for a missing cow.⁷⁹ The

⁷⁷. The Report of the Judicial Inquiry Commission on the death of Thangjam Manorama Devi was submitted to the Supreme Court in November 2014 by the State Government of Manipur after the apex court had demanded it as part of a hearing on a PIL seeking probe into custodial deaths in the north-east States. Since then it is in the public domain and available at: <https://bhrpc.files.wordpress.com/2014/11/manoramareport.pdf>

⁷⁸. The killing of Md. Azad Khan is one of the six cases investigated by Justice Santosh Hegde Commission appointed by the Supreme Court by its order dated 4 January 2013 in the case of *Extra Judicial Execution Victim Families Association and Anr. vs. Union of India*, [(2013)2SCC493]. The Supreme Court appointed Justice Santosh Hegde Commission in its report submitted to the apex court in April 2013 concluded that Md. Azad Khan was neither killed in an encounter nor was he killed in exercise of right to self defence. The Commission noted a number of carelessness in the investigation by the security forces and the investigation agencies.

⁷⁹. ACHR complaint dated 28.4.2009 to NHRC, registered as Case No. 4/14/0/09-10-AFE

Supreme Court appointed Justice Santosh Hegde Commission concluded that Elangbam Kiranjit was killed in a fake encounter.⁸⁰

Similarly, on 4 May at about 9.20 pm, Chongtham Umakanta alias Manaoton Singh had gone out from his house to visit a friend identified as Nanao. While, Umakanta was at Nanao's house, a team of the police commandos came and asked the entire male folk to come out of the house and the police team whisked away Umakanta.⁸¹ The deceased's family stated that Umakanta was innocent and killed in a fake encounter after being picked up. The security forces claimed that Umakanta was a militant and killed in a joint operation launched by the police commandos and 28th AR. The NHRC noted that the firing by the security forces was not in self-defence but "a case of serious violation of human rights".⁸²

On the alleged encounter killing of Md. Faziruddin on the night of 21 January 2010 by personnel of the 33rd AR in an alleged encounter at Kwakta Saiton area in Bishnupur district of Manipur, family members claimed that the deceased was picked up by unidentified person believed to be security forces in plain-clothes.⁸³

On the alleged encounter killing of H Amujao Meetei on 18 March 2010 by the personnel of the 28th AR in an alleged encounter in Thoubal district of Manipur, the magisterial enquiry report submitted to the NHRC revealed that: *"the deceased Hawaibam Amujao Meitei was arrested from Andro Parking by three unknown individuals suspected to be personnel of 28 Assam Rifles on 18th March 2010 at around 2.30 pm and subsequently he was killed by the personnel of 28 Assam Rifles at Takhok Mapan on 18th March 2010 in between 10.15 pm to 10.30 pm in a fake encounter"*.⁸⁴

On the alleged encounter death of Maheswar Ray in the intervening night of 4-5 September 2010 at the hands of the combined team of Assam Police and Army in an alleged encounter at Chandrapara (Bijulibari) near Onthai Gwolaw village in Kokrajhar district of Assam, the deceased's relatives alleged that on 4 September 2010 at about 9 pm, deceased Maheswar Ray was picked up by the combined team of Assam Police and Indian Army from the house of one Lankeswar Barman of Laltari village

⁸⁰. Report of Justice Santosh Hegde Commission, <https://humanrightsmanipur.files.wordpress.com/2013/07/ejevfm.pdf> [Accessed 8.9.2018]

⁸¹. ACHR complaint dated 5.2.2010 to NHRC, registered as Case No. 6/14/4/2010-AFE

⁸². Ibid

⁸³. The NHRC has awarded payment of compensation of Rs 5,00,000 based on the complaint No. 2/14/1/2010-PF dated 27.1.2010 filed by the ACHR.

⁸⁴. ACHR complaint dated 22.3.2010 to NHRC, registered as Case No. 23/14/12/2010-AF

under Salakati police station in Kokrajhar district while he was having dinner along with the family members of Lankeswar Barman. Thereafter, the deceased was taken to Chandrapara village, about 18 to 20 km away from the house of Lankeswar Barman and killed in custody in cold blood.⁸⁵ The NHRC observed that *“the killing of the late Maheshwar Roy was a grievous violation of human rights, for which it would be appropriate for the State to make reparations”*.⁸⁶

Siba Moran, Dhiraj Barua and Janak Moran were residents of Assam and returning home in a motor cycle after attending a feast at Namsai on the night of 25 December 2011. They were stopped for checking, taken into custody by the personnel of the 26th Maratha Light Infantry of the Indian Army and were later killed in an alleged encounter near the Noa-Dihing river bank under Namsai police station in Lohit district of Arunachal Pradesh.⁸⁷ The NHRC held that *“the circumstances of their killing indicate that their deaths did not take place in a genuine encounter”*.⁸⁸

As the persons who are already in custody are executed in staged encounters, the security forces are able to shoot with uncanny precision. With respect to the encounter death of alleged five dacoits in Dohikata Kadaldhowa Reserve Forests in Goalpara district of Assam by the Assam Police, the Army and Central Reserve Police Force after half an hour exchange of fire at about 10 pm on 28 June 2009, the post-mortem report in respect of all the five deceased persons revealed two entry wounds and two exit wounds on three bodies; and one entry wound and one exit wound each on two bodies. However, there was no blackening/tattooing or charring around the wounds. The NHRC stated *“The police claimed that the encounter took place in pitch darkness. It was therefore astonishing to know as to how the police party was able to inflict lethal injuries on five men without suffering any kind of injuries themselves in an encounter that continued in a jungle for half an hour in complete darkness. The level of accuracy in firing at the target was also surprising. Most importantly, each of the shots fired were from the back as the men killed had their backs turned to those who shot them”*. The NHRC stated that “this was an execution, not an encounter”.⁸⁹

With respect to the killing of Jaipal in a fake encounter in Hathras, Uttar Pradesh on 10 December 2003, the NHRC stated, *“The investigation by*

⁸⁵. ACHR complaint dated 14.6.2011 to NHRC, registered as Case No. 129/3/11/2011-AF

⁸⁶. Ibid

⁸⁷. ACHR complaint dated 28.12.2011 to NHRC, registered as Case No. 2/2/11/2012-AF

⁸⁸. Ibid

⁸⁹. National Human Rights Commission, Annual Report 2010-2011

*Crime Branch revealed that the deceased Jaipal was kidnapped by Inspector N.K. Yadav and killed in a fake encounter”.*⁹⁰

3.2 Rare eye-witnesses

In most cases of alleged encounters, there is seldom any witness as the alleged encounters often take place in darkness, at odd hours such as in the night or dawn and often in desolate places. The encounter deaths in 2017 and 2018 in Uttar Pradesh confirm the same.

In the encounter death of Naushad alias Danny (30), and Sarwar (28)⁹¹ at Shamli, Uttar Pradesh on 29 July 2017, the Uttar Pradesh Police claimed to have received tip-off from a “special informer” around 3.15 am, leading to the encounter at around 4.10 am, after Naushad and an associate opened fire when police “flashed torchlight” to stop them. Similarly, encounter death of Ikram alias Tola (40) at Shamli on 10 August 2017 took place at around 11.05 pm. The encounter deaths of Nur Mohammad alias Haseen Mota (28) took place at Partapur in Meerut on 30 December 2017 at around 10 pm; Shameem (27) at Muzaffarnagar on 30 December 2017 at about 10.50 pm; and Sabbir (about 30) at Shamli at about 10.40 pm on 2 January 2018. The encounter death of Jaan Mohd a.k.a Jaanu (35) at Khatauli, Muzaffarnagar district took place at 5.30 am on 17 September 2017 while the encounter death of Furqan (36) at Muzaffarnagar on 22 September 2017 took place at around 10.30 pm.⁹²

The UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Prof. Christof Heyns after his visit to India from 19 to 30 March 2012⁹³ stated, *“Where they occur, “fake encounters” entail that suspected criminals or persons alleged to be terrorists or insurgents, and in some cases individuals for whose apprehension an award is granted, are fatally shot by the security officers. A shootout scene” is staged afterwards. The scene portrays those killed as the aggressors who had first opened fire. The security officers allege in this regard that they returned fire in self-defence.”*

There is one visible impact of encounter being staged at odd hours - there are no witnesses.

⁹⁰. National Human Rights Commission, Annual Report 2009-2010

⁹¹. Uttar Pradesh | Copycat encounters: 21 deaths, 20 similar FIRs, same sequence of events, 22 August 2018, <https://indianexpress.com/article/india/uttar-pradesh-encounters-21-deaths-20-similar-firs-same-keywords-yogi-adityanath-up-police-5316609/>

⁹². Ibid

⁹³. UN Human Rights Council Report No. A/HRC/23/47/Add.1 dated 26 April 2013

The lack of witnesses in many of the recent encounter deaths in Uttar Pradesh is instructive. On the lack of witnesses to the encounter death of Mansur (35)⁹⁴ at Meerut on 27 September 2017, the FIR stated that police tried to find witnesses, but couldn't find one due to "*raatri ka nawaqt hone ke karan* (due to it being late night)". There was no witness to the encounter death of Akbar (about 27)⁹⁵ at Jhinhana in Shamli district of Uttar Pradesh on 3 February 2018 as "*toh raat ka waqt va goliyon ki tadtadahaat se road par aate-jaate vaahan bhi tez gati se nikal gaye* (but due to the late hour and the sound of firing, the passing vehicles too raced away)".

On the encounter death of Ikram alias Tola (40)⁹⁶ at Shamli on 10 August 2017, the FIR with respect to the witnesses had stated "...*jungle wa nawaqt hone ke karan koi janta ka gawahan farhaan na ho saka* (it being jungle area and odd hours, we couldn't find any)."⁹⁷ Similarly in the encounter death of Waseem Kala (20)⁹⁸ at Meerut on 28 September 2017, the FIR added "...*Sunsaan marg, ghana jungle hone ki wajah se* (Because of deserted road, dense jungle) not one witness could be found despite police attempts."

Fear of the law enforcement personnel or alleged criminals/terrorists is one of the key factors for the absence of witnesses. In the encounter death of Vikas a.k.a Khujli (22)⁹⁹ at Aligarh on 28 September 2017 there were a few people at the spot but as the FIR stated. "... *kintu naam, pata poochne par gawahi dene ke dar se ek dusre ka naam Govind-Arsad le de kar aage badh gaye* (But when we asked their names, addresses, they mumbled 'Govind-Arsad' and went away, scared of testifying)".

On the encounter death of Sumit Gurjar (27)¹⁰⁰ at Greater Noida, Uttar Pradesh on 3 October 2017, the FIR added that they tried to get passersby to testify. "*Toh badmaashon ke dar se koi bhi vyakti gawaahi ke liye taiyyar*

⁹⁴. Uttar Pradesh | Copycat encounters: 21 deaths, 20 similar FIRs, same sequence of events, 22 August 2018, <https://indianexpress.com/article/india/uttar-pradesh-encounters-21-deaths-20-similar-firs-same-keywords-yogi-adityanath-up-police-5316609/>

⁹⁵. Ibid

⁹⁶. Ibid

⁹⁷. A Chronicle of the Crime Fiction That is Adityanath's Encounter Raj, The Wire, 24 February 2018, <https://thewire.in/rights/chronicle-crime-fiction-adityanaths-encounter-raj>

⁹⁸. Uttar Pradesh | Copycat encounters: 21 deaths, 20 similar FIRs, same sequence of events, 22 August 2018, <https://indianexpress.com/article/india/uttar-pradesh-encounters-21-deaths-20-similar-firs-same-keywords-yogi-adityanath-up-police-5316609/>

⁹⁹. Ibid

¹⁰⁰. Ibid

nahin hua (However, afraid of the criminals, no one agreed to be a witness).”

With respect to the encounter death of Sabbir (about 30)¹⁰¹ at Shamli on 2 January 2018, on witnesses, police stated that neighbours refused to even open their doors.

On the encounter death of Bagga Singh (40)¹⁰² at Dulhipurva, Lakhimpur Kheri on 17 January 2018, the FIR stated “*bhay vash (koi) taiyyar nahin hua* (no one agreed due to fear)”.

If this is the situation in Uttar Pradesh with no record of insurgency, it is not hard to imagine the situation in armed conflict situations.

Even when there are witnesses, they are seldom produced. One Francis Turkey was killed in an alleged encounter during a Joint Operation of Police and Army in Karbi Anglong, Assam on 6 January 2010 after the police allegedly fired in retaliation for their self-defence while three other persons were arrested. The NHRC while adjudicating the case stated that the Magistrate only failed to contact the three men who were arrested, though they would have been able to confirm if indeed such an encounter took place and Francis Turkey was with them. The NHRC noted, “*the nature of the injuries found in the post-mortem made it clear that the account given by the Police was false. The autopsy found three entry wounds, all on the back. One hit the left thigh, the other on the back and the third on the head. These could not have been fired in a single burst because they were too widely dispersed. Bullets fired from three weapons simultaneously hit Francis Turkey. That would have been extremely unlikely in a genuine encounter. The scenario that emerged was of a man who had three shots simultaneously fired into his body from the back. This is the pattern of an execution, not of an encounter*”.¹⁰³

3.3 Torture of suspects before encounter killing

Torture of the victims to extract confession or information before fake encounter killing is a common practice.

Even in the heart of Delhi, the police usually pick up wanted criminals/suspects and subject them to torture before execution in fake encounter. In the case of death of Ayub, Aslam, Manoj, Sanjay and Shehzad Babu in an fake encounter by the Delhi Police on 5 May 2006, the post mortem reports revealed that several injuries on all of the examined bodies of the

¹⁰¹. Ibid

¹⁰². Ibid

¹⁰³. National Human Rights Commission, Annual Report 2012-2013

deceased were caused due to blunt force, as either fall over a hard object or impact of *lathi*¹⁰⁴ and rotatory injuries due to dragging across a hard object, like stone. Thus, the Magisterial Enquiry Report (MER) pointed out that, as per the deposition of post mortem doctor, the deceased were physically assaulted before they were hit and killed by police bullets”.¹⁰⁵

With respect to the fake encounter killing of Akoijam Priyobrata in Manipur on the night of 15 March 2009 by the Manipur Police Commandos, the NHRC also concluded that Akoijam Priyobarta was tortured before death.¹⁰⁶ The family members of Khumbongmayum Orshonjit who was killed in a fake encounter on 16 March 2010 by the Manipur Police commandos at Taothong under Lamshang police station in Imphal west district of Manipur found signs of torture marks on the deceased's body and Orshonjit's left fingers were badly broken and his right hand was fractured.¹⁰⁷

The rape and fake encounter killing of Thangjam Manorama Devi, Manipur on intervening night of 10-11 July 2004 after being arrested by a team of the 17th Assam Rifles (AR) on the charge of being a member of a banned outfit, the judicial Inquiry Commission constituted by the State Government of Manipur stated, *“I am completely at the lost to understand how the Assam Rifles personnel had chosen as a target for firing the vaginal/ genital organ of an unmarried girl and after she was taken by them under arrest and taking to places unknown to the family members of the victim. Moreover, it cannot be received on the first shot and thus these evidences and circumstances clearly indicate that victim Manorama Devi might have been subjected to rape and sexual harassment. The arresting team of the Assam Rifles with a view to cover up the crime over the person of the victim, they had specifically fired on genital organ of an unmarried girl after taking her under arrest from the house. It appears to me that this aspect exposes not only barbaric attitude but also their attempt to fabricate false evidence with a view to cover up the offence committed by them”*.¹⁰⁸ Similarly, Salam Gurung and Soubam Boucha, Manipur were killed in a fake encounter on 28 December 2008 and the family members who went to the morgue of Regional Institute

¹⁰⁴. *Lathi* means stick.

¹⁰⁵. National Human Rights Commission, Annual Report 2013-2014

¹⁰⁶. ACHR complaint dated 24.3.2009 to NHRC, registered as Case No. 48/14/0/08-09-FE

¹⁰⁷. ACHR complaint dated 22.3.2010 to NHRC, registered as Case No. 20/14/4/2010-AFE

¹⁰⁸. The Report of the Judicial Inquiry Commission on the death of Thangjam Manorama Devi was submitted to the Supreme Court in November 2014 by the State Government of Manipur after the apex court had demanded it as part of a hearing on a PIL seeking probe into custodial deaths in the north-east States. Since then it is in the public domain and available at: <https://bhrpc.files.wordpress.com/2014/11/manoramreport.pdf> [Accessed 15.08.2018]

of Medical Sciences (RIMS) at Lamphel and identified the dead bodies found clear marks of torture and the legs and hands were fractured as a result of torture.¹⁰⁹

In Assam, Jayanta Singh and Rajesh Bando were killed in a fake encounter on 28 April 2009 by the personnel of the Kumaon Regiment of Indian Army based at Tihu Camp at Haribhanga in Baska district of Assam. The family members found red marks on their wrists suggesting that they might have been tied up before being killed.¹¹⁰

In fact, in the fake encounter killing of Md. Faziruddin on 21 January 2010 by personnel of the 33rd Assam Rifles at Kwakta Saiton area in Bishnupur district of Manipur, the post mortem report had recorded 11 ante mortem injuries.¹¹¹

In the case of death of Salim during a fake encounter with Police in District Mahoba, Uttar Pradesh on 20 May 2006, there were clear marks of torture. As per the NHRC, the Medical Officers opined that *“the deceased died on account of shock and haemorrhage due to ante-mortem injuries. The Magistrate, who conducted the inquiry, has not explained other injuries on the person of the deceased.”*¹¹²

In the encounter death of Ikram alias Tola (40) at Shamli, Uttar Pradesh on 10 August 2017, Hanifa, Ikram’s wife stated that apart from the bullet injury, his ribs were broken and he had a huge injury on the back of his head indicating that he was tortured before being shot dead.¹¹³

In the case of encounter death of Sumit Gurjar (27)¹¹⁴ at Greater Noida on 3 October 2017, deceased’s father Karam Singh alleged that “His ribs were broken, his hand was broken, there were also injury marks on his chest.” NDTV confirmed that these injuries have been recorded in the post-mortem report.¹¹⁵

¹⁰⁹. ACHR complaint dated 12.1.2009 to NHRC, registered as Case No. 33/14/0/08-09-AFE

¹¹⁰. ACHR complaint dated 27.5.2009 to NHRC, registered as Case No. 37/3/18/09-10-AF

¹¹¹. ACHR complaint dated 27.1.2010 to NHRC, registered as Case No. 2/14/1/2010-PF

¹¹². National Human Rights Commission, Annual Report 2010-2011

¹¹³. A Chronicle of the Crime Fiction That is Adityanath’s Encounter Raj, The Wire, 24 February 2018, <https://thewire.in/rights/chronicle-crime-fiction-adityanaths-encounter-raj>

¹¹⁴. Uttar Pradesh | Copycat encounters: 21 deaths, 20 similar FIRs, same sequence of events, 22 August 2018, <https://indianexpress.com/article/india/uttar-pradesh-encounters-21-deaths-20-similar-firs-same-keywords-yogi-adityanath-up-police-5316609/>

¹¹⁵. Cut And Paste FIRs On Encounters In Yogi Government’s Drive To Eliminate Crime, NDTV, 21 February 2018, <https://www.ndtv.com/india-news/cut-and-paste-firs-on-encounters-in-yogi-adityanath-governments-drive-to-eliminate-crime-1815222>

Emblematic Case of Target, Detain, Torture and Execute: Fake encounter of five AASU leaders in 1994 and life sentence to three officers & four soldiers of the Indian Army

On 9 October 2018, the Summary General Court Martial of the Indian Army held at the 2 Infantry Mountain Division at Dinjan in Dibrugarh district of Assam sentenced a former major general, two colonels and four soldiers to life imprisonment for torture and extra-judicial killing of five leaders of the All Assam Students Union (AASU) in a fake encounter on 22 February 1994.¹¹⁶ The seven convicted army personnel are Major General A K Lal, Colonels Thomas Mathew and R S Sibiren, and junior commissioned officers and non-commissioned officers Dilip Singh, Jagdeo Singh, Albindar Singh and Shivendar Singh.¹¹⁷

Major General (retd.) Lal, the senior most Indian Army officer to have been convicted for encounter killing so far, was removed as commander of the strategically located 3rd Infantry Division in Leh in September 2007 after a woman officer accused him of “misconduct” and “misbehaviour” on the pretext of teaching her yoga. He was dismissed from service in December 2010 after a court martial though the Armed Forces Tribunal later restored his retirement benefits.¹¹⁸

Midnight detention

Following the killing of Rameshwar Singh, the general manager of the Assam Frontier Tea Limited at the Talap Tea Estate by the insurgent United Liberation Front of Asom (ULFA), troops of the 18th Punjab Regiment based at Dhola in Tinsukia, Assam had picked up nine youths from their houses in Tinsukia district’s Talap area on the mid-night of February 17, 1994. The youths included the five deceased viz. Prabin Sonowal, Pradip Dutta, Debajit Biswas, Akhil Sonowal and Bhaben Moran from different locations soon after Rameswar Singh, general manager of a tea company, was killed by suspected United Liberation Front of Assam (ULFA) militants.¹¹⁹ The accused were picked up to extract information about the ULFA in the wake of the killing of Rameshwar Sharma.

¹¹⁶. Three officers, four soldiers sentenced to life for 1994 fake encounter in Assam, Times of India, 15 October 2018; available at: <https://timesofindia.indiatimes.com/india/assam-fake-encounters-maj-gen-among-7-given-life-sentence-by-army-court/articleshow/66206571.cms>

¹¹⁷. Three officers, four soldiers sentenced to life for 1994 fake encounter in Assam, Times of India, 15 October 2018; available at: <https://timesofindia.indiatimes.com/india/assam-fake-encounters-maj-gen-among-7-given-life-sentence-by-army-court/articleshow/66206571.cms>

¹¹⁸. Ibid

¹¹⁹. Life term for army men in Assam ‘fake counter’, Deccan Herald, 14 October 2018; available at: <https://www.deccanherald.com/national/life-term-army-men-assam-fake697949.html>

“On February 21, the local police confirmed that the boys were being detained at the Dhola camp. Fearing for their lives, I filed a habeas corpus in the Gauhati High Court on February 22. That afternoon, Chief Justice S.N. Phukan and Justice A.K. Pattnaik ordered the Army to produce the arrested youth before a magistrate,” Mr Jagadish Bhuyan, then Vice President of the AASU's Tinsukia unit *told The Hindu* after the Court Martial verdict.¹²⁰ Mr. Bhuyan had also informed the Tinsukia district authorities, the chief secretary and the State's police chief as well as the Governor by February 21.¹²¹

Brutal torture before execution

After filing of the habeas corpus petition, the Gauhati High Court asked the army to produce the nine youths immediately before the nearest magistrate.¹²² However, the Army had tortured the five youths so badly that they could not be produced before the magistrate. As per former Tinsukia district police Chief R.K. Singh post mortems revealed the victims *“had been brutally tortured before being shot. Their tongues were sliced, eyes gouged out and kneecaps smashed, and their bodied bore evidence of electric shocks”*.¹²³

As the five youths could not have been produced in such conditions, the Army reportedly took them in two boats to the Dibru-Saikhowa National Park after crossing the Dangari river and shot them dead.¹²⁴ The two boatmen — Moka Murah and Ratna Moran — also vanished without a trace.¹²⁵

The Army released the remaining four youths in different locations of the district and handed over the dead bodies to the Dhola Police Station alleging to be the dead bodies of the members of the ULFA killed in an encounter along with certain arms and ammunitions recovered from these youths. An FIR was lodged at P.S. Doom Dooma. Assam Police visited the place on 23.2.1994 and 1.3.1994 and investigated the case.¹²⁶

¹²⁰. 1994 Assam fake encounter: Major General, six others get life term, *The Hindu*, 14 OCTOBER 2018 available at <https://www.thehindu.com/news/national/1994-assam-fake-encounter-major-general-six-others-get-life-term/article25221579.ece>

¹²¹. Life term for army men in Assam ‘fake counter’, *Deccan Herald*, 14 October 2018; available at: <https://www.deccanherald.com/national/life-term-army-men-assam-fake-697949.html>

¹²². Ibid

¹²³. Ibid

¹²⁴. Ibid

¹²⁵. Ibid

¹²⁶. Judgment of the Supreme Court of India dated 1 May 2012 in Criminal Appeal No. 257 of 2011 with Criminal Appeal No.55 of 2006 in General Officer Commanding Versus CBI & Anr

The encounter death was also investigated by the Army under the Army Court of Enquiry as provided under the Army Act. Two Magisterial enquiries were held as per the directions issued by the State Government. All these inquiries found the version of the accused Army personnel to be true and a finding was recorded that ‘the counter insurgency operation was done in exercise of the official duty’.¹²⁷

Motheswar Moran, one of the survivors of the ordeal, said the five were probably killed because the deceased were not in a position to be produced before a local magistrate. “Looking back, the four of us were lucky to have been tortured less,” he told *The Hindu*.¹²⁸

CBI inquiry and conviction by court martial

Based on a petition filed by Mr Bhuyan, the Gauhati High Court directed to register a case and handed over the inquiry to the CBI. The CBI had registered a case against the accused army men after recording statements of the survivors, other witnesses and evidence on record.¹²⁹ After completing the investigation, the CBI filed chargesheet against 7 (seven) Army personnel in the Court of Special Judicial Magistrate, Kamrup under Section 302/201 read with Section 109 of the Indian Penal Code, 1860. The Special Judicial Magistrate issued notice dated 30.5.2002 to the Army Headquarter to collect the chargesheet.¹³⁰

The competent Authority in the Army requested the Special Judicial Magistrate not to proceed with the matter as the action had been carried out by the Army personnel in performance of their official duty and thus, they were protected under the Armed Forces Special Powers Act, 1958 and in order to proceed further in the matter, sanction of the Central Government was necessary. The Special Judicial Magistrate rejected the plea of the competent authority in the Army vide order dated 10.11.2003. The competent Authority in the Army thereafter preferred a revision petition before the Gauhati High Court and the High Court too rejected the appeal vide order dated 28.3.2005. Thereafter the Army filed an appeal before the Supreme Court against the order of the High Court.¹³¹

¹²⁷. Ibid

¹²⁸. 1994 Assam fake encounter: Major General, six others get life term, *The Hindu*, 14 OCTOBER 2018 available at <https://www.thehindu.com/news/national/1994-assam-fake-encounter-major-general-six-others-get-life-term/article25221579.ece>

¹²⁹. Three officers, four soldiers sentenced to life for 1994 fake encounter in Assam, *Times of India*, 15 October 2018; available at: <https://timesofindia.indiatimes.com/india/assam-fake-encounters-maj-gen-among-7-given-life-sentence-by-army-court/articleshow/66206571.cms>

¹³⁰. Judgment of the Supreme Court of India dated 1 May 2012 in Criminal Appeal No. 257 of 2011 with Criminal Appeal No.55 of 2006 in General Officer Commanding Versus CBI & Anr

¹³¹. Ibid

The Supreme Court vide order dated 1 May 2012 directed the competent authority in the Army to “take a decision within a period of eight weeks as to whether the trial would be by the criminal court or by a court-martial and communicate the same to the Chief Judicial Magistrate concerned immediately thereafter” and further that “in case the option is made to try the case by a court-martial, the said proceedings would commence immediately and would be concluded strictly in accordance with law expeditiously”. The Supreme Court further directed, “in case the option is made that the accused would be tried by the criminal court, the CBI shall make an application to the Central Government for grant of sanction within four weeks from the receipt of such option and in case such an application is filed, the Central Government shall take a final decision on the said application within a period of three months from the date of receipt of such an application” and that “in case sanction is granted by the Central Government, the criminal court shall proceed with the trial and conclude the same expeditiously”.¹³²

The Army decided to try them under military law through a court martial.¹³³ The court-martial proceedings began on 16 July 2018 and concluded on 27 July 2018. The quantum of punishment was pronounced on 13 October 2018.¹³⁴

3.4 Law enforcement personnel: Executioners, witnesses and complainants of fake encounters

The police and other security forces who carry out fake encounters are the executioners, witnesses and complainants of fake encounter killings.

The UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Prof. Christof Heyns after his visit to India from 19 to 30 March 2012 stated “14. *After the incident, the security officers register a First Information Report (FIR) which often reflects their account of events. The Special Rapporteur heard concerns that the content of these reports is frequently undisputed, which eventually leads to the swift closure of the case. Along the same line, it appears that few, if any, encounter cases have been brought to the point of conducting investigations and, where applicable, prosecuting alleged perpetrators. Where inquiries are undertaken, the results are frequently not disclosed. Another difficulty in the investigation of encounters lies in the lack of*

¹³². Ibid

¹³³. Three officers, four soldiers sentenced to life for 1994 fake encounter in Assam, Times of India, 15 October 2018; available at: <https://timesofindia.indiatimes.com/india/assam-fake-encounters-maj-gen-among-7-given-life-sentence-by-army-court/articleshow/66206571.cms>

¹³⁴. Ibid

witnesses, often due to the fact that encounters take place mostly during the early hours of the morning. Alternatively, witnesses fear coming forward with testimonies. In some cases, such a situation is further complicated by a reported practice of offering gallantry awards and promotions to security officers after the encounters, as well as of pressuring law enforcement officers, who face already heavy workloads due to understaffing, to demonstrate results”.¹³⁵

As the law enforcement personnel are the executioners, witnesses and complainants against those executed often for attempt to fire or fire upon them, the cases are closed swiftly. As the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, had noted “the registration of First Information Reports by security officers after alleged fake encounters, in which they gave their accounts of the events often led to the swift closure of cases, as the content of the reports was frequently undisputed”.¹³⁶

¹³⁵. UN Human Rights Council Report No. A/HRC/23/47/Add.1 dated 26 April 2013

¹³⁶. Ibid

4. The license to kill

It will not be an understatement to state that the law enforcement personnel have licence to kill in India. There is social sanction for extrajudicial executions of the alleged criminals or terrorists/anti-nationals and the State indeed has provided impunity through prior sanction from the Government for prosecution of any official for acts including extrajudicial killings done in good faith. The State used to provide out of turn promotions and instant gallantry awards for encounter killing of the alleged terrorists or dreaded criminals, which was banned by the Supreme Court in its judgment dated 29.09.2014 in *People's Union for Civil Liberties & Anr Vs State of Maharashtra & Ors.*¹³⁷ Deployment in conflict situations with rampant encounter killings is one of the qualifying criteria for deployment for lucrative UN Peace Keeping Operations.

The Assam Police were indeed so emboldened that it used to publish encounter deaths in its official Newsletter until the NHRC took suo motu cognizance of the killing of five alleged activists of the Muslim United Liberation Tigers Association (MULTA) and the National Democratic Front of Bodoland (NDFB) in a fake encounter with Assam Rifles personnel on 19 April 2009 at Akabasti under Rangapara Police Station in Sonitpur District as per the official newsletter of the Assam Police. After the NHRC took suo motu cognizance, the Assam Rifles reported having recovered not only five small arms, but also 5 kg of explosives, 10 detonators, a Chinese grenade and 140 rounds of live AK 47 ammunition from these men. The NHRC observed that inquest carried out from 10.40 a.m. on the 20 April 2009, the morning after the incident, recorded that i) one of the men was wearing underwear and a jacket; ii) the second man was wearing a "long pant", a T-shirt and underwear; iii) the third man was wearing a singlet and a lungi¹³⁸; iv) the fourth man was naked but had been covered by a lungi; and v) the fifth man was wearing a yellow shirt and underwear. The NHRC went to opine that *"with only one man fully dressed, two found only in underwear, one in a lungi and the fifth naked, it would have been impossible for them men to have carried the arms, ammunition and explosives that the Assam Rifles claimed to have found. And, even if it was assumed that, because of the hot weather, it was the local custom for men to walk around in their underwear, there was no reason why one of the men, after an encounter, should have been found without any*

¹³⁷. *People's Union for Civil Liberties & Anr Vs State of Maharashtra & Ors*, 23.09.2014, available at: <http://supremecourtindia.nic.in/outtoday/ar12551999.pdf>

¹³⁸. Lungi is a garment similar to a sarong, wrapped around the waist and extending to the ankles.

clothes at all”.¹³⁹ After the NHRC started taking suo motu cognizance of the cases based on the newsletter, the Assam Police stopped publishing the cases of encounter deaths.

4.1 Social acceptance of extrajudicial executions

Killing of the alleged criminals to provide false sense of security or elimination of alleged terrorists who pose a threat to the national security has strong social acceptance. Across the world, fake encounter has been used to justify for controlling crimes. Chief Minister Yogi Adityanath of Uttar Pradesh has been supporting encounter killing of the alleged criminals since he came to power in March 2017.

4.2 Legal impunity through prior sanction and good faith

Impunity for public servants was an integral part of colonial administration by the British in India. After independence, India embedded “good faith” clause in all the legislations to protect virtually all illegal and criminal acts by public servants through the requirement of prior sanction from the concerned authorities for prosecution or institution of suit or other legal proceeding against any delinquent public servants including law enforcement personnel.

i. Procedural impunity: Registration of FIR to access to autopsy report

The registration of First Information Report (FIR) against encounter killing is extremely difficult, if not impossible, for relatives of the most victims. The law enforcement personnel are the executioners, witnesses and complainants in the FIR which is invariably registered against the dead person on the charge of attempted murder of police officers. In the rarest of rare cases, family members may dare to file the FIR.

The UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Prof. Christof Heyns after his visit to India from 19 to 30 March 2012¹⁴⁰ had noted, “*The security forces refuse to register FIRs, including those related to killings or death threats. Persons attempting to register FIRs are often subjected to threatening treatment or to the fact that their complaints are not given serious consideration. ... In particular the Dalits, the representatives of lower castes, tribes and poorer communities, as well as women are exposed to difficulties in registering FIRs. Individuals who wish to report violations by security officers face similar challenges which dissuade them from complaining and impede the accountability of State agents*”.¹⁴¹

¹³⁹. National Human Rights Commission, Annual Report 2013-2014

¹⁴⁰. UN Human Rights Council Report No. A/HRC/23/47/Add.1 dated 26 April 2013

¹⁴¹. Ibid

Further, if a FIR is registered, *“The burden of initiating civil, criminal or writ proceedings in cases of unlawful killings is frequently placed on the victim’s family. Their vulnerable status often cripples their ability to seek and secure accountability. Families of victims are not always aware of their rights in respect of the investigation of the death of the victim. The lack of knowledge of such rights forecloses the very opportunity to enjoy these rights themselves”*.¹⁴²

The security forces create various obstacles to prevent initiation of criminal proceedings. *“Families of victims face further difficulties as they lack full and easy access to autopsy reports, death certificates and other relevant documentation. Post-mortem examinations take an unnecessarily long time before being conducted and the subsequent deterioration of evidence, their inadequate conduct, as well as of an inability of the families to obtain death certificates for a very long period.”*¹⁴³

Autopsies are crucial evidence for prosecution in murder cases. In West Bengal, autopsies are allegedly performed by members of the Dom community instead of trained medical practitioners, which seriously impairs the conclusion reached after the medical examination.¹⁴⁴

Asian Centre for Human Rights has been informed that ballistic tests of encounter deaths that took place in 2010 in Manipur were conducted only after the Supreme Court directed the CBI to conduct the inquiry pursuant to the writ petitions filed by the Extra Judicial Executions Victim Families Association of Manipur.¹⁴⁵

ii. Refusal to conduct proper and impartial investigation

The law enforcement authorities and the government prevent proper and impartial investigation into fake encounter deaths. The way the NHRC has often been denied cooperation to investigate the cases of encounter deaths speaks itself. Indeed, the non-cooperation by the Delhi Police exposes the government of India's policy against proper and impartial investigations into fake encounter killings. In its 2013-2014 Annual Report, the NHRC stated, *“the guidelines it had laid down, way back in 2003, to hold magisterial enquiries in the aftermath of any encounter, involving loss of life, had been complied with, by all State Governments except by the National Capital Territory, wherein, the Delhi Police have always opposed magisterial enquiry, exercising extraordinary veto on these decisions”*.¹⁴⁶

¹⁴². Ibid

¹⁴³. Ibid

¹⁴⁴. Ibid

¹⁴⁵. Writ Petition (Crl) No. 129 of 2012 Extra Judicial Executions Victim Families Association versus Union of India

¹⁴⁶. National Human Rights Commission, Annual Report 2013-2014

The refusal by the Delhi Police is not an exception. With respect to the cold blooded murder of 20 persons in a fake encounter by the Joint Team of Special Police and Forest Personnel in Seshachalam Forests of Chittoor District, Andhra Pradesh after taking them to custody in April 2015, the NHRC stated, *“A team of the Commission led by Shri Pupul Dutta Prasad, SSP contacted Shri S.P. Tirupathi, I.G. Special Investigation Team (SIT), the Chief Secretary, Government of Andhra Pradesh and the District Collector of Chittoor but all of them gave evasive replies and did not extend any cooperation. In spite of the defiant and non-cooperative conduct of the Government of Andhra Pradesh, the Commission had to proceed with the enquiry based on whatever documents and information were available at the given time”*. Indeed, the NHRC recorded *“the reluctance of the State Government to share even basic information with the NHRC”* and the Commission still found that *“(i) There are good grounds to think that there was serious violation of human rights of 20 persons who were killed by STF personnel on 7 April 2015 in Sheshachalam forest of Chittoor district. (ii) The victims were very poor and their families suffering under deprivation. (iii) The families cannot be allowed to starve and die waiting for the final outcome of the enquiry by NHRC or investigation by an unbiased investigating agency.”*¹⁴⁷ The attempt to prevent investigation by the NHRC did not stop there. The Chief Secretary of Telangana filed Writ Petition No. 15767 of 2015 challenging the Order of the NHRC dated 28 May 2015 and also the Order dated 5 June 2015 passed by the High Court in the said Writ Petition staying the Commission’s Order dated 28 May 2015.¹⁴⁸ The same is still under consideration of the High Court as of October 2018.

Similarly with respect to the fake encounter death of four persons in Dehradun, Uttarakhand, the police forwarded relevant reports to the NHRC stating that the two criminals had snatched the gold chain of a lady around 08.50 a.m. on 24 August 2006. The lady lodged a report at P.S. Vasant Vihar, Dehradun that she had been robbed of her golden chain by two motorcycle borne persons. The motorcycle was spotted by the police around 04.45 p.m. at Turner Road. It was chased by the police and then an encounter took place in which the two persons were killed”. Considering the time gap between the incident of robbery and alleged encounter, the NHRC expressed the view that a thorough enquiry was required. The enquiry team found that the death of Ram Darshi and Jitender in the encounter was suspicious. The team also found that there were two more deaths (Sunder s/o Janardan & Parvinder alias Parveen s/

¹⁴⁷. National Human Rights Commission, ANNUAL REPORT 2015-2016

¹⁴⁸. Ibid

o Jeet Ram) in police encounter within ten hours from the encounter deaths of Ram Darshi and Jitender. The team also found that all the four deceased were from the same village and seen together by their relatives before the alleged encounter. Upon consideration of the report of the Investigation Division, the NHRC vide its proceedings dated 9 March 2011 directed the Registry to take necessary steps to obtain the concurrence of the Central Government for investigation of the incident by CBI. The Central Government gave its concurrence for CBI investigation but the Government of Uttarakhand opposed the same on the ground that closure reports had been submitted by the local police in those two cases and the same had already been accepted by the court. The NHRC in its hearing on 25 January 2012 pointed out that CBI had registered two Preliminary Enquiries on the basis of reference made by NHRC and the preliminary enquiry by CBI revealed loopholes in the police version in both cases; and the NHRC directed for an inquiry by the CBI. However, the State Government declined to give its concurrence for CBI investigation but stated that it would have no objection if monetary relief was recommended by the NHRC on humanitarian ground!¹⁴⁹

Even the government of Delhi repeatedly opposed inquiries by the Central Bureau of Investigation despite the recommendations of the NHRC. In the case of encounter death of Ayub, Aslam, Manoj, Sanjay and Shehzad Babu in an alleged fake encounter by the Delhi Police, it was alleged that the police took away Ayub, Aslam, Manoj, Sanjay and Shehzad Babu on 5 May 2006 and killed them in a fake encounter within the jurisdiction of Police Station Khajuri Khas, Delhi. The NHRC noted that there were several discrepancies with the raid as well as the subsequent lack of forensic examination of equipment from the site. No police party was deployed in the 'Khadar' area, which was an open and deserted area beside the site of incident and reason for non-deployment at that strategic area was not explained by the Special Cell. As per the post mortem reports, several injuries on all of the examined bodies of the deceased revealed injury due to blunt force, as either fall over a hard object or impact of *lathi* and rotatory injuries due to dragging across a hard object, like stone. Thus, the MER pointed out that, as per the deposition of post mortem doctor, the deceased were physically assaulted before they were hit and killed by police bullets. The post-mortem samples were not sent to the Forensic Science Laboratory (FSL), till a year later when the Khajuri Khas Police Station submitted a final report on the matter and the samples were only submitted in 2009, 3 years after the incident. In the Magisterial Enquiry Report (MER) the Enquiry Officer concluded that no due diligence was

¹⁴⁹. National Human Rights Commission, Annual Report 2013-2014

paid to any facts or circumstances in the investigation into the incident, rather, attempts were made to prove the allegations put forth in FIR lodged by Special Cell of Delhi Police. This utter subversion of due process extended to the post-mortem as well, wherein hand swabs of only 3 deceased was taken and not that of Aslam and Shehzad alias Babu, for which no explanation was given, by the doctor. The Enquiry Officer raised doubts over the genuineness of the encounter and recommended a CBI enquiry. The LG of Delhi and the Ministry of Home Affairs declined permission for a CBI enquiry on the ground that “*a CBI enquiry was not needed as the said criminals were involved in 74 heinous crimes before said encounter*”.¹⁵⁰

iii. Impunity through the requirement of prior sanction where proper and impartial investigation are held

Section 197 of the Cr.P.C.¹⁵¹ provides that no government official or member of the armed forces alleged to have committed a criminal offence while acting or purporting to acting in the discharge of his official duty can be prosecuted except with the prior sanction of the Central or State government. Sections 45¹⁵² of the Cr.P.C. specifically protects members of the armed forces from arrest without prior sanction for anything done or purported to be done in the discharge of official duties. Section 132¹⁵³ Cr.P.C. also protects police, armed forces and even civilians who engage in activities to help disperse crowds from prosecution without prior sanction.

Further, Section 6 of the AFSPA, 1958 provides that “*No prosecution, suit or other legal proceedings shall be instituted, except with the previous sanction of the Central Government against any person in respect of anything done or purported to be done in exercise of powers conferred by this Act.*”¹⁵⁴ Section 7 of the Armed Forces (Jammu and Kashmir) Special Powers Act, 1990 provides the same immunity.¹⁵⁵

¹⁵⁰. Ibid

¹⁵¹. See Chapter XIV “Prosecution of Judges and Public Servants” <http://www.icf.indianrailways.gov.in/uploads/files/CrPC.pdf>

¹⁵². See Chapter V “Protection of members of the Armed Forces from Arrest” at <http://www.icf.indianrailways.gov.in/uploads/files/CrPC.pdf>

¹⁵³. See Chapter XA “Protection against prosecution for acts done under preceding sections” <http://www.icf.indianrailways.gov.in/uploads/files/CrPC.pdf>

¹⁵⁴. See the bare Act @ http://mha.nic.in/sites/upload_files/mha/files/pdf/armed_forces_special_powers_act1958.pdf

¹⁵⁵. See the bare Act @ http://mha.nic.in/sites/upload_files/mha/files/pdf/Armedforces%20_J&K_%20Splpowersact1990.pdf

It is only under the Criminal Law (Amendment) Act, 2013 that the requirement of prior sanction under Section 197 of the Cr.P.C. to prosecute a public servant was removed for sexual offences under Section 166A, Section 166B, Section 354, Section 354A, Section 354B, Section 354C, Section 354D, Section 370, Section 375, Section 376, Section 376A, Section 376C, Section 376D and Section 509 of IPC.¹⁵⁶

However, prior sanction in cases of sexual assault is still required under the AFSPA.¹⁵⁷ In a reply dated 8 May 2013 to a question in the Rajya Sabha, the Minister of State in the MHA stated that the recommendations of amending the AFSPA have not been incorporated in the Criminal Law (Amendment) Act 2013 because of multitude and divergence of opinion on the issues.¹⁵⁸ In reality it effectively implies that the armed forces deployed in the areas declared to be disturbed under the AFSPA continue to enjoy statutory immunity from prosecution for sexual offences including rape, gang rape etc.

The requirement of prior sanction for prosecution of the law enforcement personnel especially in cases of violations of the right to life is antithetical to the notion of the rule of law and raises serious questions about the independence of judiciary in India. The case studies show that irrespective of the merits of the findings by the country's premier investigating agency such as the CBI, the prosecution cannot proceed because permission is not given by the executive authorities. This denial cannot be subject to judicial review. In effect, the executive sits over the judiciary and the supremacy of the judiciary does not exist in India on matters relating to prosecution of the law enforcement personnel.

The Supreme Court has failed to ensure accountability on many occasions. It upheld the constitutional validity of the AFSPA in the *Naga Peoples Movement for Human Rights Vs Union of India*¹⁵⁹ which empowers a non-commissioned officer to use fire-arms and force, even to the causing of death, with impunity as provided under Section 6 of the Act. This sits uneasily with plethora of recommendations for the repeal of the AFSPA

¹⁵⁶. The Criminal Law (Amendment) Act, 2013 is available at http://egazette.nic.in/WriteReadData/2013/E_17_2013_212.pdf

¹⁵⁷. See Full Text of the Justice Verma Committee Report, 23 January 2013, available at: <http://www.prindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committe%20report.pdf>, last accessed on 14 August 2013.

¹⁵⁸. Rajya Sabha Unstarred Question No. 4590 dated 8 May 2013 asked by Member of Parliament Smt. Jharna Das and answered by Shri R.P.N. Singh, Minister of State in the Ministry of Home Affairs, available at: <http://mha.nic.in/par2013/par2013-pdfs/rs-080513/4590.pdf>

¹⁵⁹. AIR 1998 SC 431

by the UN Human Rights Committee,¹⁶⁰ the UN Committee on the Elimination of All Forms of Racial Discrimination,¹⁶¹ the UN Human Rights Council under its Universal Periodic Review,¹⁶² the Justice Jeevan Reddy Committee to Review the AFSPA¹⁶³ and the Second Administrative Reforms Commission¹⁶⁴ and the Justice Verma Committee¹⁶⁵.

Case 1: Absolute requirement of prior sanction: Pathribal killings by the Army

In Chittising Pora village, District Anantnag, Jammu and Kashmir (J&K), 36 Sikhs were killed by alleged terrorists on 20 March 2000. Immediately thereafter, a search for the terrorists started in the entire area and 5 persons, purported to be terrorists, were killed at village Pathribal Punchalthan under Anantnag district by personnel of the 7th Rashtriya Rifles (RR) on 25 March 2000 in an encounter.¹⁶⁶

The 7th RR on 25 March 2000 claimed the 5 persons to be responsible for massacre of the Sikhs at Chittising Pora and Major Amit Saxena, the then Adjutant, 7th RR sent a complaint bearing No. 241/GS(Ops.) dated

¹⁶⁰. The UN Human Rights Committee (CCPR/C/79/Add.81 dated 4 August 1997) in its concluding observation expressed concerns at the continuing reliance on special powers under legislation such as the Armed Forces (Special Powers) Act, the Public Safety Act and the National Security Act in areas declared to be disturbed and at serious human rights violations, in particular with respect to articles 6, 7, 9 and 14 of the Covenant, committed by security and armed forces acting under these laws as well as by paramilitary and insurgent groups.

¹⁶¹. The CERD Committee in its Concluding Observations (CERD/C/IND/CO/19 of 5 May 2007) recommended India “to repeal the Armed Forces (Special Powers) Act and to replace it “by a more humane Act,” in accordance with the recommendations contained in the 2005 report of the above Review Committee set up by the Ministry of Home Affairs. It also requests the State party to release the report”.

¹⁶². India was recommended Report of the Working Group on the Universal Periodic Review-India, (A/HRC/21/10), dated 9 July 2012) to “*repeal the Armed Forces Special Powers Act or adopt the negotiated amendments to it that would address the accountability of security personnel, the regulation concerning detentions as well as victims’ right to appeal in accordance to international standards* (Slovakia)”.

¹⁶³. Lok Sabha, “Repeal of AFSPA”, Starred Question No.34 answered on 25.11.2014 by Kiren Rijiju, Minister of State in the Ministry of Home Affairs [Accessed 3.9.2018]

¹⁶⁴. See <http://arc.gov.in/5th%20REPORT.pdf> [Accessed 3.9.2018]

¹⁶⁵. Report of the Committee on Amendments to Criminal Law, 23 January 2013, available at: <http://www.thehindu.com/news/resources/full-text-of-justice-vermas-report-pdf/article4339457.ece>

¹⁶⁶. Judgment of the Supreme Court of India dated 1 May 2012 in CRIMINAL APPEAL NO. 257 of 2011 General Officer Commanding ...Appellant Versus CBI & Anr. With CRIMINAL APPEAL NO.55 of 2006 available at <http://www.indiankanoon.org/doc/69000120/>

25 March 2000 to Police Station Achchabal, District Anantnag for lodging FIR stating that during a special cordon and search operation in the forests of Punchalthan from 0515 hr to 1500 hrs on 25.3.2000, an encounter took place between terrorists and troops of that unit and that 5 unidentified terrorists were killed in the said operation. On the receipt of the complaint, FIR No. 15/2000 under Section 307 of Ranbir Penal Code (RPC) and Sections 7/25 of the Arms Act, 1959 was registered against unknown persons. A seizure memo was prepared by Major Amit Saxena on 25 March 2000 showing seizure of arms and ammunition from all the 5 unidentified terrorists killed in the aforesaid operation which included AK-47 rifles (5), AK-47 Magazine rifles (12), radio sets (2), AK-48 ammunition (44 rounds), hand grenades (2) detonators (4) and detonator time devices (2). The said seizure memo was signed by witnesses, Farooq Ahmad Gujjar and Mohammed Ayub Gujjar, residents of Wuzukhan, Punchalthan, J&K.¹⁶⁷

The 7th RR deposited these recovered weapons and ammunition with 2 Field Ordnance Depot. However, the local police insisted that the Army failed to hand over the arms and ammunition allegedly recovered from the five terrorists killed in the encounter, which tantamount to causing the disappearance of evidence, constituting an offence under Section 201 of the Ranbir Penal Code (RPC). In this regard, there had been correspondence and a Special Situation Report dated 25.3.2000 was sent by Major Amit Saxena, the then Adjutant, to Head Quarter-I, Sector RR stating that, based on police inputs, a joint operation with STF was launched in the forest of Pathribal valley on 25 March 2000, as a consequence, the said incident occurred. However, it was added that ammunition allegedly recovered from the killed militants had been taken away by the STF.¹⁶⁸

Kashmir valley witnessed a series of processions to protest against the killing of these 5 persons alleging that they were civilians and had been killed by the RR personnel in a fake encounter. The local population treated it to be a barbaric act of violence and there had been a demand for independent inquiry into the whole incident. On the request of the Government of J&K, a Notification dated 19.12.2000 under Section 6 of Delhi Police Special Establishment Act, 1946 (hereinafter called as "Act 1946") was issued. In pursuance thereof, Ministry of Personnel, Government of India, also issued Notification dated 22.1.2003 under Section 5 of the said law asking the Central Bureau of Investigation (CBI)

¹⁶⁷. Ibid

¹⁶⁸. Ibid

to investigate four cases including the alleged encounter at Pathribal resulting in the death of 5 persons on 25.3.2000.¹⁶⁹

The CBI conducted the investigation into the Pathribal incident and filed a chargesheet in the court of Chief Judicial Magistrate-cum- Special Magistrate, CBI, (hereinafter called the 'CJM') Srinagar, on 9.5.2006, alleging that it was a fake encounter, an outcome of criminal conspiracy hatched by Colonel Ajay Saxena, Major Brajendra Pratap Singh, Major Sourabh Sharma, Subedar Idrees Khan and some members of the troops of 7th RR who were responsible for killing of innocent persons. Major Amit Saxena prepared a false seizure memo showing recovery of arms and ammunition in the said incident, and also gave a false complaint to the police station for registration of the case against the said five civilians showing some of them as foreign militants and passed false information to the senior officers to create an impression that the encounter was genuine and, therefore, caused disappearance of the evidence of commission of the offence under Section 120-B read with Sections 342, 304, 302, 201 RPC and substantive offences thereof. Major Amit Saxena was further alleged to have committed offence punishable under Section 120-B read with Section 201 RPC and substantive offence under Section 201 RPC with regard to the aforesaid offences.¹⁷⁰

The CJM on consideration of the matter found that veracity of the allegations made in the chargesheet and the analysis of the evidence cannot be gone into as it would be tantamount to assuming jurisdiction not vested in him in view of the provisions of Armed Forces J&K (Special Powers) Act, 1990, which offer protection to persons acting under the said Act.¹⁷¹

The CJM, Srinagar, granted opportunity to the Army to exercise the option as to whether the competent military authority would prefer to try the case by way of court-martial by taking over the case under the provisions of Section 125 of the Army Act, 1950. On 24 May 2006, the Army officers filed an application before the court pointing out that no prosecution could be instituted except with the previous sanction of the Central Government in view of the provisions of Section 7 of the Act

¹⁶⁹. Ibid

¹⁷⁰. Ibid

¹⁷¹. Section 7 of the Armed Forces (Jammu and Kashmir) Special Powers Act, 1990, "7. *Protection of persons acting in good faith under this Act. No prosecution, suit or other legal proceeding shall be instituted, except with the previous sanction of the Central Government, against any person in respect of anything done or purported to be done in exercise of the powers conferred by this Act*".

1990 and, therefore, the proceedings should be closed by returning the chargesheet to the CBI.¹⁷²

The CJM in his order of 24 August 2006 dismissed the application holding that the said court had no jurisdiction to go into the documents filed by the investigating agency and it was for the trial court to find out whether the action complained of falls within the ambit of the discharge of official duty or not. The CJM himself could not analyse the evidence and other material produced with the chargesheet for considering the fact, as to whether the officials had committed the act in good faith in discharge of their official duty; otherwise the act of such officials was illegal or unlawful in view of the nature of the offence.¹⁷³

Aggrieved by the order of CJM, the General Officer Commanding of the 7th RR filed a revision petition before the Sessions Court, Srinagar and the Sessions Court directed the CJM to give one more opportunity to the Army officials for exercise of option under Section 125 of the Army Act.¹⁷⁴

The General Officer Commanding of the 7th RR approached the High Court against the order of the Sessions Court. The High Court vide impugned order dated 10.7.2007 affirmed the orders of the courts below and held that *“the very objective of sanctions is to enable the Army officers to perform their duties fearlessly by protecting them from vexatious, malafide and false prosecution for the act done in performance of their duties. However, it has to be examined as to whether their action falls under the Act 1990. The CJM does not have the power to examine such an issue at the committal proceedings. At this stage, the Committal Court has to examine only as to whether any case is made out and, if so, the offence is triable”*.¹⁷⁵

Thereafter an appeal was filed before the Supreme Court of India by the GOC of the 7th RR, among others, claiming immunity under Section 7 of the Armed Forces (Jammu and Kashmir) Special Powers Act, 1990.¹⁷⁶

Though the CBI contented that “killing innocent persons in a fake encounter in execution of a conspiracy cannot be a part of official duty

¹⁷². Judgment of the Supreme Court of India dated 1 May 2012 in CRIMINAL APPEAL NO. 257 of 2011 General Officer Commanding ...Appellant Versus CBI & Anr. With CRIMINAL APPEAL NO.55 of 2006 available at <http://www.indiankanoon.org/doc/69000120/>

¹⁷³. Ibid

¹⁷⁴. Ibid

¹⁷⁵. Ibid

¹⁷⁶. Ibid

and thus, in view of the facts of the case no sanction is required”, the Supreme Court in May 2012 held that it has “no hesitation to hold that sanction of the Central Government is required in the facts and circumstances of the case and the court concerned lacks jurisdiction to take cognizance unless sanction is granted by the Central Government”.¹⁷⁷

The case was handed over to the Army which, as expected, closed the case in January 2014 citing lack of evidence to establish a prima facie case against any of the accused Army officials.¹⁷⁸

Case 2 : Denial of permission for prosecution of police officials in Khwaja Yunus fake encounter death

Khwaja Yunus, a 27-year-old Parbhani resident and software engineer, was arrested along with others for his alleged involvement in the bomb blast that took place in Ghatkopar, Mumbai on 2 December 2002. His alleged co-accused were acquitted of all charges subsequently by a special court. While the police claimed that Yunus had escaped from custody, his then co-accused, who was the first prosecution witness before the trial court had submitted that he had seen Yunus being stripped and assaulted on 6 January 2003, following which, he was never seen again. Based on the complaint of this co-accused in 2003, an FIR was filed against the policemen.¹⁷⁹

A CID probe also revealed that the claim of police about Yunus escaping while being taken to Aurangabad was a “false story” and Yunus had died in police custody.¹⁸⁰

The CID inquiry conducted pursuant to directions of the Bombay High Court on a petition filed by Yunus’s father revealed he had died in police custody. The CID inquiry had indicted 14 policemen, but the government sanctioned prosecution for only four, who are on trial. These four police officials – Sachin Waze Sachin Waze, Rajendra Tiwari, Rajaram Nikam

¹⁷⁷. Ibid

¹⁷⁸. The Pioneer, “Army Closes Pathribal Fake Encounter Case; Anger in J&K”, 25.1.2014, <http://www.dailypioneer.com/nation/army-closes-pathribal-fake-encounter-case-anger-in-jandk.html>

¹⁷⁹. Khwaja Yunus custodial death: Maharashtra removes prosecutor who wanted 4 cops to stand trial, Indianexpress.com 18 April 2018; available at: <https://indianexpress.com/article/india/khwaja-yunus-custodial-death-maharashtra-removes-prosecutor-who-wanted-4-cops-to-stand-trial-5141791/>

¹⁸⁰. Rs 20 Lakh Compensation Awarded To Khwaja Yunus’ Mother, IndiaTVnews.com, 10 April 2012; available at: <https://www.indiatvnews.com/news/india/rs-20-lakh-compensation-awarded-to-khwaja-yunus-039-mother-15560.html>

and Sunil Desai – have been facing trial on charges of murder, voluntarily causing grievous hurt to extort confession, fabricating evidence, and criminal conspiracy in the case. Trial in the case began in May 2017, i.e. 14 years after tortured to death of Yunus.¹⁸¹

After the deposition of the first prosecution witness in January 2018, Special Public Prosecutor (SPP) Dhiraj Mirajkar had moved an application before the trial court seeking trial of four more policemen. Annoyed over moving the application seeking indictment of four more police officials viz. Praful Bhosale (retired as ACP Crime Branch), Rajaram Vhanmane (senior inspector at Dindoshi police station), Ashok Khot (senior inspector at Crime Branch Unit 5) and Hemant Desai (senior inspector at the Local Arms Unit) as named by Yunus's then co-accused and prosecution's first witness, the State government removed Mirajkar as SPP on 16 April 2018, apparently to block prosecution of these four accused police officials. Mirajkar was the third special public prosecutor in the case. Before Mirajkar, R V Mokashi had resigned from the post in 2013 citing personal reasons. Yug Choudhary, who succeeded him, had resigned in 2015. Mirajkar was appointed in November 2015, based on the recommendation made by Yunus' mother, Aasiya.¹⁸²

The lack of seriousness of the police on this case is manifestly demonstrated from the fact that as of mid-April 2018, the police brought only one of the prosecution witnesses before the court for recording of evidence.¹⁸³ On 26 June 2018, Sessions Judge V S Padalkar had directed the CID to 'take immediate action' to proceed with the case on a daily basis. Rapping the police for not bringing witnesses before the court, the court expressed displeasure over the State government's "delay tactics to prolong the matter". Judge Padalkar lamented, "Though the government and the prosecution are well aware that the matter is pending for so many years, yet no steps have been taken to complete the case except calling one witness so far." The court directed the police to ensure that witnesses are brought for recording of evidence. The court posted the

¹⁸¹. Khwaja Yunus custodial death case: Decision to remove prosecutor not to shield cops, says Maharashtra government, *The Newindiaexpress.com*, 28 July 2018; available at: <http://www.newindianexpress.com/nation/2018/jul/28/khwaja-yunus-custodial-death-case-decision-to-remove-prosecutor-not-to-shield-cops-says-maharashtra-1849817.html>

¹⁸². Khwaja Yunus custodial death: Maharashtra removes prosecutor who wanted 4 cops to stand trial, *Indianexpress.com* 18 April 2018; available at: <https://indianexpress.com/article/india/khwaja-yunus-custodial-death-maharashtra-removes-prosecutor-who-wanted-4-cops-to-stand-trial-5141791/>

¹⁸³. *Ibid*

case for 2 July 2018 and said that the trial should be conducted on a day to day basis.¹⁸⁴

4.3 Out of turn promotions and medals for encounter killings

The encounter deaths have been recurring because of the policy of the Government of India and various State governments to give the concerned law enforcement personnel out-of-turn promotion or instant gallantry rewards for killing terrorists and/or criminals. This has worked as incentive for “fake encounters”.

The case of Ketchup Colonel Kohli

In a rather infamous case involving the Indian Army, a colonel involved in counter-insurgency operations in 2003 faked the killing of five civilians as militants in his regiment’s custody.¹⁸⁵ In an effort to boost the image of the brigade and earn awards, Colonel Harvinder Singh Kohli received orders to report the five captured militants as “kills.”¹⁸⁶ Instead of succumbing to his superior’s pressure to kill militants, Kohli had five civilians pose as slain militants (complete with tomato ketchup sprayed on the bodies to resemble blood) near Bara Nagadung under Kachar district of Assam on the night of 17 and 18 August, 2003 in an effort to appease his superiors as the “kill” had already been reported to higher authorities.¹⁸⁷

An anonymous complaint was filed about the fake encounter. Initially Col. Kohli pleaded guilty and was dismissed from service despite being promised a plea deal

¹⁸⁴. Khwaja Yunus death: Proceed with case daily, court tells CID, Indianexpress.com, 27 June 2018; available at: <https://indianexpress.com/article/cities/mumbai/khwaja-yunus-death-proceed-with-case-daily-court-tells-cid-5234834/>

¹⁸⁵. See TNN, “Army revisits ‘Ketchup Colonel’ case this week,” Times of India, 7 July 2010, available at: http://articles.timesofindia.indiatimes.com/2010-07-07/india/28311861_1_bosses-defence-ministry-harvinder-singh-kohli

¹⁸⁶. See Rajat Pandit, TNN, “Govt dismisses leniency plea for ketchup colonel,” Times of India, 4 April 2008, available at: http://articles.timesofindia.indiatimes.com/2008-04-04/india/27762141_1_ketchup-colonel-major-general-ravinder-singh-severe-reprimand-and-loss

¹⁸⁷. See TNN, “Army revisits ‘Ketchup Colonel’ case this week,” Times of India, 7 July 2010, available at: http://articles.timesofindia.indiatimes.com/2010-07-07/india/28311861_1_bosses-defence-ministry-harvinder-singh-kohli; See also Judgment of the Armed Forces Tribunal, Col Harvidner Singh Kohli vs Union of India and others, TA/254/09 in W.P.C. No.7827/2009, Judgment 11 January 2010, available at: http://aftdelhi.nic.in/benches/principal_bench/judgments/court_2/ta25409harvinder11012010.pdf

of a two-year seniority loss. After dismissal, Col. Kohli submitted that the fake encounter had been staged on the orders of his superior, Brig. Rao, and that this was done with the knowledge of the brigadier's boss. As a result, Brig. Rao was also court martialled and was "cashiered from service", which basically entails loss of rank and retirement benefits. However in March 2007, the Army revoked the court martial ordered and Brig. Rao's punishment was reduced to a "severe reprimand" and loss of seniority of seven years (later reduced to five years). Kohli asked the Delhi High Court to review his case, and after review the CoAS recommended that Kohli be reinstated with a loss of seniority of five years and a severe reprimand. However the special secretary in the MoD did not recommend Kohli's reinstatement. As a result, Kohli's case was referred to the Armed Forces Tribunal, Principal Bench, New Delhi. The Tribunal in its judgment dated 11 January 2010 dismissed the plea of Kohli stating that the punishment was not disproportionate and shocking, and that Kohli was required to be "honest towards his duties."¹⁸⁸

As the case of Colonel Kohli demonstrates, the incentive to engage in extrajudicial executions, regardless of whether they actually occur or not for the purpose of promotion exists and is a real motivating force within the Indian Army and the Police.

In order to address the menace of fake encounter for promotion, the NHRC in its Guidelines on Encounter Killings on 2 December 2003 directed that "*no out-of-turn promotion or instant gallantry rewards shall be bestowed on the concerned officers soon after the encounters*".¹⁸⁹ While setting

¹⁸⁸. See TNN, "Army revisits 'Ketchup Colonel' case this week," Times of India, 7 July 2010, available at: http://articles.timesofindia.indiatimes.com/2010-07-07/india/28311861_1_bosses-defence-ministry-harvinder-singh-kohli; see also Rajat Pandit, TNN, "Govt dismisses leniency plea for ketchup colonel," Times of India, 4 April 2008, available at: http://articles.timesofindia.indiatimes.com/2008-04-04/india/27762141_1_ketchup-colonel-major-general-ravinder-singh-severe-reprimand-and-loss; see also Marching orders for 'Ketchup' Brigadier, The Times of India, 25 June 2006, available at: http://articles.timesofindia.india-times.com/2006-06-25/india/27798618_1_marching-orders-ketchup-colonel-court-martial, last accessed on 13 August 2013; see also Judgment of the Armed Forces Tribunal, Col Harvidner Singh Kohli Vs Union of India and others, available at http://aftdelhi.nic.in/benches/principal_bench/judgments/court_2/ta25409_harvinder11012010.pdf.

¹⁸⁹. Letter of NHRC Chairperson Justice A.S. Anand Chairperson dated 2 December 2003 to all Chief Ministers of States/UTs on encounter killings, <http://nhrc.nic.in/Documents/RevisedGuidelinesDealingInEncounterDeaths.pdf>

the law for dealing with encounter deaths under Article 141 of the Constitution of India, the Supreme Court of India in its judgment on 23 September 2014 in the case of *People's Union for Civil Liberties Versus State of Maharashtra* (Criminal Appeal No. 1255 of 1999) stated, “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 officers is established beyond doubt”.

The UN Special Rapporteur on extrajudicial executions stated that he had heard of the case of Mr. Sumedh Singh Saini, accused of human rights violations committed in Punjab in the 1990s, who was promoted in March 2012 to Director General of Police in that State. “Promoting rather than prosecuting perpetrators of human rights violations is not unique to Punjab” asserted the Special Rapporteur.¹⁹⁰

Sumedh Singh Saini who was accused of human rights violations including fake encounter killings during the days of Punjab militancy in the 1980s and 1990s, was promoted in March 2012 to Director General of Police in Punjab and he held the post till October 2015. An eyewitness Gurmeet Singh Pinky, a former police constable, revealed that Sumedh Singh Saini who as then Senior Superintendent of Police (SSP) was involved in the fake encounter killing of Professor Rajinderpal Singh Bulara, who was teaching at the Punjab Agricultural University in Ludhiana, in January 1989. Pinky stated that Prof Bulara was kidnapped and killed by the police at the orders of seniors including Mr Saini.¹⁹¹ Mr Saini still faced a CBI inquiry for allegedly kidnapping and eliminating Ludhiana industrialist Vinod Kumar, his brother-in-law and his driver when he was posted in Ludhiana as SSP in 1994.¹⁹² A CBI investigation was also ordered against Mr Saini by the Punjab and Haryana High Court for his alleged involvement in fake encounter of alleged militant Balwant Singh Multani in December 1991 when Mr Saini was SSP Chandigarh.¹⁹³

¹⁹⁰. UN Human Rights Council Report No. A/HRC/23/47/Add.1 dated 26 April 2013

¹⁹¹. Confessions Of A Killer Cop, Outlook, 14 December 2015, <https://www.outlookindia.com/magazine/story/confessions-of-a-killer-cop/296046>

¹⁹². Sumedh Singh Saini: Between rights and wrongs, top cop who walked his own line, The Hindustan Times, 1 July 2018, <https://www.hindustantimes.com/punjab/sumedh-singh-saini-between-rights-and-wrongs-top-cop-who-walked-his-own-line/story-qEiRfiyJ6MRLTI95aeGPuI.html>

¹⁹³. SC stays CBI probe against Sumedh Saini in fake encounter case, OneIndia, 11 July 2008 <https://www.oneindia.com/2008/07/11/sc-stays-cbi-probe-against-sumedh-saini-in-fake-encounter-case-1215779897.html>

However, in December 2011, the Supreme Court set aside and quashed the order of Punjab and Haryana High Court.¹⁹⁴

The case of Saini is not an exception. In a number of fake encounter cases, President's Gallantry Medal had to be cancelled and forfeited.

In a notification dated 21 September 2017, the President of India cancelled and forfeited the "Police Medal for Gallantry" awarded to Deputy Inspector-General of Police (Ratlam Range) Dharmendra Choudhary, IPS, for killing a dacoit in an encounter 13 years ago. The Madhya Pradesh police officer was given the Police Medal for Gallantry for killing Lobhan Singh, a dacoit wanted in more than a dozen cases in Madhya Pradesh, Rajasthan and Gujarat in 2002 but the NHRC had held the encounter to be fake. Choudhary was Additional Superintendent of Police posted in Jhabua in 2002 when he killed Lobhan Singh, and two years after the encounter, he was awarded the President's Medal. In 2008, the NHRC found that the encounter was fake and recommended to the Ministry of Home Affairs to review the medal and asked the Madhya Pradesh government to pay Rs 5 lakh compensation to Lobhan Singh's family.¹⁹⁵

Earlier, in October 2008, the Andhra Pradesh government issued "charge memos" to three IPS officers namely A Shivashankar, Shriram Tiwari and Nalin Prabhat for allegedly faking their role in a Naxalite encounter case and obtaining gallantry awards based on these misrepresentations. These three IPS officers were awarded the Police Medal for Gallantry by the Central government between 2002 and 2003 but as per a complaint by other IPS officers of the state, these three officers were not even present at the site of encounter. Three Central Committee members of a Maoist group were killed in the said encounter which took place in Karimnagar district in the Telangana region in December 1999.¹⁹⁶

4.4 Deployment for lucrative UN Peace Keeping Operations

India is one of the largest contributors of personnel to UN peacekeeping operations. India has supported some 43 peacekeeping operations since

¹⁹⁴. Supreme Court quashes CBI probe against Punjab police officers, *The Hindu*, 8 December 2011, <https://www.thehindu.com/todays-paper/tp-national/supreme-court-quashes-cbi-probe-against-punjab-police-officers/article2696554.ece>

¹⁹⁵. President cancels police medal awarded 13 years ago, *The Indian Express*, 6 October 2017, <https://indianexpress.com/article/india/president-ram-nath-kovind-cancels-police-medal-awarded-13-years-ago-to-madhya-pradesh-cop-4876603/>

¹⁹⁶. 3 IPS officers in dock for faking role in encounter, *The Times of India*, 13 October 2008, <https://timesofindia.indiatimes.com/india/3-IPS-officers-in-dock-for-faking-role-in-encounter/articleshow/3591276.cms>

the 1950s. It is currently the third largest troop contributor. Over 163,000 Indian personnel have served the UN in the last 60 years.¹⁹⁷ More Indian soldiers have lost their lives in the defence of UN's peace than any other nation: 154 Indian soldiers have died serving with the UN.¹⁹⁸

The posting for the UN mission is lucrative. Selection for the UN missions is considered coveted. Security personnel who serve on UN missions earn approximately four times his/her monthly pay, upwards of \$ 2,200 a month for an officer and \$1,100 for a Jawan, in addition to other allowances.¹⁹⁹ Compensation for injury or death is far greater than that offered domestically. Should an Indian deployed on UN mission die, \$70,000 is paid to the next of kin as compensation. Disability compensation is awarded on a sliding scale based on the injury.²⁰⁰ The Delhi High Court described the posting with the UN Mission as “the life time opportunity” in the case of *Naib Subedar K.C. Jena vs Union of India & Ors.*²⁰¹

Troops are mainly selected for UN peacekeeping based on their performance with the priority going to performance in counter-insurgency operations. For example, all Indian troops selected for the MUNOC (French acronym for the UN Mission in the Democratic Republic of Congo) were chosen based on their outstanding performances in counter-insurgency operations.²⁰² India's official policy for selection of the UN peacekeepers gives explicit “*preference to Persons Below Officer Rank (PBOR)*”

¹⁹⁷. See Dipankar Banerjee, “Contributor Profile: India,” Institute of Peace and Conflict Studies, New Delhi, 27 January 2013, available at: http://www.ipinst.org/~ipinst/images/pdfs/india_banerjee130201.pdf

¹⁹⁸. Out of 3,135 peacekeepers killed during missions, India has lost 154, followed by Nigeria with 139, Pakistan with 133, Ghana with 131, Canada with 121 and Bangladesh with 113. See UN Peacekeeping, Fatalities, Nationality and Mission up to 31 July 2013, available at: http://www.un.org/en/peacekeeping/fatalities/documents/stats_2.pdf

¹⁹⁹. Rotting Olives: Corrupt Indian peacekeepers in the Congo are marring a legacy, The Outlook, 02 June 2008 available at <http://www.outlookindia.com/article.aspx?237577>

²⁰⁰. Lok Sabha Starred Question No. 528 answered on 14.05.2012 by Mr. A K Anthony, Defence Minister, Government of India

²⁰¹. The judgment dated 1 February 2010 in W.P. (C) No.7994/2009 & C.M. No.4481/2009 is available at <http://delhicourts.nic.in/Feb10/Naib%20Subedar%20K.C.%20Jena%20Vs.%20UOI.pdf>

²⁰². The Press Information Bureau of the Government India stated that the following contingents were chosen based on their excellent performances in counter-insurgency operations: 1) the 5th Garhwal Rifles, 2) the 10th Assam Regiment, 3) the 19th R&O Flight, 4) the 6th Battalion of the Sikh Regiment, 5) the 5th Bihar Regiment and 6) the 18th Grenadiers. See Press Information Bureau, Government of India, Indian Contingent to UN Peacekeeping Mission in Congo, 20 March 2008, available at: <http://pib.nic.in/newsite/erelease.aspx?relid=36810>

who have proven themselves while serving in counter-insurgency operations".²⁰³ For the Central paramilitary forces/Central Armed Police the selection criteria again emphasize "personnel, who have served for at least two years in the hard/extreme hard areas like Jammu and Kashmir, North East region or the Naxal Affected states".²⁰⁴

As the case of "Ketchup Colonel" demonstrates, there appear to be incentives to engage in extrajudicial executions, and other gross violations of human rights during counter insurgency operations. If Indian peacekeepers are selected from those who have performed in counter insurgency and, if those counter insurgency operations routinely involve gross violations of human rights, then logically it is difficult to resist the conclusion that perpetrators of extrajudicial executions are being selected for the UN peacekeeping duties.

There are well-documented cases of serious human rights abuses committed by the Army during counter-insurgency operations. Two units who received such nominations, the 5th Garhwal Rifles and 10th Assam Regiment, participated in Operation Rhino from September 1991 to January 1992²⁰⁵ against the United Liberation Front of Assam. The Indian Army carried out massive search-and-arrest operations, leading to arbitrary arrests and detentions and other serious human rights violations, including extrajudicial killings, rape, torture, assault and harassment. Human rights groups in Assam reported that as many as 40 people were killed in army custody in 1991 and early 1992.²⁰⁶ Instead of investigations being launched into the actions (or inactions) of these battalions/units, the highly sought after positions in UN peacekeeping missions were given as a reward to these Units for participation in the Operation Rhino.²⁰⁷

²⁰³. Provided in the *Naib Subedar K.C. Jena vs Union of India & Ors.* on 1 February, 2010 [W.P.(C) No.7994/2009 & C.M. No.4481/2009] judgment available at <http://delhicourts.nic.in/Feb10/Naib%20Subedar%20K.C.%20Jena%20Vs.%20UOI.pdf>

²⁰⁴. See criteria for selection of officers for deployment with UN/Foreign Missions, available at <http://bsf.nic.in/doc/recruitment/r46.pdf>

²⁰⁵. See No End in Sight: Human Rights Violations in Assam, April 18, 1993 Vol. 5 Issue 7, Human Rights Watch, available at: <http://www.hrw.org/reports/pdfs/i/indonesia/indones2934.pdf>, last accessed on 12 August 2013.

²⁰⁶. Ibid

²⁰⁷. Indian Contingent to un Peace Keeping Mission in Congo, 20 March 2008 <http://pib.nic.in/newsite/ereelcontent.aspx?reliid=36810>

5. Guidelines and laws to deal with encounter deaths

5.1 NHRC Guidelines on Encounter Deaths

In the light of the receipt of complaints from the members of the general public and the non-governmental organisations that instances of fake encounters by the police are on the increase and that police kill persons instead of subjecting them to due process of law if offences are alleged against them and further that no investigation whatsoever is made as to who caused these unnatural deaths and as to whether the deceased had committed any offences, on 29 March 1997 the NHRC issued guidelines in respect of procedures to be followed by the State Governments in dealing with deaths occurring in encounters with the police. The NHRC held that *“Under our laws the police have not been conferred any right to take away the life of another person. If, by his act, the policeman kills a person, he commits the offence of culpable homicide whether amounting to the offence of murder or not unless it is proved that such killing was not an offence under the law. Under the scheme of criminal law prevailing in India, it would not be an offence if death is caused in the exercise of the right of private defence. Another provision under which the police officer can justify the causing of death of another person, is Section 46 of the Criminal Procedure Code. This provision authorises the police to use force, extending upto the causing of death, as may be necessary to arrest the person accused of an offence punishable with death or imprisonment for life. It is, therefore, clear that when death is caused in an encounter, and if it is not justified as having been caused in exercise of the legitimate right of private defence, or in proper exercise of the power of arrest under Section 46 of the Cr.P.C., the police officer causing the death, would be guilty of the offence of culpable homicide. Whether the causing of death in the encounter in a particular case was justified as falling under any one of the two conditions can only be ascertained by proper investigation and not otherwise”*.²⁰⁸

In its Guidelines, the NHRC issued the following procedures to be followed in case of encounter deaths with the police:²⁰⁹

- (1) when the police officer in charge of a Police Station receives information about the deaths in an encounter between the Police party and others, he shall enter that information in the appropriate register,

²⁰⁸. The NHRC Guidelines are available at <http://nhrc.nic.in/Documents/RevisedGuidelinesDealingInEncounterDeaths.pdf>

²⁰⁹. The armed forces are out of the purview of the National Human Rights Commission as per Section 19 of the Protection of Human Rights Act, 1993.

(2) the information as received shall be regarded as sufficient to suspect the commission of a cognizable offence and immediate steps should be taken to investigate the facts and circumstances leading to the death to ascertain what, if any, offence was committed and by whom,

(3) as the police officers belonging to the same Police Station are the members of the encounter party, it is appropriate that the cases are made over for investigation to some other independent investigation agency, such as State CID,

(4) question of granting of compensation to the dependents of the deceased may be considered in cases ending in conviction, if police officers are prosecuted on the basis of the results of the investigation.²¹⁰

However, these guidelines were seldom followed as the cases of encounter deaths continued to rise. The NHRC on 2 December 2003 stated that *“experience of the Commission in the past six years in the matters of encounter deaths has not been encouraging. The Commission finds that most of the states are not following the guidelines issued by it in the true spirit. It is of the opinion that in order to bring in transparency and accountability of public servants, the existing guidelines require some modifications”*.²¹¹

The NHRC further lamented that *“Though under the existing guidelines, it is implicit that the States must send intimation to the Commission of all cases of deaths arising out of police encounters, yet some States do not send intimation on the pretext that there is no such specific direction. As a result, authentic statistics of deaths occurring in various states as a result of police action are not readily available in the Commission. The Commission is of the view that these statistics are necessary for effective protection of human rights in exercise of the discharge of its duties.”*²¹²

The NHRC therefore revised its guidelines on 2 December 2003 and further introduced the following new elements to strengthen the earlier Guidelines:

²¹⁰. Letter of NHRC Chairperson Justice M.N. Venkatachaliah dated 29 March 1997 to Chief Ministers regarding the Procedure to be followed in cases of deaths in police encounters, <http://nhrc.nic.in/Documents/CasesOfEncounterDeaths.pdf>

²¹¹. Letter of NHRC Chairperson Justice A.S. Anand Chairperson dated 2 December 2003 to all Chief Ministers of States/UTs on encounter killings, <http://nhrc.nic.in/Documents/RevisedGuidelinesDealingInEncounterDeaths.pdf>

²¹². Ibid

- (i) Where the police officers belonging to the same Police Station are members of the encounter party, whose action resulted in deaths, such cases should be investigated by some other independent investigating agency, such as State CBCID,
- (ii) FIR should be immediately registered under appropriate sections of the I.P.C and such case shall invariably be investigated by State CBCID,
- (iii) A Magisterial Inquiry must invariably be held in all cases of encounter death and the next of kin of the deceased must invariably be associated in such inquiry,
- (iv) Prompt prosecution and disciplinary action must be initiated against all delinquent officers found guilty in the magisterial enquiry/ police investigation,
- (v) No out-of-turn promotion or instant gallantry rewards shall be bestowed on the concerned officers soon after the occurrence,
- (vi) A six monthly statement of all cases of deaths in police action in the State shall be sent by the Director General of Police to the Commission, so as to reach its office by the 15th day of January and July respectively.²¹³

The NHRC further revised guidelines on 12.05.2010 after it found that “most of the states are not following the guidelines issued by it in the true spirit”. The NHRC further added new elements for compliance such as all cases of encounter deaths should be reported to the NHRC by the Senior Superintendent of Police/Superintendent of the Police of the district within 48 hours of such death, in a prescribed format and further that a second report must be submitted in all cases of encounter deaths within three months providing the following information: Post Mortem Report, Inquest Report, Findings of Magisterial enquiry/enquiry by senior officers disclosing (i) names and designations of the police officers if found responsible for the death, (ii) whether force was justified and action taken was lawful, (iii) result of forensic examination, (iv) report of the ballistic expert on examination of the weapons alleged to have been used by the deceased and his companions.²¹⁴

²¹³. Ibid

²¹⁴. The revised Guidelines of the NHRC dated 12.05.2010 are available at <http://nhrc.nic.in/documents/death%20during%20the%20course%20of%20police%20action.pdf>

5.2 Andhra Pradesh High Court judgment on mandatory registration of FIR against the police in encounter deaths

Andhra Pradesh witnessed insurgency by the Peoples War Group, the ultra left wing group, and the State had become infamous for encounter killings since 1968. The Andhra Pradesh High Court gave seminal judgments on the issue with respect to the petitions filed by the Andhra Pradesh Civil Liberties Committee (APCLC). Indeed, the first Guidelines of the NHRC were framed in the light of the complaints filed by the APCLC with respect to fake encounters in Andhra Pradesh.

The Andhra Pradesh High Court considered a bunch of Writ Petitions together and delivered its historic judgment²¹⁵ on 6th February 2009 making it mandatory for registration of the FIR “where a police officer causes death of a person, acting or purporting to act in discharge of official duties or in self-defense as the case may be”.

The judgment was delivered after considering the following writ petitions:

- W.P. No. 15419 of 2006 was instituted by the APCLC seeking direction to the concerned police to register a crime into the offence of killing of eight (8) Maoist Naxalites in an alleged encounter that occurred on 23-07-2006 in the Nallamala Forest near Darboina Penta and Nekkanti Palutla villages of Yerragondapalem mandal, Prakasham District, by registering a case under Section 302 of the Indian Penal Code, 1860 against the police personnel who participated in the alleged encounter; to initiate proceedings for their prosecution; to call for all the records with regard to the crime registered on this encounter; and to pass such other order or orders as may be deemed fit and proper in the circumstances of the case.

- The sister of one of the deceased Rajitha @ Shyamal filed W.P. No. 857 of 2008 in respect of the same incident as is covered by the above writ petition. The petitioner sought disclosure of the identity of 15 members of District Special Police, S.I and P.C. Nos. 430 and 1843 of Yerragondapalem P.S. and a direction to register a case against the concerned police officers Under Section 302 IPC in view of their involvement in the death by encounter of petitioner’s sister and 7 others.

²¹⁵. A.P. Civil Liberties Committee (APCLC) Vs The Government of A.P & others WRIT PETITION Nos: 15419 of 2006; 26358 of 1999; 7906 of 2000; 14475 of 2002; 440 of 2003 and 857 of 2008

- W.P. No. 26358 of 1999 was filed seeking a declaration that the inaction of the State and the security forces in proceeding under law against the concerned Police officers of the 1st respondent P.S. (for having opened fire without provocation thereby severely injuring the petitioner's husband on 15.6.1999 evening at Gajasingavaram, Gambhirraopet Mandal, Karimnagar District) and failing to take financial and other responsibility for the medical care and well being of the injured, is arbitrary and illegal; for a direction to the 6th respondent to provide adequate medical treatment; for compensation in an amount of Rs. 2 lakhs towards damages and costs of the medical expenses incurred; and for a further direction to the respondents 3 and 6 to prosecute the concerned police personnel of the 1st respondent P.S. in accordance with law.

- W.P. No. 7906 of 2000 was filed by the APCLC seeking direction for preservation of the bodies of the persons killed in an encounter that occurred in Kaukonda Hills, Parkal Mandal, Warangal District; for handing over the bodies to the family members after identification; and for a direction to register a crime Under Section 302 IPC.

- W.P. No. 14475 of 2002 was filed by the APCLC seeking direction to the 6th respondent to register a case Under Section 302 r/w Section 34 IPC against the respondents 1 to 5; direction to the State (R-7) to entrust the investigation in the said case to the C.B.I. (R-18) in relation to the death in encounter of one Durga Prasad @ Pilli Prasad at Vijayawada on 7.6.2002; and for suitable compensation to the family members of the deceased. The deceased Durga Prasad was arrested by the Vuyyur Town Police on 19.5.2002 in connection with Cr. No. 75/02 alleging his involvement in the murder of Sirikonda Venkanna. According to the version of the State during the course of investigation in Cr. No. 75/02 Durga Prasad was perceived to be concerned with Cr. No. 161/02 for the death of one Peyyala Ramu. He was taken into custody in respect of that crime too. While in police custody and in the early hours of 5.6.2002 when the accused Durga Prasad was being escorted out of the police lock up for answering calls of nature he escaped and Cr. No. 444/02 was registered against him. On 7.6.2002 during the efforts to trace the absconder Durga Prasad and on information the police party proceeded towards Gunadala Railway Station. On the night of 8.6.2002 the police found two persons consuming liquor. On questioning the identity

of the two persons, one escaped under the cover of darkness and the other attacked the Inspector with a knife and inflicted bleeding injuries. The S.I. fired in private defence resulting in instantaneous death. The deceased was identified as Durga Prasad. Thereupon Cr. No. 448/02 was registered under Sections 332, 307 and 100 r/w 34 IPC and Section 134 Cr.P.C. and investigation taken up.

- W.P. No. 440 of 2003 was filed by the APCLC seeking direction for preservation of 6 bodies killed in two different alleged 'fake encounters' occurred on 5.1.2003 and 6.1.2003 within the jurisdiction of the respondents 1 and 2 P.S.; to direct post mortem by a team of forensic doctors duly videographed; to hand over the bodies to the family members; and to register a case Under Section 302 IPC against the Police Officers involved in the two incidents.

The lead writ petition (W.P. No. 15419 of 2006) was admitted on 27-09-2006 and certain interlocutory directives were issued. By way of W.P.M.P. No. 20579 of 2007 the petitioner sought a direction to the respondent Nos. 3, 5 and 8 to reveal the names of the members of the police special party who participated in the operations that resulted in the death of eight (8) Maoist Naxalites on 23-07-2006. The High Court by an order dated 30-07-2007 rejected this application on the ground that the petitioner had made no such request to the concerned authority under the Right to Information Act, 2005 (for short 'the Information Act, 2005').

On 30.11.2007, a Division Bench of the Andhra Pradesh High Court directed the writ petition to be listed before a Full Bench having regard to the issues raised in the writ petition as also the claim of privilege by the State. The Full Bench of the High Court by its order dated 04-12-2007 referred the writ petition along with the interlocutory applications therein (W.P.M.P. Nos. 29843 of 2007 and 31250 of 2007) to be heard and decided by a Larger Bench of five Judges.

It is pertinent to mention that a Full Bench of the Andhra Pradesh High Court in *A.P. Civil Liberties Committee v. State of A.P (APCLC): 2007(5) ALT639* had considered the issue regarding the nature of the action to be taken in the event of death of an individual in an encounter with the police and per majority recorded the following conclusions:

- (a) No crime can be registered under Section 307 I.P.C. against a person killed in an encounter;

(b) Whenever a person is found dead out of bullet injuries in an encounter, with the police,

(i) If a specific complaint is made alleging that any identified individual had caused the death of such person, an independent F.I.R. shall be registered in it, if it satisfied the law laid down by the Supreme Court in State of Haryana and Ors. v. Bhajan Lal and Ors: 1992CriLJ527

(ii) In the absence of any complaint, the procedure prescribed under Section 176 of the Cr.P.C. shall be followed, without prejudice to any investigation that may be undertaken by the Police itself.

(iii) The judgment in People's Union for Civil Liberties v. Union of India: AIR1997SC1203 does not represent the correct legal position.

In view of the privilege claim by the State (regarding disclosure of names), the (referring) Full Bench of the Andhra Pradesh opined that the following five (5) issues and other related questions may necessitate reconsideration of the judgment in APCLCs case : 2007(5)ALT639 . The specific issues/questions referred to the Larger Bench were:

(1) What would be the remedy available in law to a complainant who is unaware of the identity of the individual police officer whose firing had caused the death of a person due to bullet injuries?

(2) Whether the Executive is bound to disclose or can it claim privilege from disclosing the identity of the said police officer?

(3) In selectively refusing to disclose the identity of such police officer/s, is the Executive not exercising the judicial power of the State and conclusively to judge for itself whether the officer/officers concerned had acted in self-defence?

(4) If so, would such usurpation of the judicial power of the State, by an Executive act of claiming privilege, not result in deprivation of life and personal liberty otherwise than in accordance with the procedure established by law violating Article 21 of the Constitution of India?

(5) Does the Executive have the power to determine to what extent the rights conferred by Part-III should be restricted or

abrogated in their application to the police force of the State when such power is conferred exclusively only on the parliament under Article 33 of the Constitution of India?

For the purposes of the bunch of writ petitions, the Court on 07-02-2008 framed the following issues for consideration:

(1) Where a police officer causes the death of a person, acting or purporting to act in discharge of official duties or in self-defence as the case may be, is there commission of a cognizable offence (including in an appropriate case the offence of culpable homicide); and whether the information relating to such circumstances requires to be registered as a First Information Report obligating investigation in accordance with the procedure prescribed by the Code of Criminal Procedure, 1973?

(2) Whether the existence of circumstances bringing a case within any of the exceptions in the Indian Penal Code, 1860 including exercise of the right of private defence could be conclusively determined during investigation; whether the final report submitted by the police officer to the Magistrate on completion of the investigation is conclusive or whether the existence of the circumstances coming within the exceptions requires to be determined only in appropriate judicial proceedings?

(3) Whether a magisterial enquiry (whether under the Code of Criminal Procedure or extant Police Standing Orders) into the cause and circumstances of death occasioned by an act of a police officer obviate the rigor of investigation and trial of such act?

(4) Whether the State, the police establishment or a police officer is immune from an obligation to disclose the identity of a Police Officer who had committed an act causing the death of a person, to enable an investigating officer or any person aggrieved by such death to effectively seek justice; and if so, in what circumstances or contexts?

The Andhra Pradesh High Court²¹⁶ after hearing the parties in its judgment on 6.2.2009 issued the following directions:

(A) Where a police officer causes death of a person, acting or purporting to act in discharge of official duties or in self-defence as the case may be, the first information relating to such circumstance (even when by a Police/Public Official whether an

²¹⁶. Ibid

alleged perpetrator is named or not) shall be recorded and registered as FIR, enumerating the relevant provisions of Law, (u/Sec. 154(1) Cr.P.C.) and shall be investigated (u/Sec. 156/157 Cr.P.C.).

(B) The existence of circumstances bringing a case within any of the exceptions in the Indian Penal Code including the exercise of the right of private defense (a General Exception in Chapter IV IPC), cannot be conclusively determined during investigation. The opinion recorded by the Investigating Officer in the final report forwarded to the Magistrate (u/Sec. 173 Cr.P.C.) is only an opinion. Such opinion shall be considered by the Magistrate in the context of the record of investigation together with the material and evidence collected during the course of investigation. The Magistrate (notwithstanding an opinion of the Investigating officer, that no cognizable offence appears to have been committed; that one or more or all of the accused are not culpable; or that the investigation discloses that the death of civilian(s) in a police encounter is not culpable in view of legitimate exercise by the police of the right of private defense), shall critically examine the entirety of the evidence collected during investigation to ascertain whether the opinion of the Investigating Officer is borne out by the record of investigation. The Magistrate has the discretion to disregard the opinion and take cognizance of the offence u/Sec. 190 Cr.P.C.

(C) A magisterial enquiry (inquest) (u/Ss. 174 to 176 Cr.P.C.) is neither a substitute nor an alternative to the obligation to record the information as FIR and to conduct investigation into the facts and circumstances of the case and if necessary to take measures for the discovery and arrest of the offender (s) (u/Ss. 154(1), 156 and 157 Cr.P.C.) and

(D) A declaration [that the information conveyed to the officer in charge of a Police Station (u/Sec.154(1) Cr.P.C.) or a complaint made to the Magistrate (u/Chpt. XV Sec. 200 Cr.P.C.), need not mention the name of the Police Officer(s) who the complainant believes is the perpetrator of the offence complained of], it is not necessary to pronounce on whether the State, the Police Establishment or a Police Officer has immunity from the obligation to disclose the identity (of a police officer who had committed an act causing the death of a person), to a person aggrieved by such death to effectively seek justice. Whether the

investigating officer is required to disclose the names of the police officers who are involved in an operation resulting in civilian casualty when a request for such information is lodged by an individual, is an issue not within the spectrum of the issues falling for our determination herein. This aspect is left open. The obligation to disclose to the Investigating Officer the identity of the police officer(s) so involved, is however absolute and there is no immunity whatsoever from this obligation. Withholding of any information or material that impedes effective or expeditious investigation violates several provisions of the Indian Penal Code and the Criminal Procedure Code.

In March 2009, the Supreme Court stayed the above verdict²¹⁷ and the stay continues as on date.

5.3 Law established by the Supreme Court for dealing with encounter deaths

The Supreme Court set the law under Article 141 of the Constitution in the case of *People's Union for Civil Liberties (PUCL) Vs State of Maharashtra*²¹⁸ for dealing with encounter death cases.

The PUCL filed three writ petitions before the Bombay High Court on the issue of genuineness or otherwise of nearly 99 encounters between the Mumbai police and the alleged criminals resulting in death of about 135 persons between 1995 and 1997. In the Writ Petitions, the PUCL prayed for (i) directing the State and the concerned law enforcement official to furnish the particulars regarding the number of persons killed in last one year in police encounters, their names, addresses, the circumstances in which they were killed, the inquiries, if any, conducted with respect to the said killings and any other relevant information and the action taken, if any, by them; (ii) directing the State of Maharashtra to register offence under Section 302 of Indian Penal Code and other enactments against the police officers found prima-facie responsible for the violations of fundamental rights and other provisions of the Indian Penal Code and other relevant enactments; (iii) directing the Coroner of Mumbai to submit a detailed report and the details of action taken by him under the provisions of the Coroners Act 1871; (iv) directing an

²¹⁷. Encounters: A.P. High Court order stayed, The Hindu, 05 March 2009 available at <https://www.thehindu.com/todays-paper/tp-national/tp-andhrapradesh/Encounters-A.P.-High-Court-order-stayed/article16630458.ece>

²¹⁸. Judgment dated 23 September 2014 in *People's Union for Civil Liberties Versus State of Maharashtra* (Criminal Appeal No.1255 of 1999)

appropriate authority to enquire into and report to this Court in all the police encounters that have taken place not only in the city of Mumbai but also in the entire State of Maharashtra in which persons have been killed or injured in police encounters; (v) directing the State of Maharashtra to constitute the Maharashtra State Human Rights Commission as provided under Section 21 and other provisions contained in the Human Rights Act 1993, and (vi) directing the State Government to frame appropriate guidelines governing planning and carrying out encounters for the purpose of protection of life and liberty guaranteed under Article 21 read with Article 14 of the Constitution of India.

After the hearing, the Mumbai High Court vide judgment and order dated 22-25.02.1999 directed the following guidelines to be followed necessarily and mandatorily by the police in the State:

- “1. Whenever the respondents-police are on the receipt of intelligence or a tip off about the criminal movements and activities pertaining to the commission of grave crimes, it shall be entered into a case diary. If the receiving authority is the police officer of a particular police station, the relevant entry has to be made in the General diary and if the receiving authority is the higher police officer, the relevant entry to the said effect has to be made by a separate diary kept and provided therefore and then pursue further in accordance with the procedural law.
2. Regarding any encounter operation is over and persons are killed or injured and the same is reported to either orally or writing to the police in furtherance of Section 154 of the Criminal Procedure Code, it shall be registered in Crime Register of that particular police station and that further the said First Information Report along with copies to the higher officials and the Court in original shall be sent with immediately without any delay whatsoever through proper channel so as to reach to the Court without any delay at all. A report, as enjoined under Section 157(1) of the Criminal Procedure Code, shall also be followed necessarily by the concerned police station.
3. After setting the law in motion by registering the First Information Report in the Crime Register by the concerned police officer of the particular police station, the investigating staff of the police shall take such steps by deputing the man or men to get the scene of crime guarded so as to avoid or obliterate or disfigure the existing physical features of the scene of occurrence or the operation encounter. This guarding of the scene of

occurrence shall continue till the inspection of occurrence takes place by the investigating staff of the police and preparation of spot *panchnama*²¹⁹ and the recovery *panchnama*.

4. The police officer who takes part in the operation encounter or the investigating officer of the concerned police station, shall take all necessary efforts and arrangements to preserve finger prints of the criminals or the dreaded gangster of the weapons who handled immediately after the said criminal was brought down to the ground and incapacitated and that the said fingerprints, if properly taken and preserved, must be sent to the Chemical Analyzer for comparison of the fingerprints of the dead body to be taken.

5. The materials which are found on the scene of occurrence or the operation encounter and such of the materials including the blood stained earth and blood stained materials and the sample earth and other moveable physical features, shall also be recovered by the investigating staff under the cover of recovery *panchnama* attested by the independent witnesses.

6. To fix the exact date and actual place of occurrence in which operation encounter has taken place, a rough sketch regarding the topography of the existing physical features of the said place shall be drawn by the police or the investigating staff of the police either by themselves or by the help of the staff of the Survey Department even during the spot *panchnama* is prepared.

7. The inquest examination shall be conducted by the investigating staff of the police on the spot itself without any delay and statements of the inquest witnesses are to be recorded under Section 161 of the Code of Criminal Procedure and the inquest *panchnama* shall be sent along with the above case record prepared along with the First Information Report without any delay whatsoever to the Court.

8. If the injured criminals during the operation encounter are found alive, not only that they should be provided medical aid immediately but also arrangements and attempts shall be taken by the police to record their statements under Section 164 of the Criminal Procedure Code either by a Magistrate, if possible and if not, by the Medical Officer concerned duly attested by the

²¹⁹. *Panchnama* means record of the investigation by police or other investigative agency.

hospital staff mentioning the time and factum that while recording such statements the injured were in a state of position that they will be able to give statements and the connected certificates by the doctors appended thereto.

9. After the examination of further witnesses and completing the investigation inclusive of securing the accused or accused persons, the concerned police is directed to send final report to the Court of competent jurisdiction as required under Section 173 of the Criminal Procedure Code for further proceeding.

10. Either in sending the First Information Report or sending with the general diary entry referred in the guideline nos. 1 and 2, the concerned police shall avoid any iota of delay under any circumstances whatsoever so also rough sketch showing the topography of the scene and the recovery of the materials and the blood stained materials with the sample earth and the blood stained earth with the other documents viz, the spot *panchnama*, recovery *panchnama* - all seems very vital documents - the respondents-police are also directed to send them to the Court of concerned jurisdiction without any delay.”

Not satisfied with the adequacy of the reliefs granted by the Mumbai High Court, the PUCL filed three Special Leave Petitions (SLPs) against the judgment and order dated 22-25.02.1999.

The Supreme Court of India in its judgment on 23 September 2014 framed the following directions to be treated as law in the matters of investigating police encounters in the cases of death as the standard procedure for thorough, effective and independent investigation:

(1) Whenever the police is 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 Code²²⁰ without any delay. While forwarding the report under Section 157 of the Code, the procedure prescribed under Section 158 of the Code²²¹ shall be followed.

(3) An independent investigation into the incident/encounter shall be conducted by the CID or 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:

(a) To identify the victim; colour photographs of the victim should be taken;

(b) To recover and preserve evidentiary material, including blood-stained earth, hair, fibers and threads, etc., related to the death;

²²⁰. 157. Procedure for investigation preliminary inquiry.

(1) If, from information received or otherwise, an officer in charge of a police station has reason to suspect the commission of an offence which he is empowered under section 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report and shall proceed in person, or shall depute one of his subordinate officers not being below such rank as the State Government may, by general or special order, prescribe in this behalf, to proceed, to the spot, to investigate the facts and circumstances of the case, and, if necessary, to take measures for the discovery and arrest of the offender; Provided that-

(a) when information as to the commission of any such offence is given against any person by name and the case is not of a serious nature, the officer in charge of a police station need not proceed in person or depute a subordinate officer to make an investigation on the spot;

(b) if it appears to the officer in charge of a police station that there is no sufficient ground for entering on an investigation, he shall not investigate the case.

(2) In each of the cases mentioned in clauses (a) and (b) of the proviso to sub- section (1), the officer in charge of the police station shall state in his report his reasons for not fully complying with the requirements of that sub- section, and, in the case mentioned in clause

(b) of the said proviso, the officer shall also forthwith notify to the informant, if any, in such manner as may be prescribed by the State Government, the fact that he will not investigate the case or cause it to be investigated.

²²¹.Section 158 of the Criminal Procedure Code :

1. Every report sent to a Magistrate under section 157 shall, if the State Government so directs, be submitted through such superior officer of police as the State Government, by general or special order, appoints in that behalf.

2. Such superior officer may give such instructions to the officer in charge of the police station as he thinks fit, and shall, after recording such instructions on such report, transmit the same without delay to the Magistrate

(c) To identify 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 rough sketch of 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 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 In-charge/ 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 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 concerned Court.

(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 chargesheet 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 to NHRC by 15th 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 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 use of firearm amounting to offence under the 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 a 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 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 officers 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 incident. Upon such complaint being made, the concerned Sessions Judge shall look into the merits of the complaint and address the grievances raised therein.

The Supreme Court also stated that the above guidelines will also be applicable to grievous injury cases in police encounter, as far as possible and further that the above 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.

6. Supreme reluctance by the Supreme Court to address encounter killings

The Supreme Court has so far hesitated to take a firm view to deal with encounter deaths. It has failed to address legal lacuna to deal with encounter deaths in which seldom any evidence exist or witnesses are available.

The full bench of the Andhra Pradesh High Court delivered its historic judgment²²² on 6th February 2009 making it mandatory for registration of the FIR “where a police officer causes death of a person, acting or purporting to act in discharge of official duties or in self-defense as the case may be”. However, a three-judge Bench of the Supreme Court, headed by then Chief Justice K.G. Balakrishnan who went to become Chairman of the National Human Rights Commission stayed the judgment on 4 March 2009 on an appeal²²³ by the Andhra Pradesh Police Officers’ Association. The petition was part heard on 08.04.2016. Thereafter, the petition was not listed as on date i.e. almost one decade after the appeal was filed.²²⁴

In the meanwhile, the Supreme Court delivered its judgment in *People’s Union for Civil Liberties & Anr Vs State of Maharashtra & Ors*²²⁵ on 23 September 2014 and issued 16-point guidelines to deal with encounter death cases. The Supreme Court while accepting the argument of the State merely directed for registration of an FIR and rejected the order to file the FIRs against policemen involved in the encounter. It means justifying the current practice i.e. registration of the FIR against the dead person on the charge of attempted murder of police officers and as the accused is already dead, s/he cannot defend and police exonerate themselves without taking the case to the court.²²⁶

²²². A.P. Civil Liberties Committee (APCLC) Vs The Government of A.P & others WRIT PETITION Nos : 15419 of 2006; 26358 of 1999; 7906 of 2000; 14475 of 2002; 440 of 2003 and 857 of 2008

²²³. Special Leave to Appeal (C) Petition No. 5933/2009, A P Police Officers Association Versus A P Civil Liberties Committee

²²⁴. The case status of the Supreme Court of India at <https://www.sci.gov.in/> was last accessed on 15.10.2018.

²²⁵. *People’s Union for Civil Liberties & Anr Vs State of Maharashtra & Ors*, 23.09.2014, available at: <http://supremecourtindia.nic.in/outtoday/ar12551999.pdf>

²²⁶. See “*Showing weak judgment*” by Colin Gonsalves, The Indian Express, 25.9.2014, <http://indianexpress.com/article/opinion/columns/showing-weak-judgment/>, & “Not enough, Your Honour!”, Deccan Herald, 5.10.2014, <http://www.deccanherald.com/content/434202/not-enough-your-honour.html>

Further, the apex court directed the encounter killings be investigated by the CID or a police team from another police station despite apex court itself in numerous decisions having handed over the investigation to the CBI.²²⁷

The order also restricted the authority and scope of the NHRC and empowered the police to choose to send the immediate information either to the NHRC or the State Human Rights Commission (SHRC) with most SHRCs being non-functional for want of non-appointment of members and inadequate resources.²²⁸

The apex Court further stated that the intervention of the NHRC is not necessary unless there is serious doubt about the independence and impartiality of the investigation and that compensation to be provided to the dependents of the victims who suffered death in a police encounter, the scheme provided under Section 357(A) of Cr.P.C. must be applied.

The NHRC had no other option but to file a Writ Petition²²⁹ on 1 December 2014 before the Supreme Court requesting its intervention to issue a writ of Mandamus directing the concerned governments and police authorities to continue to send the reports/information asked for by the NHRC and to abide by the guidelines issued by it in May 2010 with respect to the procedure to be adopted by the Police in cases of encounter killings and further that not to construe the guidelines issued by the Supreme Court in the case of *People's Union for Civil Liberties & Anr Vs State of Maharashtra & Ors* in such a manner as to obstruct enquiries by NHRC in cases of encounter. The NHRC contended that under Section 12 of the PHRA it has a statutory duty to look into all cases of violation of human rights which also includes right to life which is involved in the cases of death in encounter and that the power of NHRC to reward compensation is independent of Section 357 (A) of Cr.P.C. The NHRC further contented, “who and when will decide the issue of serious doubt about the independent and impartial investigation?” and “what is the purpose of information to the NHRC if not actionable?”²³⁰ The appeal of the NHRC is yet to be heard by the Supreme Court.

²²⁷. Ibid

²²⁸. “Of encounter killings, SC & human rights”, By Satyabrata Pal, The Tribune, 2.10.2014, <http://www.tribuneindia.com/2014/20141002/edit.htm#6>

²²⁹. W.P.(C).001012/2014 National Human Rights Commission Vs Union of India and others

²³⁰. NHRC files a Writ Petition in the Supreme Court in connection with its order in a case of PUCL on encounter deaths (12.12.2014), available at <http://www.nhrc.nic.in/dispatchive.asp?fno=13460>

7. Fake encounters are counter-productive

Fake encounters are illegal and plain cold blooded murder, often committed after entering into criminal conspiracy. It is the most unaccountable violation of the right to life in India as there is rarely any witness or evidence. The aim of fake encounter has been to instill fear among the alleged insurgents or alleged criminals and provide a false sense of security to the populace.

7.1 Uttar Pradesh: Crimes are increasing despite highest encounter killings

The Bharatiya Janata Party (BJP) in its Election Manifesto for Uttar Pradesh elections of March 2017 declared its motto as “*Na goondaraj Na Bhrashtachar* (no goondaraj, no corruption)” and promised to bring back all criminals, who are out on parole and committing crimes, back to jails within 45 days.²³¹

After coming to power, Chief Minister Yogi Adityanath elaborating the policy stated, “*Agar apradh karenge, toh thok diye jayenge*”²³² (If they commit crimes, we will knock them down). This policy led to encounter killing of 63 criminals between Chief Minister Yogi Adityanath-led government took charge of the state in March 2017 and August 2018. Four policemen were also killed and over 500 people were injured in these operations that took place in various districts in order to clamp down on crime in the state.²³³

The question is whether encounter killings actually reduce crime rate?

As stated, from 1 April 1998 to 31 March 2018, the NHRC registered a total of 2,955 complaints of encounter deaths and the largest number of encounter deaths during the period took place in Uttar Pradesh with 1,004 encounter killings i.e. 34% of the total cases.

²³¹. Highlights of BJP manifesto for Uttar Pradesh Assembly elections 2017, The Hindu, 28.02.2017 available at <https://www.thehindu.com/elections/uttar-pradesh-2017/Highlights-of-BJP-manifesto-for-Uttar-Pradesh-Assembly-elections-2017/article17108890.ece>

²³². ‘Thok Denge’: We will knock down criminals in UP, says UP CM Yogi Adityanath in Aap Ki Adalat, India TV, 2 June 2017 available at <https://www.indiatvnews.com/politics/national-thok-denge-we-will-knock-down-criminals-in-up-says-up-cm-yogi-adityanath-in-aap-ki-adalat-384587>

²³³. Uttar Pradesh | Copycat encounters: 21 deaths, 20 similar FIRs, same sequence of events, 22 August 2018, <https://indianexpress.com/article/india/uttar-pradesh-encounters-21-deaths-20-similar-firs-same-keywords-yogi-adityanath-up-police-5316609/>

For the purposes of understanding the relations between crime rate and encounter killings which is justified by the State and populist governments for controlling crimes, Asian Centre for Human Rights collated the data of encounter deaths registered by the NHRC from 1 April 2007 to 31 March 2017. The NHRC has received a total of 1,694 encounter deaths. These included 177 cases in 2007-08, 132 cases in 2008-09, 111 cases in 2009-10, 199 cases in 2010-11, 179 cases in 2011-12, 181 cases in 2012-13, 148 cases in 2013-14, 192 cases in 2014-15, 206 cases in 2015-16, and 169 cases in 2016-17.

Table 2 : Cases of Encounter Deaths registered by the NHRC during 2007 to 2017²³⁴

SI NO.	State	2007-2008	2008-2009	2009-2010	2010-2011	2011-2012	2012-2013	2013-2014	2014-2015	2015-2016	2016-2017	Total
1	ANDHRA PRADESH	20	2	2	11	8	5	2	4	5	3	62
2	ARUNACHAL PRADESH	1	0	0	1	1	2	6	4	3	3	21
3	ASSAM	22	15	31	54	87	55	58	84	49	31	486
4	BIHAR	3	0	2	7	2	2	7	0	3	4	30
5	CHATTISGARH		0	0	8	3	19	18	23	50	75	196
6	GOA	0	0	0	0	0	0	0	0	0	0	0
7	GUJARAT	1	0	1	1	2	0	0	0	0	0	5
8	HARYANA	7	3	1	1	2	2	5	2	9	0	32
9	HIMACHAL PRADESH	0	0	0	0	0	0	0	0	0	2	2
10	JAMMU & KASHMIR	2	1	0	2	0	0	0	0	2	0	7
11	JHARKHAND	5	6	5	7	9	12	12	10	17	7	90
12	KARNATAKA	6	2	2	8	1	3	2	1	1	2	28
13	KERALA	0	0	0	1	0	0	0	0	0	1	2
14	MADHYA PRADESH	3	4	2	4	5	10	4	6	3	1	42
15	MAHARASHTRA	10	14	8	8	1	5	1	11	3	8	69
16	MANIPUR	1	3	0	4	17	15	3	1	9	3	56
17	MEGHALAYA	0	0	0	6	5	17	7	22	16	10	83
18	MIZORAM	0	0	0	0	0	0	0	0	0	0	0
19	NAGALAND	0	0	0	0	0	0	0	0	0	0	0
20	ORISSA	1	0	1	10	5	8	12	6	8	9	60
21	PUNJAB	2	2	0	2	0	1	2	2	2	2	15
22	RAJASTHAN	0	1	0	5	3	3	0	0	0	0	12
23	SIKKIM	0	0	0	0	0	0	0	0	0	0	0
24	TAMILNADU	1	6	4	4	2	3	1	0	1	2	24
25	TRIPURA	0	0	0	0	1	1	0	0	0	0	2
26	UTTAR PRADESH	84	69	47	42	19	8	4	7	5	4	289
27	UTTARAKHAND	3	3	4	1	0	0	0	0	0	0	11
28	WEST BENGAL	3	0	1	12	5	7	1	5	15	1	50
29	ANDAMAN & NICOBAR	0	0	0	0	1	0	0	0	0	0	1
30	CHANDIGARH	0	0	0	0	0	0	0	0	0	0	0
31	DADRA & NAGAR HAVELI	0	0	0	0	0	0	0	0	0	0	0
32	DAMAN & DIU	0	0	0	0	0	0	0	0	0	0	0
33	DELHI	2	1	0	0	0	3	3	2	2	1	14
34	LAKSHADWEEP	0	0	0	0	0	0	0	0	0	0	0
35	PUDUCHERRY	0	0	0	0	0	0	0	0	0	0	0
36	TELANGANA								2	3	0	5
	GRAND TOTAL	177	132	111	199	179	181	148	192	206	169	1694

²³⁴. Source: Annual Reports of the NHRC and Rajya Sabha Starred Question No.86 answered on 25.07.2018

Assam topped the chart with 486 encounter killings, followed by Uttar Pradesh (289), Chhattisgarh (196), Jharkhand (90), Meghalaya (83), Maharashtra (69), Andhra Pradesh (62), Odisha (60), Manipur (56), West Bengal (50), Madhya Pradesh (42), Haryana (32), Bihar (30), Karnataka (28), Tamil Nadu (24), Arunachal Pradesh (21), Punjab (15), Delhi (14), Rajasthan (12), Uttarakhand (11), Jammu and Kashmir (7), Gujarat and Telangana (5 each), Himachal Pradesh, Kerala and Tripura (2 each), Andaman & Nicobar (1).

However, Table 3 shows that percentage of contribution to all India Total Crime Incidence has been increasing both for Assam and Uttar Pradesh. It is clear that encounter deaths, apart from being absolutely illegal, had no deterrent effect.

Table 3 : Percentage of contribution to all India total crime incidence²³⁵

Top Ten states in encounter killings		Percentage of contribution to all India Total crime incidence									
Rank	States	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
1	Assam	2.3	2.5	2.6	2.8	2.9	3.3	3.3	3.3	3.5	3.4
2	Uttar Pradesh	7.6	8.1	8.1	7.8	8.4	8.3	8.6	8.4	8.2	9.5
3	Chhattisgarh	2.3	2.5	2.4	2.5	2.5	2.3	2.1	2	1.9	1.8
4	Jharkhand	1.9	1.8	1.8	1.7	1.5	1.7	1.8	1.6	1.5	1.4
5	Meghalaya	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1
6	Maharashtra	9.8	9.9	9.4	9.4	8.8	8.5	8.9	8.8	9.3	8.8
7	Andhra Pradesh	8.8	8.6	8.5	8.2	8.2	8.1	8.2	4	3.8	3.6
8	Odisha	2.8	2.7	2.6	2.5	2.6	2.8	2.7	2.6	2.8	2.7
9	Manipur	0.2	0.2	0.1	0.1	0.1	0.2	0.1	0.1	0.1	0.1
10	West Bengal	4.1	5	5.3	5.8	6.2	6.8	6.4	6.5	6.1	5.9

The problem in Uttar Pradesh lies in judicial delay and no fear of the rule of law which emboldens the criminals.

A total of 9,10,087 cases have been pending in the High Court of Judicature at Allahabad as on 01.02.2018. Of these, 7,05,078 pending at the Principal seat in Allahabad and 2,05,009 cases in Lucknow bench.²³⁶

According to the Summary report of cases as available on the webpage of the National Judicial Data Grid (NJDG), there are 67,61,404 pending cases in Districts and Sessions Courts in Uttar Pradesh as on 10 October 2018. Of these, 16,40,450 are civil cases and 51,20,954 are criminal cases. The figure of pending cases in Uttar Pradesh constitutes 24.35% of total 2,77,73,239 cases pending in India as of 30 September 2018.²³⁷

²³⁵. Crime in India annual reports published by the National Crime Records Bureau, Ministry of Home Affairs, government of India

²³⁶. See <http://allahabadhighcourt.in/casestatus/pendency.html>

²³⁷. See http://njdg.ecourts.gov.in/njdg_public/main.php

For the purposes of early disposal of the cases, the Supreme Court categorized the pending cases into three categories i.e. over 10 years old, over five years old and below five.

Out of total 67,61,404 pending cases, 9,34,742 (2,58,760 civil & 6,75,982 criminal cases) constituting 13.82% of the total pendency are cases pending over 10 years. 16,31,991 cases (3,14,845 civil & 13,17,146 criminal) constituting 24.14% of the total pendency in UP are cases pending between 5 to 10 years while 18,27,687 (4,73,961 civil & 13,53,726 criminal) cases 27.03% of the total pendency in UP are cases pending between 2 to 5 years and 23,66,984 cases (5,92,884 civil & 17,74,100 criminal) constituting 35.01% are cases pending less than 2 years.²³⁸

In the absence of punishment because of the judicial delay, there is no fear of the rule of law in Uttar Pradesh either among the police or the criminals.

7.2 Politically counter-productive: Sohrabuddin Sheikh fake encounter haunts BJP President Amit Shah

On 26 November 2005, Sohrabuddin Sheikh was killed by the Anti-Terror Squad (ATS) team of the Gujarat Police in an alleged encounter near Gandhinagar in Gujarat. The police claimed that Sohrabuddin was an alleged gangster having links with Pakistan-based terror outfit Lashkar-e-Taiba and killed in an encounter. However, family members alleged that Sohrabuddin and his wife, Kausarbi were abducted by the ATS when they were on the way from Hyderabad to Sangli in Maharashtra. Sohrabuddin was killed while his wife disappeared and suspected to have been killed.²³⁹

In April 2007, D G Vanzara, then Deputy Inspector General of Police, was arrested along with two other police officers, Rajkumar Pandian and Dinesh M N, in connection with the encounter killing.²⁴⁰ Tulsiram Prajapati, an aide of Sohrabuddin and an eyewitness to the encounter, was also allegedly killed by the police at Chapri village in Banaskantha district in Gujarat in December 2006. In September 2012, the case was

²³⁸. http://njdg.ecourts.gov.in/njdg_public/main.php

²³⁹. Sohrabuddin Sheikh fake encounter case: Charges against Geeta Johari dropped, Firstpost, 3 March 2015 http://www.firstpost.com/india/sohrabuddin-sheikh-fake-encounter-case-charges-geeta-johari-dropped-2132439.html?utm_source=FP_TOP_NEWS

²⁴⁰. Former Gujarat top cop Vanzara gets bail in Sohrabuddin case, The Indian Express, 11 September 2014, <http://indianexpress.com/article/india/india-others/former-gujarat-top-cop-vanzara-gets-bail-in-sohrabuddin-case/>

transferred to Mumbai at the CBI's request for fair trial. In 2013, the Supreme Court had clubbed Tulsiram Prajapati's encounter killing case with that of Sohrabuddin. On 2 March 2015, a special CBI court dropped charges against Gujarat Additional Director General of Police Geeta Johari in connection with Sohrabuddin Sheikh and Tulsiram Prajapati fake encounter cases for want of mandatory sanction from the Gujarat government for her prosecution. Johari was charged with delaying the investigations in the Prajapati case and destruction of evidence. Earlier, the court had discharged then Gujarat Home Minister and current national President of ruling Bharatiya Janata Mr Amit Shah and others from the case.²⁴¹ On 3 October 2018, the Bombay High Court heard the PIL seeking a writ of mandamus to be issued to the Central Bureau of Investigation directing the agency to challenge the discharge of BJP national president and Member of Parliament Amit Shah from the alleged fake encounter case of Sohrabuddin Sheikh. The Mumbai High Court has reserved its judgment.²⁴²

7.3 Promotes public uprising: Machil fake encounter that gave birth to stone pelting in Jammu and Kashmir

On 29 April 2010, three youths identified as Shazad Ahmad Khan, Riyaz Ahmad Lone and Mohammad Shafi Lone, residents of Nadihal village in Baramulla district of Jammu and Kashmir, were lured to Machil on the pretext of jobs and good money as porters with the Army. The three were shot dead by soldiers of the 4th Rajput Regiment of the Indian Army in a staged encounter on 30 April. The victims were dubbed as Pakistani militants killed while trying to infiltrate across the Line of Control. Police investigation into the incident exposed the entire conspiracy, and led to the charge-sheet against three Army Officers, five soldiers, one Territorial Army personnel and two civilians in July 2010. In July 2012, the Chief Judicial Magistrate Court, Sopore allowed the Army to try its personnel in military court. In November 2014, the General Court Martial (GCM) of the Army sentenced Colonel Dinesh Pathania, Captain Upendra Singh, Havildar Devinder, and Lance Naiks Arun Kumar and Lakhmi to life imprisonment for killing the three youth in a fake encounter. The GCM also held that Colonel Dinesh Pathania, Captain Upendra Singh, Havildar

²⁴¹. Sohrabuddin Sheikh fake encounter case: Charges against Geeta Johari dropped, Firstpost, 3 March 2015 http://www.firstpost.com/india/sohrabuddin-sheikh-fake-encounter-case-charges-geeta-johari-dropped-2132439.html?utm_source=FP_TOP_NEWS

²⁴². Bombay HC Reserves Order On A Plea Seeking Directions To CBI To Challenge Amit Shah's Discharge In Sohrabuddin Case, Livelaw.in, 3 October 2018 available at <https://www.livelaw.in/bombay-hc-reserves-order-on-a-plea-seeking-directions-to-cbi-to-challenge-amit-shahs-discharge-in-sohrabuddin-case/>

Devinder and Lance Naiks Lakhmi and Arun Kumar should be cashiered from service including stripping of their ranks and all pension benefits. The killings of the three youth had sparked widespread protests in Kashmir valley, which killed nearly 120 people in firing by the security forces.²⁴³

7.4 Rape and encounter killing of Thangjam Manorama Devi that shaped the movement against the APFSPA

In the intervening night of 10-11 July 2004, Thangjam Manorama Devi was arrested by a team of the 17th Assam Rifles (AR) on the charge of being a member of a banned outfit from her house at Bamon Kampu Mayai Leikai under Irilbung police station in Imphal East District of Manipur. The multiple bullet-ridden dead body of Manorama Devi was found on a roadside near Yaiphorok village on the morning of 11 July. The AR claimed that Manorama Devi was shot dead when she attempted to escape from their custody.²⁴⁴

However, the report of the judicial Inquiry Commission constituted by the State Government of Manipur which was submitted to the Supreme Court in November 2014 revealed the torture including sexual assault suffered by Manorama Devi before being killed while in the custody of the AR personnel. The report stated that the “escape theory” and “firing at her legs” claimed by the AR was a “naked lie”. There were no injuries on the legs. The report on the basis of medical reports and injuries sustained by the victim stated that the victim fell down after receiving the first gunshot injury, but the personnel continued firing aiming at her vital parts of the body including the vaginal part. Thus the report noted *“the victim was fired in order to eliminate her and to destroy material evidence. Really, the firing on her person was made so brutally with a prominent feature to kill her ruthlessly. Every firing seemed to show that she should die and could not live any more”*. On the allegation of rape on Manorama Devi, Chairman of the Commission, C. Upendra Singh, retired District and Sessions Judge, Manipur stated *“I am completely at the lost to understand how the Assam Rifles personnel had chosen as a target for firing the vaginal/ genital organ of an unmarried girl and after she was taken by them under arrest and taking to places unknown to the family members of the victim. Moreover, it cannot be*

²⁴³. The Times of India, “Machil fake encounter: 5 army men sentenced to life imprisonment”, 14.11.2014 <http://timesofindia.indiatimes.com/india/Machil-fake-encounter-5-army-men-sentenced-to-life-imprisonment/articleshow/45142081.cms>

²⁴⁴. The Report of the Judicial Inquiry Commission on the death of Thangjam Manorama Devi was submitted to the Supreme Court in November 2014 by the State Government of Manipur after the apex court had demanded it as part of a hearing on a PIL seeking probe into custodial deaths in the north-east States. Since then it is in the public domain and available at: <https://bhrpc.files.wordpress.com/2014/11/manoramareport.pdf>

*received on the first shot and thus these evidences and circumstances clearly indicate that victim Manorama Devi might have been subjected to rape and sexual harassment. The arresting team of the Assam Rifles with a view to cover up the crime over the person of the victim, they had specifically fired on genital organ of an unmarried girl after taking her under arrest from the house. It appears to me that this aspect exposes not only barbaric attitude but also their attempt to fabricate false evidence with a view to cover up the offence committed by them”.*²⁴⁵ The judicial commission report also revealed the blatant violations of the order of the Supreme Court in the case of *Naga Peoples Movement for Human Rights Vs Union of India* in which the validity of the AFSPA was upheld. The report named Major N Dagar, Commander of the operational team of the 17th AR responsible either directly or vicariously, and four others namely Havildar Suresh Kumar, Rifleman T. Lotha, Rifleman Ajit Singh, and Rifleman Saikia who were directly responsible for killing Manorama Devi. The AR had attempted to avoid inquiry by invoking the AFSPA.²⁴⁶

On 18 January 2014, the Supreme Court directed the Government of India to pay Rs. 10,00,000 (one million) as compensation to the family of Manorama Devi. The Supreme Court remained silent on the prosecution of the guilty personnel. Manorama Devi’s family stated that their demand was not for “compensation but justice”.²⁴⁷

The rape and encounter killing of Manorama Devi led to massive public protests in Manipur immediately after the killing and over the years. Five days after the killing, around 30 middle-aged women walked naked through Imphal to the Assam Rifles headquarters, shouting: “Indian Army, rape us too... We are all Manorama’s mothers.”²⁴⁸ Author M. K. Binodini Devi, immediate descendent of late Maharaja of Manipur Churachand Singh returned prestigious Padma Shree award given by the Government of India in protest against rape and encounter killing of Manorama Devi.²⁴⁹

In order to assuage public outrage, the Government of India established the “Committee to Review The Armed Forces Special Powers Act” on 19

²⁴⁵. Ibid

²⁴⁶. Ibid

²⁴⁷. See “Can compensation replace Justice”, The Morung Express, 3.1.2015, available at: http://nhrc.nic.in/documents/nhrc_in_news/2015_01_03.pdf

²⁴⁸. Women give vent to naked fury in front of 17 AR at Kangla, Sangai Express, 5 July 2004 available at <http://www.e-pao.net/GP.asp?src=1.10.160704.jul04>

²⁴⁹. An era ends with the passing away of MK Binodini, The Sangai Express, 17 January 2011 available at <http://e-pao.net/GP.asp?src=1..180111.jan11>

November 2004 *“in the wake of the intense agitation launched by various civil society groups in Manipur following the death of Kr. Th. Manorama Devi on 11.7.2004 while in the custody of the Assam Rifles, and the earlier indefinite fast undertaken by Ms. Irom Sharmila since 2001 demanding repeal of the Armed Forces (Special Powers) Act, 1958.”*²⁵⁰

²⁵⁰. Report of the Committee to Review The Armed Forces Special Powers Act dated 6 June 2005 is available at [http://notorture.ahrchk.net/profile/india/ArmedForcesAct1958 .pdf](http://notorture.ahrchk.net/profile/india/ArmedForcesAct1958.pdf)

8. The status of implementation of Supreme Court judgment of 2014 : The case of Uttar Pradesh

Emboldened by the policy of UP Chief Minister Yogi Adityanath “*Agar apradh karenge, toh thok diye jayenge*”²⁵¹ (If they commit crimes, we will knock them down), Uttar Pradesh has become infamous for encounter deaths. As of 21 August 2018, the Uttar Pradesh Police has killed 63 criminals in encounters since Chief Minister Yogi Adityanath-led government took charge of the state in March 2017. Four policemen were also killed and over 500 people were injured in these operations that took place in various districts in order to clamp down on crime in the state.²⁵²

There has been massive hue and cry over alleged encounter killings in Uttar Pradesh. *India Today TV* on 7 August 2018 reported that its special investigation team “found that some members of the state police force could be implicating innocent civilians in false cases and shooting them down in staged confrontations in exchange for bribes and promotions”.²⁵³

As political and public pressure mounted against fake encounters, on 21 September 2018 the Uttar Pradesh Police invited the media persons to film an encounter with two criminals that was going to take place in Aligarh’s Harduaganj. The two alleged criminals, identified as Mustaqeem and Naushad, who were killed in the operation carried a bounty of Rs 25,000 each on their heads. Video footage from the encounter site in Aligarh showed policemen armed with guns taking aim and firing.²⁵⁴ The invitation raised more questions about the fake encounter in the State. How did the police have time to invite journalists from the time they

²⁵¹. ‘Thok Denge’: We will knock down criminals in UP, says UP CM Yogi Adityanath in Aap Ki Adalat, India TV, 2 June 2017 available at <https://www.indiatvnews.com/politics/national-thok-denge-we-will-knock-down-criminals-in-up-says-up-cm-yogi-adityanath-in-aap-ki-adalat-384587>

²⁵². Uttar Pradesh | Copycat encounters: 21 deaths, 20 similar FIRs, same sequence of events, 22 August 2018, <https://indianexpress.com/article/india/uttar-pradesh-encounters-21-deaths-20-similar-firs-same-keywords-yogi-adityanath-up-police-5316609/>

²⁵³. Exposed: Uttar Pradesh’s cash-for-encounter raj, India Today, 7 August 2018 available at <https://www.indiatoday.in/india/story/exposed-uttar-pradesh-s-cash-for-encounter-raj-1306730-2018-08-06>

²⁵⁴. UP Police invites media to witness encounter in Aligarh’s Harduaganj in bid to convey transparency, shoots two men dead, Firstpost, 21 September 2018 available at <https://www.firstpost.com/india/up-police-invites-media-to-witness-encounter-in-aligarhs-harduaganj-in-bid-to-convey-transparency-shoots-two-men-dead-5230571.html>

intercepted the motorcycle to their killing in encounter was one of the questions raised about the genuineness of the encounters. The family members as on 11 October 2018 were virtually put on house arrest!²⁵⁵

The extrajudicial execution of 38-year-old executive of Apple, the multinational company, Mr Vivek Tiwari, in the early morning of 30th September 2018 by police constables Prashant Chaudhary and Sandeep Kumar in Lucknow after he allegedly tried to evade a routine check established the patterns of fake encounters in Uttar Pradesh. The policemen who sought to pass it off as an encounter and were supported by the senior police officers. Ms Sana Khan, a colleague of Tiwari stated “...*Two policemen came on a motorcycle. We tried to escape them and they stopped us. Suddenly, I heard a gunshot, the car kept moving and it hit the underpass pillar. Blood was pouring from Vivek’s head. I cried for help and soon, a police team came and took Vivek to hospital. Later, I was told that he is dead*”.²⁵⁶ The two police constables have since been arrested and sent to jail.

The Indian Express had accessed FIRs of 20 deaths in police encounters under Chief Minister Yogi Adityanath in Uttar Pradesh and found startling pattern of encounters/FIRs lodged by the police namely similar description of the sequence of events leading to the encounter, of the encounter itself, of the police response, and of what followed. In many cases, even the words and phrases used are identical. The Indian Express investigation stated that in as many as 12 FIRs, police recorded that the criminals were intercepted on a “tip-off” from an “informer”, the criminals arrived on a “motorcycle”, mostly followed by them “skidding”, “falling” and “opening fire”. In 11 FIRs, police stated that they acted as per “sikhlaye gai tareeke”, or “training”, or “fieldcraft”. In 18 FIRs, police recorded their “indomitable courage (the same phrase ‘adamya sahas’ is used)”. In 16 FIRs, police mentioned that they acted “jaan ki parwah kiye bina (without caring for our lives)”; in nine of them, they were hit in “bullet-proof jackets”. In 12 FIRs, police said they looked for but couldn’t find witnesses due to “night or odd hours” or “bhay vash (people being scared)”. In 18 FIRs, the criminal was killed and the accomplice “fled”. Almost all the FIRs mention that the encounters took place at night or early morning, and in several police say they spotted the men using

²⁵⁵. Aligarh Encounter Victims’ Family Allegedly Faces ‘House Arrest’ and ‘Sexual Harassment’, NewsClick, 11 October 2018 available at <https://www.newsclick.in/we-are-facing-house-arrest-sexual-harassment-says-aligarh-encounter-victims-family>

²⁵⁶. Constable in UP shoots dead Apple executive in cold blood, *The Indian Express*, 30 September 2018 <https://indianexpress.com/article/india/apple-executive-shot-dead-gomtinagar-up-police-5379136/>

torchlight, and claim to have carried out “aatmaraksharth (self-defence)”, “nyuntam (minimum)” firing.²⁵⁷

The pertinent question arises as to how the Supreme Court judgment in *People’s Union for Civil Liberties (PUCL) Vs State of Maharashtra*²⁵⁸ that firmly stated that the guidelines be treated as the law of the land under Article 141 of the Constitution in the case of for dealing with encounter death cases is being implemented. *The Indian Express* reported on 22 August 2018, “In eight FIRs, police put on record that their response during the encounter and later followed Supreme Court orders and guidelines of the National Human Rights Council to the full”.²⁵⁹ There is no doubt that at the stage of filing the FIR, it cannot be assessed as to whether the law set by the Supreme Court and guidelines of the National Human Rights Council have been complied “to the full”. Therefore, the compliance with the directions has been only on paper at the stage of filing the FIR.

Excerpts of the cases investigated by *The Indian Express* are reproduced below:

Case 1 : Encounter death of Gurmeet (25)²⁶⁰

Gurmeet was shot in an encounter at Bhaila, Saharanpur district on 31 March 2017 and died in hospital on 22 April 2017. The FIR stated, “... *sikhlai gai training ke aadhaar par* (Acting as per our training), we approached the criminals and challenged them... They started running and firing. Sub-Inspectors Mir Hasan and Ajay Prasad Gaur fired in self-defence two rounds each. S-I Gaur was injured... One badmaash (bad character) was also injured — he identified himself as Gurmeet - while another, Sushil, was captured.” The third accomplice was later identified as Kalu.

The FIR added that “Apprising the accused of their crime (during the encounter)... *mananiya Sarvochch Nyayalaya va manavadhikar aayog ke disha nirdeshon ka paalan karte hue* (following the orders and instructions of the Hon’ble Supreme Court and human rights panel), the accused were arrested.”

²⁵⁷. Uttar Pradesh | Copycat encounters: 21 deaths, 20 similar FIRs, same sequence of events, 22 August 2018, <https://indianexpress.com/article/india/uttar-pradesh-encounters-21-deaths-20-similar-firs-same-keywords-yogi-adityanath-up-police-5316609/>

²⁵⁸. Judgment dated 23 September 2014 in *People’s Union for Civil Liberties Versus State of Maharashtra* (Criminal Appeal No.1255 of 1999)

²⁵⁹. Uttar Pradesh | Copycat encounters: 21 deaths, 20 similar FIRs, same sequence of events, 22 August 2018, <https://indianexpress.com/article/india/uttar-pradesh-encounters-21-deaths-20-similar-firs-same-keywords-yogi-adityanath-up-police-5316609/>

²⁶⁰. Ibid

Police, who claimed they were tipped off by an informer, say they urged passersby to be witnesses, “but no one agreed, fearing trouble”.

Gurmeet passed away on April 22, 2017, becoming the first to die in police encounters under the Yogi Adityanath government. As per the post-mortem, the cause of death was “shock as a result of septicaemia”.

Case 2 : Encounter deaths of Naushad alias Danny (30), and Sarwar (28)²⁶¹

Naushad alias Danny and Sarwar were killed in an encounter at Shamli on 29 July 2017. Police claimed to have received tip-off from a “special informer” around 3.15 am, leading to the encounter around 4.10 am, after Naushad and an associate opened fire when police “flashed torchlight” to stop them.

The FIR stated, “Seeing the danger to our lives... police *ko nyuntam jawabi firing aatmaraksharth karne ka nirdesh diya tatha mujh thanadhyksha dwara bhi adam sahas va shaurya ka parichay dete hue, apni jaan ki parwah na karte hue* (I gave orders to fire minimally in self-defence, and I too, showing indomitable courage and valour, not caring for my life) (we) entered the firing range of the accused.” The FIR goes on to praise “the indomitable courage and valour of” other officers too and one of them was injured.

The FIR added that during the encounter, “the orders and instructions of the Supreme Court and human rights panel were followed”.

Post mortem reports stated that Sarwar was shot in the head while Naushad was shot multiple times.

Case 3 : Encounter death of Ikram alias Tola (40)²⁶²

Ikram was killed in an encounter at Shamli on 10 August 2017. Police claimed that they intercepted two men on a motorcycle around 11.05 pm after receiving “information”, and the latter opened fire. The FIR lodged by the SHO of Kairana Police Station, Dharmendra Singh Pawar stated, “Seeing the danger to the police officers... *apni jaan ki parwah na karte hue badmaashon ki firing range mein ghuskar, sahas aur shaurya ka parichay dete hue (police) ne badmaashon par aatmarakshak fire kiya* (not caring for their lives, getting into the firing range of the criminals, showing courage and valour, police fired on them in self-defence).” Ikram was

²⁶¹. Ibid

²⁶². Ibid

killed, while his “accomplice” reportedly fled. Ikram’s post-mortem report recorded 10 gunshot entry and exit wounds on his knees and feet, with “blackening”. Two constables were injured in the shootout.

On witnesses, the FIR stated, “...*jungle wa nawaqt hone ke karan koi janta ka gawahan farbaan na ho saka* (it being jungle area and odd hours, we couldn’t find any).” It added that “During arrest and seizure, the orders and instructions of the Supreme Court and National Human Rights Commission were followed to the letter.”

Hanifa, Ikram’s wife stated that her husband even did not know how to ride a bike. On 9 August 2017, he had gone to visit his friend Kallu’s son who was admitted at Aastha hospital in Baghpat. According to Hanifa, apart from the bullet injury, his ribs were broken and he had a huge injury on the back of his head indicating that he was tortured before being shot dead.²⁶³

Case 4 : Encounter death of Nadeem (33)²⁶⁴

Nadeem was killed in an encounter in Muzaffarnagar on 8 September 2017. Police claimed that Nadeem fled their custody while being taken to a Muzaffarnagar court, with the help of two accomplices, who reportedly sprayed pepper powder. Police haven’t produced any witness who saw this.

The FIR stated that two days later Station Officer of Kakrauli Police Station Anil Kumar Singh intercepted two men on a motorcycle fleeing a robbery. “We flashed our torches. However, the driver lost balance. When we approached the men, they fired at us, injuring Sub-Inspector Vijay Kumar Tyagi. I decided immediately, *achaanak hue hamle se vichalit naa hote hue jaan maal ki parwah na karte hue* (unshaken by the sudden attack and without a care for my life)... to carry out *nyuntam* (minimal) firing... Seeing the criminal motionless, sikhlaai anasar (as per our training), we approached him,” says the FIR. Police claimed that while one of the men escaped, the person killed was identified “from newspapers and WhatsApp” as Nadeem. He carried Rs 15,000 reward against his name.

²⁶³. A Chronicle of the Crime Fiction That is Adityanath’s Encounter Raj, The Wire, 24 February 2018, <https://thewire.in/rights/chronicle-crime-fiction-adityanaths-encounter-raj>

²⁶⁴. Uttar Pradesh | Copycat encounters: 21 deaths, 20 similar FIRs, same sequence of events, 22 August 2018, <https://indianexpress.com/article/india/uttar-pradesh-encounters-21-deaths-20-similar-firs-same-keywords-yogi-adityanath-up-police-5316609/>

Case 5 : Encounter death of Shamshad (37)²⁶⁵

Shamshad was killed in an encounter in Saharanpur on 10-11 September 2017. Police claimed that they intercepted two men who had “jumped a check-post” around 1.30 am on September 10-11. The motorcycle reportedly skidded and the men started firing. The FIR stated, “Taking position *sikhlai (training) ke tareeke se, assessing the bhogolik paristithiyon (geography) ... apni jaan ki parwah na karte hue (without caring for our lives), we entered their line of fire showing adamyasahas evam shauurya.*” While one man fell, the ‘accomplice’ fled. Two policemen identified the dead as “the same man who had escaped on September 7 from custody after a hearing”. Shamshad carried Rs 12,000 reward against his name.

The FIR recorded two policemen as having received injuries in the shootout. About witnesses, it said that it couldn’t get any “*na-waqt hone ke kaaran* (due to odd hours)”. The FIR added that “In compliance with Supreme Court instructions, the UP 100 police van reached and the injured suspect and policemen were taken to a hospital.”

The cause of death is recorded as “shock and hemorrhage from ante mortem injury”.

Case 6 : Encounter death of Jaan Mohd a.k.a Jaanu (35)²⁶⁶

Jaan Mohd was killed in an encounter at Khatauli, Muzaffarnagar district on 17 September 2017. The police claimed that they intercepted a white car at 5.30 am, flashing torchlight. Sub Inspector Sube Singh stated in the FIR: “The criminals fired at us. Constables Deepak, Sohanvir got injured. I resorted to *aatmaraksharth* (self-defence) firing, without being vichalit (shaken), and seeing no other way to save my friends and officials. On my orders, despite being injured along with me, *uccha koti ki veerta dikhaate hue (showing exemplary courage) Constables Deepak, Kulwant Sohanvir, Vijay Maavi dwara apni jaan ki parwah na karte hue adamyasahas aur shauurya ka parichay dete hue... aatmarakshartha nyuntam firing ki.* (without caring about our lives fired in self defence).”

Case 7 : Encounter death of Furqan (36)²⁶⁷

Furqan was killed in an encounter at Muzaffarnagar on 22 September 2017. The police claimed that they spotted five men on two motorcycles at about 10 pm, and flashed torches to stop them. As per the FIR, the

²⁶⁵. Ibid

²⁶⁶. Ibid

²⁶⁷. Ibid

encounter happened around 10.30 pm. “*Hum policewalon ne sikh lai training ke anusar apni jaan ki parwah kiye bina adam sahas ka parichay dete hue aatmaraksha mein firing kari*” (based on the training received and without caring for lives and indomitable courage fired in self defence) with Sub Inspector Sauveer Nagar stated in the FIR that bullets hit his bullet-proof jacket while S-I Aadesh Tyagi and Constable Harvendra were injured. As per the FIR, two of the men on one motorcycle escaped while, of the three men on the second, two fled and a third died. The deceased was identified as Furqan, who had Rs 50,000 reward on him.

Case 8 : Encounter death of Mansur (35)²⁶⁸

Mansur was killed in an encounter at Meerut on 27 September 2017. The FIR stated that local police had put up barricades on receiving a call that three bike-borne men had looted a car, but the latter opened fire, and they shot back in “self-defence”. In the FIR, SHO Prashant Kapil of Sadar Bazaar, Meerut stated, “One bullet hit the bullet-proof jacket of SHO, Lisadi Gate. Hum sabhi policewale devyog se ewam prashikshan mein sikhaaye gaye tareeke se (All of us by god’s grace and by the virtue of what we have learnt in training), managed to save ourselves... *Adamiya sahas aur shaurya ka parichay dete hue, apne jaan ki parwaah na karte hue badmaashon ki firing range mein ghus kar aatmaraksharth firing kiye*” (not caring for their lives, getting into the firing range of the criminals, showing courage and valour, police fired on them in self-defence). Mansur later succumbed to his injuries. His accomplice reportedly managed to escape despite 13 armed police present at the spot. The FIR added that police tried to find witnesses, but couldn’t find one due to “*raatri ka nawaqt hone ke karan* (due to it being late night)”. The FIR also states that “the orders and instructions of the human rights commission and Supreme Court were followed to the letter”. Mansur’s post-mortem report noted a bullet injury in the chest.

According to the family members, Mansur was picked up by three people in plain clothes from his house in Pathanpura village in Saharanpur and killed. The police claimed to have found a ‘German brand revolver’ from the crime spot. But Mansoor had been living in a disoriented state of mind after his release from jail and repeated torture by electrocution in Saharanpur jail in a case of attempt to murder.²⁶⁹

²⁶⁸. Ibid

²⁶⁹. A Chronicle of the Crime Fiction That is Adityanath’s Encounter Raj, The Wire, 24 February 2018, <https://thewire.in/rights/chronicle-crime-fiction-adityanaths-encounter-raj>

Case 9 : Encounter death of Waseem Kala (20)²⁷⁰

Waseem Kala was killed in an encounter at Meerut on 28 September 2017. Police say an “informer” told them that Sabbir and Waseem were travelling on a motorcycle along with “atyadhunik (ultra-modern)” weapons and planning a “big criminal activity”, and on interception, the two opened fire. The FIR stated, “In the firing, their bullet hit Constable Pritam’s bullet-proof jacket. Seeing no alternative, led by me, *party ne apni jaan ki parvaah kiye bina adamyaa sahas evam shaurya ka parichay dete hue badmaashon ke ekdum nazdik se nazdik firing ki* (the police party not caring about their lives and showing courage and valour shot the criminals from extremely close range).”

Waseem was shot while Sabbir reportedly managed to flee. According to the FIR, Wasim’s motorbike had a police sticker on it.

The FIR added that “...*Sunsaan marg, ghana jungle hone ki wajah se* (Because of deserted road, dense jungle) not one witness could be found despite police attempts.”

The post-mortem report mentions Waseem’s body had eight entries, exit wounds.

Case 10 : Encounter death of Vikas a.k.a Khujli (22)²⁷¹

Vikas was killed in an encounter at Aligarh on 28 September 2017. The FIR stated that around 9 pm, SHO Amit Kumar of Jawa Police Station received information from the Circle Officer, Barla, Anuj Choudhary, about a tip-off that two wanted criminals were coming on a motorcycle in their direction. Around 9.45 pm, police saw the motorcycle approaching. Police said they flashed torchlight, the motorcycle slipped, the two men fell and, running into a deserted lane, opened fire. The FIR stated that after CO Barla and a Sub-Inspector, Abhay Kumar, got injured, “*apni aatmaraksha mein adamyaa sahas ka parichay dete hue sikhrai gayi tactics ka prayog karte hue jawabii firing ki*” (For self defence with indomitable courage the police returned fire).

On witnesses, the FIR stated that there were a few people at the spot. “... *kintu naam, pata poochne par gawahi dene ke dar se ek dusre ka naam Govind-Arsad le de kar aage badh gaye* (But when we asked their names, addresses, they mumbled ‘Govind-Arsad’ and went away, scared of testifying)”.

²⁷⁰. Uttar Pradesh | Copycat encounters: 21 deaths, 20 similar FIRs, same sequence of events, 22 August 2018, <https://indianexpress.com/article/india/uttar-pradesh-encounters-21-deaths-20-similar-firs-same-keywords-yogi-adityanath-up-police-5316609/>

²⁷¹. Ibid

Incidentally, the FIR doesn't name the dead, and he was later identified as Vikas, a criminal with Rs 50,000 reward on him.

Case 11 : Encounter death of Sumit Gurjar (27)²⁷²

Sumit Gurjar was killed in an encounter at Greater Noida on 3 October 2017. The FIR stated that around 8 pm, an informer told police about Sumit and associates moving about in Greater Noida in a car, and soon they stumbled upon the men, who opened fire. The FIR filed by SHO, Kasna, Jitendra Kumar stated, "*SHO, Sector 58, and SO, Bisrakh, apne-apne force and SI Shri Satish Kumar ke saath adamiya sahas va shaurya ka parichay dete hue kartavya parayanta se or vichalit na hote hue police yukti ka prayog karte hue* (SHO, Sector 58, and SO, Bisrakh with their men and with S-I Satish Kumar, showing indomitable courage and bravery, unshaken in their call of duty, using police tactics) moved forward to catch the criminals."

During the encounter, SHO, Sector 58 (Anil Pratap Singh), and SO, Bisrakh (Ajay Kumar Sharma), were hit in their bullet-proof jackets while S-I Kumar was injured. Of the four criminals, three escaped while one died. He was identified by his voter ID card as Sumit Gurjar, and police later said he was involved in the murder of two employees of Ponty Chadha's liquor firm. The post-mortem report mentions a shot in the chest.

The FIR added that they tried to get passersby to testify. "*Toh badmaashon ke dar se koi bhi vyakti gawaahi ke liye taiyyar nahin hua* (However, afraid of the criminals, no one agreed to be a witness)."

However, the deceased's brother Praveen Singh stated that Sumit was picked up on 30 September from Balauni by three policemen. The deceased's father Karam Singh alleged that "His ribs were broken, his hand was broken, there were also injury marks on his chest." NDTV has confirmed that these injuries have been recorded in the post-mortem report.²⁷³

²⁷². Ibid

²⁷³. Cut And Paste FIRs On Encounters In Yogi Government's Drive To Eliminate Crime, NDTV, 21 February 2018, <https://www.ndtv.com/india-news/cut-and-paste-firs-on-encounters-in-yogi-adityanath-governments-drive-to-eliminate-crime-1815222>

Case 12 : Encounter death of Ramzani (30)²⁷⁴

Ramzani was killed in an encounter with the police at Chandgarhi village in Aligarh on 8 December 2017. In the FIR, Station Officer of Aligarh's Akrabad Police Station, Vinod Kumar, stated that around 8.50 pm, he spotted three men coming down Nanau bridge in a stolen car. The police stated that they called for back-up, and Circle Officer, Barala, Anuj Kumar Chaudhary and S-I Arvind Kumar arrived with officials. The suspects opened fire, hitting the CO in his bullet-proof jacket and S-I Kumar in his leg. The FIR stated, “...*Apni aad chodkar (leaving our cover) adam sahas va bahaduri ka parichay dete hue, challenging the criminals, we started aatmaraksharth firing.*” One suspect reportedly got hit while the other two fled. Police said they found papers in the fallen man's pocket identifying him as Ramzani, who carried rewards on his head. On witnesses, the FIR stated, “One-two passersby stopped on hearing the firing, but when asked to testify, *bina naam-pata bataaye chale gaye* (left without telling their name and address).”

Case 13 : Encounter death of Nur Mohammad alias Haseen Mota (28)²⁷⁵

Haseen Mota was killed in an encounter with the police at Partapur in Meerut on 30 December 2017. As per the FIR, the Meerut police including Crime Branch Sub-Inspector Jayveer Singh were looking for two men coming from Delhi on a motorcycle, with the intention of “committing a crime”. Around 10 pm, they spotted the men and gave them a chase, when the motorcycle slipped and the men started firing.

The FIR added that policemen acted “*jaan ki parwah naa kar, adamyi sahas evam shaurya ka parichay dete hue*” and using “sukhsham (minimum) firing”. According to the FIR, S-I Singh and Constables Jayvardhan and Vipin Bhati were shot in their bullet-proof jackets, while one of the alleged criminals was hit and another escaped. Police identified the deceased as Haseen Mota, who carried Rs 50,000 reward against his name.

Case 14 : Encounter death of Shameem (27)²⁷⁶

Shameen was killed in a police encounter at Muzaffarnagar on 30 December 2017. The FIR stated that Jansath Station Officer Anil Kumar was

²⁷⁴. Uttar Pradesh | Copycat encounters: 21 deaths, 20 similar FIRs, same sequence of events, 22 August 2018, <https://indianexpress.com/article/india/uttar-pradesh-encounters-21-deaths-20-similar-firs-same-keywords-yogi-adityanath-up-police-5316609/>

²⁷⁵. Ibid

²⁷⁶. Ibid

informed by the Jansath Circle Officer that Shameem, a wanted criminal with a reward of Rs 50,000, was planning a crime in Jansath. At about 10:50 pm, Kumar's team spotted a vehicle matching Shameem's car's description and flashed their torches, and the latter opened fire. The FIR stated, "The three teams used *aatmaraksharth nyuntam firing*. Two policemen moved close to the car *sikhlai anusaar, apni jaan ki parwah na karte hue... adamyia sahas ka parichay dete hue*." In the FIR, Anil Kumar stated that despite 15 policemen surrounding Shameem's car, his accomplice reportedly fled while he and a constable were injured. The post-mortem report mentioned two shots to the head.

Case 15 : Encounter death of Sabbir (about 30)²⁷⁷

Sabbir was killed in a police encounter at Shamli on 2 January 2018. In the FIR, complainant Shamli Superintendent of Police Ajay Pal Sharma stated that around 10.40 pm on January 2, an informer tipped them off that Sabbir was in his house in Jandhedi village along with associates, and guns. The FIR stated, "The moment Constable Ankit Tomar entered the room *adamyia va sahas va shaurya ka parichay dete hue*, firing back with his AK 47 rifle, the criminals shot him... Despite the firing, my subordinates being injured, and the difficult situation, I showed *dhairya* (patience)... Not caring for the firing, keeping up the morale of my force, not caring for my life, *kartavya ka paalan junoon mein adamyia sahas va shaurya ka parichay dete hue, badmaashon ke firing range mein ghuskar... aatmaraksharth jawabi firing ki gayi* (swept up in the passion of my duty, showing indomitable courage and bravery, entered the firing range of the criminals and fired at them in self-defence)." One of the men was shot while his associates reportedly fled. Constable Tomar too died, while the Kairana SHO was injured. About witnesses, police stated that neighbours refused to even open their houses.

Case 16 : Encounter death of Bagga Singh (40)²⁷⁸

Bagga Singh was killed in an encounter at Dulhipurva, Lakhimpur Kheri on 17 January 2018. The STF claimed to have got a tip-off that Bagga, who was wanted for the murder of a constable, carrying a reward of Rs 1 lakh against his name, would be passing through Dulhipurva area in order to execute a "*sangeen ghatna*" (serious crime). The FIR, lodged by Additional Superintendent of Police (ASP) Vishal Vikram Singh, stated that on reaching the spot, they tried to gather witnesses, but "*bhay vash (koi) taiyyar nahin hua* (no one agreed due to fear)". At around 7.30 am,

²⁷⁷. Ibid

²⁷⁸. Ibid

police stated that they saw two persons coming on a motorcycle, who tried to speed away, but lost control of the vehicle and fell. Bagga reportedly opened fire, hitting ASP Singh in his bullet-proof jacket. The FIR added that police saved their lives “*sikhlaye hue tareeke se*” 9as per methods taught). “*Jaan ki parwah kiye bina... saahas vah shaurya ka parichay dete huye... firing range mein ghbus kar firing kiye.*” The FIR stated that Bagga died, while his associate escaped.

Case 17 : Encounter death of Mukesh Rajbhar (23)²⁷⁹

Mukesh Rajbhar was killed in an encounter with the police at Azamgarh on 26 January 2018. The police stated that they laid a trap for Rajbhar, accused in an attack on a constable days earlier, near Halwada village in Azamgarh, “acting on information”. Late in the evening, they reportedly spotted two people on a motorcycle, who opened fire when told to stop. The FIR lodged by SHO, Sidhari Police Station, Nagesh Upadhyay stated, “Seeing policemen in danger, *Nagar area in-charge Sachinand ne apni jaan ki parwah na karte hue... apni sarkari pistol se aatmaraksharth ek round niyantrit (controlled) firing kiya...* Seeing my friends’ lives in danger, I, the SHO, came out of my cover, and showing atyant shauryata (extreme courage), *apni jaan ki parwah na karte hue aatmaraksharth ek round firing ki*” (without caring about my life, I fired one round). The FIR added that the police lost no time taking the injured Rajbhar and a constable, who was also shot, to hospital as per “the orders, instructions of the Supreme Court and human rights panel”.

Case 18 : Encounter death of Akbar (about 27)²⁸⁰

Akbar was killed in an encounter at Jhijnjhana in Shamli district on 3 February 2018. Around 7.10 pm, the police stated that they saw two men coming on a motorcycle towards where money was kept as bait to foil an extortion bid. Police said that they flashed torchlight and asked the men to stop, but the two opened fire, and that when they fired in retaliation, one of the men was hit. The associate “escaped”. The FIR stated, “I, the SO, S-I Pravej Kumar, Constable Raju Tyagi, S-I Sunil Singh va Constable Vikas Kumar ne adamiya sahas va shaurya ka parichay dete hue, *apni jaan ki parwah na karte hue, badmaash ke nazdik pahunchkar jawabhi fire kiye*”. S-I Pravej Kumar and Constable Raju Tyagi got injured, while Akbar, who carried a reward of Rs 50,000 against his name, died. The FIR stated that they tried to get witnesses, “*toh raat ka waqt va goliyon ki tadtadahat se road par aate-jaate vaahan bhi tez gati se nikal gaye* (but due

²⁷⁹. Ibid

²⁸⁰. Ibid

to the late hour and the sound of firing, the passing vehicles too raced away”.

The FIR added that the orders and instructions of the Supreme Court and human rights panel were “fully followed”.

Case 19 : Encounter death of Vikas (36)²⁸¹

Vikas was killed in an encounter at Muzaffarnagar on 6 February 2018. In the FIR, Station Officer of Muzaffarnagar’s Kotwali Police Station Manoj Chaudhary stated that an informer told him that “Vikas, with a reward of Rs 50,000 on him, is in Muzaffarnagar”. The FIR stated that a police team intercepted the men on a motorcycle, they skidded, and started firing. The FIR stated, “We challenged the men to surrender sikhlaye hue tareeke se, but they didn’t listen... I, the SO, along with Sub-Inspector Sunil Kumar and Constable Amit Teotia crawling, using fieldcraft, moved towards the criminals with *adamya sahas va shaurya* and setting an example in rajkiya karye (official duty), not caring for our lives.”

The FIR stated that in the crossfire, around 7.15 pm, Sub-Inspector Vinay Sharma and Constable Teotia were hit, one man reportedly fled while the other was killed. The post-mortem showed Vikas was shot thrice, near his heart and in his skull.

Case 20 : Encounter death of Rehaan (about 17-18)²⁸²

Rehaan was killed in an encounter on Muzaffarnagar-Thana Bhawan road on 3 May 2018. The FIR recorded an encounter sometime around 9 pm with two men fleeing on a motorcycle after “shooting at a woman”. The FIR stated that after Constable Harvendra Kumar was hit, police warned the men to surrender. The FIR stated, “*Apni jaan ki parwah na karte hue, hum adamy sahas va shaurya ka parichay dete hue, fieldcraft va tactics ka prayog karte hue*, moved towards the criminals so as to capture them. But the criminals again opened fire. So, we had no choice but to fire with our official pistols, minimally, in self-defence.” Police said that they checked “by torchlight” and saw the two men lying injured. The FIR stated that the men were “immediately” taken to hospital “as per the orders of the Supreme Court and human rights panel”. One of them died and was later identified as Rehaan. Police stated they then realised he was a member of the Mukeem Kala gang, and carried a reward of Rs 50,000 on his head.

²⁸¹. Ibid

²⁸². Ibid

The woman shot at by him was identified as ‘Sanjida’. Charthawal Police Station records show an FIR based on Sanjida’s complaint was registered at 8.43 pm on May 3. The encounter took place at 8.30 pm that day. Rehaan’s post-mortem report mentions one firearm wound in brain cavity, and one wound in the chest.

NDTV has also examined the evidence in 14 encounter killings under Chief Minister Yogi Adityanath and found that in all the FIRs examined, the language used by the police appeared to be in cut and paste format along these lines: *“The criminal was on a bike or a car with their accomplice. The police tried to stop them, but the crime suspects/criminals opened fire. This led to the police opening fire in self defence.”* In at least seven cases, the families alleged there were marks of torture on the body.²⁸³

²⁸³. Cut And Paste FIRs On Encounters In Yogi Government’s Drive To Eliminate Crime, NDTV, 21 February 2018, <https://www.ndtv.com/india-news/cut-and-paste-firs-on-encounters-in-yogi-adityanath-governments-drive-to-eliminate-crime-1815222>

9. 42 emblematic fake encounter cases adjudicated by the NHRC

On 29 March 1997, National Human Rights Commission (NHRC) issued guidelines in respect of procedures to be followed by the State Governments in dealing with deaths occurring in encounters with the police.²⁸⁴ In the last two decades i.e. from 1 April 1998 to 31 March 2018, the NHRC registered a total of 2,955 complaints of encounter deaths i.e. an encounter almost every second day.

In December 2012, the NHRC informed the Supreme Court that it had awarded compensation in 191 cases of fake encounter killings during 2007-2012.²⁸⁵

The NHRC found the following emblematic cases to be fake encounter deaths and these cases explain the patterns of encounter killings in India.

Case No. 1 to 5 : Emblematic cases that led to the adoption of guidelines in respect of procedures to be followed by the State Governments in dealing with deaths occurring in encounters with the police²⁸⁶

The NHRC continued to receive complaints alleging “false encounters” involving the police and the security forces. Given the gravity of such complaints, the Commission treated them with utmost seriousness. In its preceding Annual Report, the Commission mentioned that it had received a complaint from the Andhra Pradesh Civil Liberties Committee (APCLC) alleging the involvement of the Andhra Pradesh police in a number of such incidents. The Commission constituted a Special Bench to go into this matter in detail. The Bench held public hearings in Hyderabad and recorded evidence. Given the importance of the questions of law and procedure involved, it also notified the Solicitor General of India and the Advocate General of the State of Andhra Pradesh. After hearing arguments at its Headquarters in New Delhi, the Commission pronounced its final orders on 5 November 1996 and communicated these to the State Government of Andhra Pradesh immediately thereafter, which accepted the recommendations of the Commission in full.

The following cases were also the subject of a letter dated 29 March 1997 from the Chairperson of the Commission to all Chief Ministers, in which

²⁸⁴. <http://nhrc.nic.in/Documents/RevisedGuidelinesDealingInEncounterDeaths.pdf>

²⁸⁵. The Times of India, “191 fake encounters in last five years, NHRC tells Supreme Court”, 5.12.2012 <http://timesofindia.indiatimes.com/india/191-fake-encounters-in-last-five-years-NHRC-tells-Supreme-Court/articleshow/17486080.cms> [Accessed on 28 November 2014]

²⁸⁶. National Human Rights Commission, Annual Report 1996-97

the latter are requested to issue directions, through the Directors General of Police to all Police Stations, on the procedures they should follow in regard to cases where death has been caused in “encounters” with the police.

Name of the complainant	:	A.P.C.L.C
File Nos.		234 (1)/93-94/NHRC
		234 (2)/93-94/NHRC
		234 (3)/93-94/NHRC
		234 (5)/93-94/NHRC
		234 (6)/93-94/NHRC

From Naxalbari, a place in the Northern region of West Bengal, under the initial leadership of one Kanhu Sanyal, originated the concept of forcible protest against the social order relating to holding of property and sharing of social benefits. In course of time, it developed into what came to be known as the Naxallite movement. In due course it spread into parts of Bihar, Orissa, Andhra Pradesh and bordering districts of Tamil Nadu, Madhya Pradesh and Maharashtra. Naxallite got divided into different groups -sometimes known by their faith and at other times going by the names of their leaders. In Andhra Pradesh, though initially known as Naxallites, they came to have their identity under the nomenclature of “Peoples War Group” (PWG) by 1980.

2. It is unnecessary to deal with various groups of the PWG operating in Andhra Pradesh. The activities were broadly the same though the mode varied from group to group and occasion to occasion. At the inception, so far Andhra Pradesh is concerned, Naxallite activities were confined to the district of Srikakulam and bordering areas of Orissa and spread into some of the Telengana districts like Warangal, Karimnagar and Nalgonda.

3. Concentration of activities has mostly been in rural areas but there have been many eventful incidents in urban areas too. Hundreds of innocent villagers and a considerable number of policemen have been done to death by the PWG men, government property has been targeted and very often set on fire causing substantial loss to government, both State and Central and even owners of buildings where public offices were being held in tenanted premises have suffered on this account. Initially, perhaps, attacks were concentrated on the richer groups but later people from the poor classes also did not escape attack, on both person and property. There have been incidents where the male members have been done to death and the female folk have been subjected to physical violence

including rape. There was also a case of a man being killed and his head severed from the body, put into a basket and the widow compelled to go round the village with that head load. Normal life and social order had been destroyed/disturbed by such activities and extra legal operations of Naxallite groups is not disputable. The State Government brought in a legislation empowering it to declare an association to be or to have become unlawful and in exercise of power under Section 3 of this legislation (Andhra Pradesh Public Security Act, 1992), PWG had been declared to be an unlawful association for a specific period. There was a short gap when the ban was not in operation but the ban has now become operative.

4. Since the law and order situation was disturbed by PWG activities, the police started adopting initially stiff and gradually stiffer measures to contain their illegal operations. As PWG people started moving in groups for carrying out their activities, the police also formed groups for counter attack and keeping the illegal activities, under check and control. This led to frequent encounters in which there used to be loss of life and injuries to persons on both sides. Government re-enforced the police force and provided matching sophisticated weapons to them when it was found that some of the members of the PWG were using sophisticated arms and ammunition. PWG groups soon established access for getting land mines and started setting them on several rural roads which killed police parties and destroyed their vehicles. The relationship between the PWG and the police force, therefore, became bitter and totally inimical.

5. APCLC is a Non-Governmental Organisation operating within the state of Andhra Pradesh with headquarters at Hyderabad and is affiliated to PUCL at the national level. It filed a complaint before the Commission on 30th March, 1993 giving particulars of 285 police encounters which it described as fake ones organised by the police to eliminate members of the Peoples War Group or their supporters and sympathisers instead of subjecting them to the due process of law for punishing the guilty. The complaint was scrutinised in the Registry and it transpired that several of the incidents had happened prior to one year before the making of the complaint and therefore, were beyond the purview of the Commission on account of the special limitation of one year provided under Section 36(2) of the Protection of Human Rights Act, 1993. The complainant, therefore, agreed to confine its complaint to cases within the period of limitation. Ultimately it wanted the Commission to examine the question of fake police encounter in six cases of its choice and gave a list of them being :

1. 234 (1)/93-94/NHRC (case of Kayita Yakaiah)

2. 234 (2)/93-94/NHRC (case of Chinnarapu Sangaiah)
3. 234 (3)/93-94/NHRC (case of Varikuppala Shankaraiah)
4. 234 (5)/93-94/NHRC (case of Badavath Jaitya)
5. 234 (6)/93-94/NHRC (case of Bat tu Anjaiah & Peddaboyina Saidulu)

6. When notice was issued the State Government denied the plea of fake encounter and sought justification for its action. The response of the State was notified to APCLC and it wanted opportunity of leading evidence to substantiate/establish its stand. The Commission, therefore, agreed to have a sitting at Hyderabad to receive evidence and the state Government on being notified made arrangements for such a sitting from August 21 to 24, 1995.

7. Evidence in five of the cases was recorded from the side of the complainants. In some of these cases, the State led evidence; some documents were exhibited. No evidence was led in case no.234 (4)/93-94/NHRC on the plea that the complainant and his witnesses had been detained by the police at some unknown place. It was agreed that further hearing would take place at Delhi with opportunity to the complainant to produce his witnesses in the case where no evidence was led at Hyderabad. On the 21st of September, 1995, the Commission recorded the following proceeding:

“Six cases were picked up by APCLC for evidence to be led and enquiry undertaken by the Commission into what is alleged as police encounter deaths in Andhra Pradesh. These six cases were set down for receiving evidences at Hyderabad from August 21 to August 24, 1995. Evidence in five cases was recorded and witnesses did not turn up in one case. We had given opportunity to the parties to lead evidence if they so liked at Delhi. Today counsel for APCLC has reported that they do not want to lead evidence and press for that case. The enquiry is, therefore, confined to the remaining five cases where evidence has already been recorded “

Pursuant to the aforesaid direction, further hearings were undertaken. Mr Dipankar Gupta, Learned Solicitor General appeared on the request of the Commission to assist it. Advocate General of Andhra Pradesh on one occasion and the Additional Advocate General on the other argued for Andhra Pradesh and Mr Sitapati placed the case of the Andhra Pradesh police. Mr Kannibaran appeared on behalf of the complainant.

8. After we had closed the matter, the judgement of a division bench of the Andhra Pradesh High Court in Writ Petition No.16868195 dated

14.8.1995 was produced before us in support of the stand of the petitioner. Commission's Registry reported that a Special Leave Petition had been filed against the decision and the Supreme Court ultimately has granted leave and directed the stay of operation of the judgement.

9. Since the judgement of the High Court had close bearing on the point in issue, we waited for the decision of the apex Court but as it appears it may take some more time and, therefore, we proceed to formulate our recommendations without waiting any longer.

10. We would like to indicate in brief the facts of the five cases pressed for consideration before us.

I. Case No.234 (1)/93-94

The complainant in this case is Kayita Lachchaiah. Deceased Kayita Yakaiah was neither a member of the Naxallite groups nor had he ever participated in Naxallite activities. There was a pending criminal case against him in a case relating to the burning of RTC bus. He was involved along with 26 others in that case. He was regularly appearing in court in this case. The family had one acre of wet land and about the same extent of dry land which the deceased was cultivating and he was also engaged in lorry loading work with 14 labourers employed under him.

On 25.5.1993, after loading four lorries he had come to the village to take bidi leaves and after finishing that job he returned home around 10 PM and retired by 11 PM. By 1 AM, 60 to 70 policemen came to the village and when they reached his house, all the members of the family were asleep. Some 30 policemen entered into the house. They lighted a powerful torch which made PW 3 wake up. When he shouted, the other members of the family were aroused from sleep. They identified Kumaraswamy, Sub Inspector of Police who was then trying to take out Yakaiah. When the members of the family prevented his being taken away, force was applied by the police. On 26.5.1993 and the day following, PWs 1 and 3 accompanied by the Village Surpanch (PWG) and some others went to the neighbouring police stations to ascertain the whereabouts of the deceased. He was alleged to have been killed at 9 AM on 26.5.1993 within Eturnagaram Police Station limits. PWs 1 and 2, who are respectively father and mother of the deceased, were informed about the killing of the deceased in the hands of the police. The police version was that the deceased was an un-identified Naxallite notwithstanding the fact that he was arrested by the police in the pending case and had been appearing in the court on the fixed dates. Madhusudan, Sub Inspector of Police of Mangapet Police Station (RW 1), who led the

raiding party which participated in the alleged encounter accepted in-cross-examination that many of the Naxallites he confronted were wearing olive green uniform but the deceased was not in such uniform. The inquest report shows that the deceased was wearing a lungi and a shirt. PW 4, sister of the deceased, stated to the Commission that police had made serious attempts to keep the witnesses away from the Commission and to give effect to their designs, the widow of the deceased and PW 4 herself had been forcibly taken by the police to the village of the deceased about 140 kms from their own place. The police witnesses accepted the position that there were 24 policemen and 12 Naxallites involved in the alleged encounter. The firing went on for half an hour in broad day light, and the distance between the two parties was only 50 yards. Yet no policeman sustained any injury while all the alleged Naxallites were killed. The deceased, as would appear from the post-mortem report (Exhibit R 7) had three fractured bones; obviously these could not have been caused by gun fire and could fit into the position that the deceased had sustained injuries on account of torture and was later killed. It has been contended that this position is also suggestive of the fact that the deceased had been taken to the police station, assaulted there and later was shot dead. The bullet injuries are on the upper part of the body -the chest, shoulder, etc -which is indicative of the fact that the intention was to kill

Counsel for the complainant contended that the oral and documentary evidence on record lead to the following conclusions:

- I. The deceased was not a Naxallite but a peasant and a lorry loading worker by occupation.
- II. There was only one criminal case of arson against him pending on the date of occurrence.
- III. He had been taken into police custody from his house in the presence of many witnesses and had been killed in the alleged encounter.
- IV. The Magisterial enquiry was delayed for a long period and was completed only when the Commission decided to include this case within the ambit of enquiry.
- V. Serious attempt was made by the police to keep the witnesses away from the Commission.

We have read through the evidence and prima facie the conclusions suggested above, in our opinion, are borne out by the evidence.

II. Case No.234 (2)/93-94

Deceased Sangaiah was a resident of village Variguntham in Medak District of Andhra Pradesh and was an activist of CPI(ML). On 25th May, 1993, he went to his own agricultural lands, took the meal brought there by his wife and he again went to Variguntham, sent word to his wife and they met in the field. According to the complainant, the deceased was taken away by the police from the place of work and was shot dead. The version of the incident by the respondent was that while combing the local forest area they found a group of extremists and an encounter followed at about 5 AM and in the exchange of fire the deceased died.

12. The complainant examined four witnesses to support the version and the State examined one witness. The complainant's witnesses stated that the deceased was shot dead in the alleged encounter. Mr Sitapati cross-examined the complaint's witness at length. The evidence of the witness, which has been stated to be natural, has been asked to be brushed aside. RW-1 is the then Inspector of Police, Medak Circle. From his cross-examination it appears that he was also the Investigating Officer of the case registered on his report. It is the admitted position that while on complainant's side there has been death, on the side of the police there was not even a single abrasion caused by the alleged exchange of fire. The autopsy report indicates three gunshot injuries and an abrasion on the person of the deceased. On a close scrutiny of the evidence, prima facie it appears that the evidence of picking up the deceased from the rural agricultural field has not been shaken. The complainant himself assumed the role of Investigating Officer with a view to hampering an adequate investigation.

III. Case No.234 (3)/93-94

13. Varikuppala Shankaraiah, was not involved in any Naxallite activity nor had he been arrested or even mentioned in any police record. Three years before his death, he shifted from his paternal to the maternal village Inolu in Achampet Mandal with a view to helping his Uncle in the construction of a school building. After the work was over, he stayed on as a mason in the village along with his wife. The deceased was constructing the house of one Madavath Madhya by June 1993. In the morning of 5.6.1993, the deceased and his wife, PW 1, left the village to reach the hamlet where they had undertaken work. Around 6 PM, Shantamma came back alone to Inolu and told PW 1 that the deceased had gone to Achampet government hospital to get the treatment of his leg injury. On his return by bus, near the check post outside Achampet, four policemen in plain clothes forced him to get down from the bus. On 6.6.1993

Shantamma and PW 1 made enquiries at Achampet and Amrabad Police Stations, but the police told them that they knew nothing about the arrest of the deceased. The leader of the police party, who participated in the alleged encounter resulting in the death, sent information to the Amrabad Police Station at 7 AM on 6.6.1993 about the occurrence in which the deceased had been killed. There is evidence to show that the wife and the relatives were not informed about the incident and they came to know about it through newspaper and when they went to see the body, they saw several injuries apart from those caused by gun shots. The post-mortem report referred to three contusions, one of which was close to the eye. The post-mortem doctor, stated that these injuries could have been caused by a blunt weapon. A Magisterial enquiry had been held where PWs 5, 6 and 10 before us had given evidence. The Magisterial Enquiry had not been completed for more than 2 years. The Inspector of Police, RW-1, who led the raiding party, himself became the Investigating Officer. He admitted in cross-examination that the deceased was not wanted in any criminal case by the police. The deceased was wearing a white pant and a pink coloured shirt and not the olive green uniform usually worn by the PWG activists. Pressure had been put on some of the witnesses examined by us in the left over Magisterial enquiry. The evidence of PW 1 clearly indicates that there were 17 policemen and 10 to 12 Naxallites in the alleged encounter. The exchange of fire is said to have taken place for half an hour. The distance between the police and the Naxallites was about 50 yards and yet there was no injury to the policemen.

IV. Case No.234 (5)/93-94

14. One Badavath Jaitya, son of PW-1 is the deceased, Badavath Jagni, wife of the deceased is PW-2. The deceased is claimed not to be a Naxallite but he had been implicated in cases connected with Naxallite activities because local landlords had given false information to the police. He had surrendered to the police and Government had given him 12 bicycles to run a cycle taxi shop but he sold the bicycles as he could not run it. His family land was sold and he was making arrangements with the money thus obtained to go to the Gulf countries. From 1989 onwards, the deceased was busy in his efforts for going over to the Gulf countries. He was in Bombay for most of the time and had come to the village only 5 to 6 times in those four years. He was away and did not appear in the pending cases; so non-bailable warrants were taken out. On a joint application of his and his wife, Government had sanctioned a house loan. The deceased had, therefore, come from Bombay to complete the transaction preceding the obtaining of the loan. He was killed within 2

days of his return on 2nd October, 1993. The deceased was taken by four people, who had come on two scooters, to one side of the road and he was directly shot dead. One of these four men went in a vehicle and came back with many policemen in a jeep and a van. When the deceased was forcibly taken, no one mentioned that there was a warrant against him to be executed. The records produced by the police before the Commission show that the deceased had surrendered to the police in response to an appeal made by the State Chief Minister to Naxallites on 9th August 1989. While he was in jail, he was shown as involved in three cases in all. The Investigating Officer, RW-2, admitted before the Commission that when he proceeded to enquire into the case, no local man supported the police stand.

V. Case No.234 (6)/93-94

15. On November 1st 1993, Anjaiah belonging to village Kambalapalli of Warrangal District along with Saidulu was going on a motor cycle. By the time they reached the outskirts of Mahabubabad it was around 9 PM. The police party led by the Deputy Superintendent of Police Akula Ramakrishna killed the two persons on the motor cycle in a fake encounter. The police came forward with the story that they received information through VHF set that a police picket at Matpally in Karimnagar district had been blasted by two motorcycle borne extremists and that the Deputy Superintendent of Police, Mahabubabad alerted all the police stations under his jurisdiction and he led a police party to check the vehicular traffic on the outskirts of Mahabubabad and around 9.30 AM they tried to stop a motor cycle coming from Nellikiduru road and the driver and the pillion rider in an attempt to evade the police fell in a ditch, and the pillion rider took position behind the bushes and fired three rounds and in self defence the police party fired 38 rounds and that the motor cycle driver and pillion rider died of gun-shot injuries. PWs 1 and 3 are eyewitnesses to the occurrence. Anjaiah was a sympathiser of the CPI (M L) and he was acting as an elderly person in the area, conducting arbitration of disputes and was bringing public issues to the notice of the authorities concerned for solution. Around 8 PM on November 1st 1993, while he was coming on foot from B.T. road he saw a jeep coming from Mahabubabad with head lights on and a motor- cycle coming from opposite direction. He saw the Head-Constable and Sub-Inspector of Police getting down from the jeep. They caught hold of the motor cycle driver as also the pillion rider and within 5 minutes killed them. The gun shot injuries on Saidulu, one of the deceased, clearly indicate that the shot entered from his backside, which fits, into the case of the complainant. The distance between the place where the blast had taken

place and the place of the incident would be around 300 kms. It is indeed very difficult to cover the same in two and a half hours by motor cycle

16. In order to appreciate the material placed before the Commission and reach the conclusion as to whether there was a true encounter or a fake one, we shall have to assess the evidence. Broad features have to be looked into and on the analysis of the material before the Commission, it has to be found out whether the stand of the police is correct or not. Mr Sitapati has taken the stand that the allegation of encounter was true and there was no scope to hold that they were fake ones. We have already pointed out the several features relevant to the issue while dealing with the facts of each case. Prima facie the version of the complainant appears to be nearer truth but we would not like to come to any definite conclusion as the cases have got to be investigated and truth has to be ascertained.

17. Reliance has been placed on Section 46 of the Code of Criminal Procedure and in support of the contention that the persons who have been killed were involved in criminal cases, warrants for arrest had been issued and the police had the right to use force, which could extend upto causing of death as the deceased were involved in offences punishable with death or with imprisonment for life. It is also the claim of the police that in each of the encounters, they had the right of private defence as the members of the Naxalite groups (PWG) were the aggressors and unless the police had defended themselves, they would have been killed by the members of the unlawful association.

18. As has already been mentioned, one of the deceased persons was not at all connected with any criminal case. The evidence on record does not show, in each of other four cases, an attempt by the police to arrest the deceased persons and their offer of resistance. Sub Section (3) of Section 46 of Cr.P.C. provides that the causing of death could be conditioned upon the involvement of the accused in an offence punishable with death or with imprisonment for life and offer of resistance when attempt is made to arrest him.

19. Article 21 of the Constitution of India provides that no person shall be deprived of his life except according to the procedure established by law. Article 6 of the International Covenant on Civil and Political Rights provides:

1. "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."

“Right to life” is the most important one so far as any person is concerned because all other rights would be dependent upon the subsistence of life. The Constitution and the Covenant have, therefore, guaranteed life in emphatic terms and the only limitation is that it could be taken away by the procedure established by law. It is not necessary to support this conclusion by any authority and it appears to us as too elementary. What is next to be examined is, is there is procedure which authorises taking away of life in the facts of these cases.

20. Mr Sitapati has clearly accepted the position that the practice obtaining in Andhra Pradesh is that when an encounter death takes place, an entry is made in the police station of the fact and FIR is drawn up showing the deceased as accused and closing the case as having abated on account of death of the accused person. No investigation is ordinarily undertaken. In many of these cases, the police has claimed the right of private defence and since the investigation is made very often by the officer at the police station who has himself led the alleged encounter, he utilises his own knowledge to close the matter

21. This practice of showing the deceased person as accused and closing the case as abated is seriously challenged by Mr Kannabiran, as being contrary to legal procedure. We had enquired from learned Solicitor General, as also from the Advocate General of Andhra Pradesh as to whether this was a tenable practice in law and whether this could stand the test of criminal jurisprudence. Both of them found it difficult to support this as a legal practice. Even conceding that the police stand is correct -that there had been a real encounter -the dead lot cannot be shown as the accused because in most of these cases they prima facie did not do anything which would justify their being arrayed as accused persons particularly in the process of killing subject, of course, to the acceptance of the plea of resistance to arrest. As we have already pointed out while dealing with the evidence, in none of these encounters did the police receive any injury, while in every case one or more persons from the other side died. The scheme of the criminal law prevailing in India is that a person who claims the right of private defence as a cover against prosecution has to plead and establish the same. Chapter IV of the Indian Penal Code deals with “General Exceptions” and makes no distinction between an ordinary person and a policeman in this regard excepting in the matter of the plea of performance of duty. In case a situation as contemplated in these Sections arises, police is certainly entitled to take to arms and even kill the attackers without suffering any punishment for the killing.

22. Right of private defence, if raised, has to be established Criminal law contemplates that entitlement of protection under an exception would be available if the conditions are satisfied. It is difficult to apply the golden scale when the battle for life is on. The punishment prescribed is a lesser one than in normal situation. The right of private defence has to be raised and established at the trial and not during investigation. Section 105 of the Evidence Act clearly prescribes:

“When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code (45 of 1860) or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances.”

23. Mr Sitapati for the police was very emphatic that the procedure which is being followed is just and proper and has the authority of being in vogue for over a century. He also emphasised before us in unequivocal terms that if it be otherwise, it would be difficult for the police to function in the areas where the normal law and order is not operating and groups of unlawful associations have taken the law into their own hands and have been disturbing peace. There may be force in his submission that taking a contrary view would be inconvenient to the police. What is for consideration is not inconvenience but the legality of the action within the frame of Article 21. We do not think there is scope for acceptance of the stand of Mr. Sitapati.

24. We would, however, like to mention about the human rights of the innocent citizens and the policemen who fall prey to the illegal activities of the PWG men. Human rights are universal and everyone is entitled to them. In course of arguments we had suggested and we repeat that the PWG should stop their extra-legal activities and show respect for the lives of others and bring themselves into the fold of law and confirm to the conduct prescribed.

25. We are conscious of the position that the State of Andhra Pradesh is undergoing severe strain and turmoil on account of the illegal activities of the PWG. Apart from the attacks which police suffer now and then in the hands of the PWG people, the common man, both in urban and non-urban areas is badly affected. He runs the risk of his life; there is no protection to his property and peace and tranquillity within the society are totally in the hands of groups of PWG. The hardship of the State, in our view, cannot take away or abridge the guarantee under Article 21 of the Constitution or Article 6 of the Covenant and while enforcing the

guarantee and working in favour of its sustenance in full form, we cannot invoke the doctrine of necessity and apply it as a cover against the fundamental right.

26. The question for consideration is as to whether the procedure followed as above has the sanction of law. Section 154 Cr.P.C. provides that if information is given orally relating to the commission of a cognizable offence, the officer-in-charge of the Police Station shall reduce it into writing. Section 156 speaks of power of Police officers to investigate cognizable cases. Section 157 provides that if a cognizable offence is suspected from the information received or from other sources, the officer-in-charge of the Police Station shall forthwith send a report of the same to the Magistrate empowered to take cognizance of such offence and he shall proceed to take up investigation of the case. Section 173 requires the investigation to be completed with expedition and as soon as it is completed to forward the investigation report to the concerned Magistrate. The investigation must be directed to find out if and what offence is committed and as to who are the offenders. If, upon completion of the investigation, it appears to the officer-in-charge of the Police Station that there is no sufficient evidence or reasonable ground, he may decide to release the suspected accused, if in custody, on his executing a bond. If, however, it appears to him that there is sufficient evidence or reasonable ground to place the accused on trial, he has to take necessary steps as provided in Section 170 of the Code. In either case, on completion of the investigation, he had to submit a report to the Magistrate. The report of investigation in such cases should be examined thoroughly by the Magistrate so that complete application of the judicial mind is available to ensure just investigation and upright conclusion. The Magistrate, on consideration of the report, may either accept the same or disagree with the conclusions and call for further investigation as provided in Section 173 (8) of the Code. If the Magistrate accepts the report, he can take cognizance of the offence under Section 190 of the Code.

27. Section 157 (1) requires the officer-in-charge of the police station to apply his mind to the information received and the surrounding circumstances to find out whether there is reason to suspect the commission of a cognizable offence, which he is empowered under Section 156 to investigate. He cannot mechanically accept the information received. When the information received indicates that death was caused in the encounter as a result of the firing by the Police, *prima facie* the ingredients of Section 299 IPC which defines culpable homicides, are satisfied. This is sufficient to suspect that an offence of culpable homicide has been committed. Thus, Section 157 of the Code is attracted calling

for investigation. Any plea like causing of the death in the case does not constitute an offence either because it was done in exercise of the right of private defence or in exercise of the powers of arrest conferred by Section 46 of the Code, can be accepted only after investigating into the facts and circumstances. Section 100 of IPC provides that right of private defence of the body extends to the voluntary causing of death if occasion for exercise of the right falls in anyone of the six categories enumerated in that Section Whether the case falls under anyone of the six categories, can only be ascertained by proper investigation. Similarly, when Section 46 (3) of the Code is invoked, it has to be ascertained as to whether the death of the deceased occurred when he forcibly resisted the endeavour of the Police to arrest him and whether the deceased was accused of an offence punishable with death or imprisonment for life. Without proper investigation, the Police officer cannot say that the causing of the death in the encounter was not an offence either because it was done in exercise of the right of private defence or was done in legitimate exercise of the power conferred by Sec. 46 of the Code. One of the deceased persons in these cases was not at all connected with any criminal case. Hence, Section 46 could not be invoked in that case. Section 174 of the Code says that when the Police officer in charge of the Police station receives information that a person has been killed by another, he shall make an investigation about the apparent cause of death and submit a report to the District or Sub-Divisional Magistrate and also to take steps to arrange for the autopsy of the body. These provisions indicate that unnatural death has to be taken note of seriously by the Police and required them to find out by investigation the real cause of death. The responsibility is greater when it is the Police that are the cause of unnatural death. There is also a general feeling that most of the encounters are fake. It is, therefore, in public interest that the conduct of the Police involved is subjected to proper scrutiny by investigation. To avoid the possibility of bias, the investigation in such cases should be entrusted to an independent agency like the State CID by a general order of the Government. We are, therefore, of the opinion that when information is received in the Police Station about the causing of the death by the Police officer in an encounter, the officer-in-charge of the Police Station, must, after recording that information, draw the inference that there is reason to suspect the commission of an offence and proceed to investigate the same as required by Section 157 of the Code. If such a procedure is not required to be followed, it would give licence to the Police to kill with impunity any citizen in the name of an encounter by just stating that he acted in 'the right of private defence or under Section 46 of the Code. A procedure which brings about such unjust, unfair and unreasonable consequences cannot be countenanced as being within Article 21 of the Constitution.

28. The stand of the Police in these cases is that in the course of the encounters that took place, several persons alleged to belonging to the PWG, died as a result of the firing on the side of the police without even a simple injury being suffered by the police. On the basis of the information furnished by the leader of the Police party that was engaged in the encounter, entries were made in the respective Police Stations stating that the deceased persons made an attempt to kill the Police and were, therefore, guilty of the offence of attempt to murder under Section 307 IPC. On that basis, they were described as accused and FIRs were drawn up by the Police. The cases were closed without investigation on the ground that they have abated on account of the death of the accused persons. No attempt whatsoever was made to ascertain as to the Police Officers responsible for the respective killings and as to whether any offences were committed by any of them punishable in law. The stand of the Police before us is that they have not committed any offence as they acted in exercise of the right of private defence. In some of the cases, the killing is sought to be justified by invoking Section 46(3) of the Cr.P.C. It is on this assumption that information was recorded in the Police Station. The information recorded in the Police Station in many of these cases is as furnished by the very Police officer who led the alleged encounter. Attention was confined to the conduct of the deceased and not to that of the Police who had caused the deaths when the information was received at the Police Station. Causing of death by the Police firing in the alleged encounter has been assumed to be justified either in exercise of the right of private defence, or in course of exercise of power of arrest under Section 46. No attempt was made to investigate the circumstances under which the police opened fire, causing death to several persons. The procedure followed in this case is not sanctioned by law. It is even opposed to the procedure prescribed by the Code. The procedure is unjust, unfair and unreasonable and, therefore, violative of the fundamental right guaranteed by Article 21 of the Constitution.

29. For the reasons stated above, we make the following recommendations:

- i) As the information furnished to the Police officers in charge of the respective Police Stations in each of these cases is sufficient to suspect the commission of a cognizable offence, immediate steps be taken to investigate the facts and circumstances leading to the death of the PWGs, in the light of the elucidation made in this order.
- ii) As the Police themselves in the respective cases are involved in perpetrating encounter, it would be appropriate that the cases are made

over to some other investigating agency preferably the State CID. As a lot of time has already been lost, we recommend that the investigation be completed within four months from now. If the investigation results in prosecution, steps for speedy trial be taken. We hope compensation would be awarded in cases ending in conviction and sentence.

iii) Deceased Shankariah (Case No.234 (3)/93-94/NHRC) admittedly was not involved in any pending criminal case and ending his life through the process of alleged encounter was totally unjustified. So far as he is concerned, we are of the view learned Advocate General conceded that our view was right that the State Government should immediately come forward to compensate his widow by payment of compensation of Rs. 1 lakh as done in similar cases and the police involved in killing him should be subjected to investigation and trial depending upon the result of investigation.

iv) We commend to the State Police to change their practice and sensitise everyone in the State to keep the legal position in view and modulate action accordingly. In case the practice continues notwithstanding what we have now said, the quantum of compensation has to be increased in future and stricter view of the situation has to be taken. Being aware of the fact that this practice has been in vogue for years and the people have remained oblivious of the situation, we are not contemplating the award of any interim compensation at this stage.

30. Our recommendation be forwarded to the State Government without delay for acceptance and 30 days' time is given for intimation of response.

31. We are thankful to learned Solicitor General for responding to our request to assist the Commission. We place on record our appreciation for the assistance given by counsel for the parties.

Sd/-
(Ranganath Misra)
Chairperson

Sd/-
(M.Fathima Beevi)
Member

Sd/-
(V.S.Malimath)
Member

Case No. 6 : Death of 20 Red Sanders Smugglers in an Alleged Encounter with Joint Team of Special Police and Forest Personnel in Seshachalam Forests of Chittoor District, Andhra Pradesh²⁸⁷

The NHRC came across a media report in The Times of India dated 7 April 2015 under the caption “Police kill 20 sandalwood smugglers in Andhra Pradesh”. It was reported that 20 red sanders smugglers were killed in an alleged encounter with a joint team of special police and forest personnel in the Seshachalam forests of Chittoor District, Andhra Pradesh in the early hours of Tuesday, 7 April 2015. According to the report, the incident took place at Etagunta and Vacchinodu Banda hamlets, in the deep forests in Chandragiri Mandal. From the media reports, it appeared that the police and forest officials opened fire as the smugglers attacked them with stones, axes and knives.

Taking *suo motu* cognizance of the media reports, the Commission registered Case No.475/1/3/2015-AFE and the Commission vide its proceedings dated 7 April 2015 observed and directed as under:

“The Commission considers the incident a serious violation of human rights of the individuals and the act of police and forest officials should be explained by the Government of Andhra Pradesh. The Commission is also constrained to note that this incident has taken place at a time when a similar incident was reported from the bordering districts of Andhra Pradesh and Tamil Nadu in the month of December, 2014 wherein Andhra Pradesh forest officials were seen physically torturing and assaulting a man in a naked position and reports are awaited from concerned authorities and the issue is under consideration of the Commission.

Issue notice to the Chief Secretary and the DGP of Andhra Pradesh. Response within two weeks. The matter shall be taken up for hearing in the Camp Sitting of the Commission to be held at Hyderabad on 23rd April, 2015.”

The Commission also received an intimation dated 7 April 2015 on the above incident from the District Magistrate, Chittoor which was registered separately but tagged along with the main file.

On 13 April 2015, two villagers, namely Shri Sekhar and Shri Balachandran appeared before the Commission along with the wife of the former and gave information about the death of 20 persons who

²⁸⁷. Case No.475/1/3/2015-AFE reported in National Human Rights Commission’s Annual Report 2015-2016

were killed in the above incident. These witnesses wanted to give oral statement before the Commission. Their statements were got recorded by the Registrar (Law) of the Commission, with the help of a Tamil knowing Officer of the NHRC. Since the two persons who gave statements before the Commission apprehended threat to their lives and to their family members and relatives, the Commission directed that police protection by the Director General of Police, Tamil Nadu, be provided to them.

Considering the gravity of the situation and the large number of persons involved in the incident, the Commission vide proceedings dated 13 April 2015 issued the following directions:

1. A Magisterial Enquiry be conducted by a Judicial Magistrate First Class as laid down u/s 176 (1)(A) Cr.P.C.;
2. Ensure that names of all forest officials and police officials who were on duty and were part of the Special Task Force (STF) be submitted to the NHRC on or before 22 April 2015;
3. Post mortem, if any, of the dead persons may be conducted as per the Guidelines issued by the NHRC;
4. Ensure that all the weapons allegedly used by the STF and the deceased persons be placed in safe custody; and
5. Police Register, Log Books, GD Entries and any other documents relating to the incident shall not be destroyed, tampered with or weeded out during the pendency of the NHRC proceedings.

The Commission also deputed its Joint Registrar to record the statement of one more witness, who was in the custody of an NGO - The Peoples' Watch and who was able to divulge details regarding the incident but he was unable to reach Delhi. Pursuant to the directions given by the Commission, Shri A.K. Parashar, Joint Registrar (Law) recorded the statement of Shri M. Illango at Government Guest House, Puducherry on 15 April 2015.

The case was then taken up at Hyderabad on 23 April 2015 during the Camp Sitting of the Commission held for the Southern States. There, the Commission heard Shri Henri Tiphagne of People's Watch; Shri Chilka Chandra Shekar, Advocate and representatives of PUCL, Telangana; Human Rights Forum, Hyderabad; and Social Initiative for Legal Remedies, Secunderabad.

Shri Lingaraju Panigrahi, Special Chief Secretary and Shri Vinay Ranjan, ADGP (Legal) also appeared before the Commission on behalf of the Government of Andhra Pradesh. Quoting the order passed by the Andhra Pradesh High Court on 13 April 2015 in PIL No. 91 of 2015, they expressed inability to share any information with the Commission. The Commission pointed out to them that the High Court had restrained the State Government only from divulging the result of investigation and not the information like post mortem report of all deceased persons, the medico-legal reports of the injured STF personnel, details of weapons used by STF on the deceased persons, the police register, log book, G.D. entries, details of mobile phones, etc. The Commission categorically told the officers of the State Government that the High Court would not do anything to prevent a statutory institution like NHRC from discharging its statutory functions or from exercising its statutory powers conferred by the PHR Act 1993. The officers of the State Government were asked to interpret the order of the High Court in a proper and reasonable manner. The purpose of the order was to ensure a fair and independent investigation so as to instill faith in the minds of the people and that the order could never have been intended to obstruct an enquiry by NHRC. When the officers of the State Government were made to understand the order of the High Court in proper perspective, Shri Vinay Ranjan, ADGP (Legal) submitted that the directions given by the Commission on 13 April 2015 shall be complied with.

During the Camp Sitting on 23 April 2015, Shri Lingaraju Panigrahi, Shri Vinay Ranjan and Shri M. Naga Raju were also informed that a team would be visiting the place of occurrence for an on the spot enquiry and the State Government was asked to extend all the facilities to the NHRC team for purposes of enquiry. A team of the Commission led by Shri Pupul Dutta Prasad, SSP contacted Shri S.P. Tirupathi, I.G. Special Investigation Team (SIT), the Chief Secretary, Government of Andhra Pradesh and the District Collector of Chittoor but all of them gave evasive replies and did not extend any cooperation. In spite of the defiant and non-cooperative conduct of the Government of Andhra Pradesh, the Commission had to proceed with the enquiry based on whatever documents and information were available at the given time.

Considering the background of the victims, the delay in registration of the FIR, improvements made by the officers of the State Government, the nature of weapons allegedly seized from the spot, the testimony of Shri Sekhar, Shri A. Balachandran, Shri M. Illango and the reluctance of the State Government to share even basic information with the NHRC, the Commission found that –

- i) There are good grounds to think that there was serious violation of human rights of 20 persons who were killed by STF personnel on 7 April 2015 in Sheshachalam forest of Chittoor district.
- ii) The victims were very poor and their families suffering under deprivation.
- iii) The families cannot be allowed to starve and die waiting for the final outcome of the enquiry by NHRC or investigation by an unbiased investigating agency.

The Commission vide its proceedings dated 28 May 2015 made the following directions/recommendations:

1. The Government of Andhra Pradesh shall pay Rs. 5,00,000/- (Rupees Five Lakhs only) as immediate interim relief to the dependents of each of the 20 persons who were killed by the STF on 7 April 2015 in Sheshachalam forest of Chittoor District. The compliance report with proof of payment shall be submitted to the Commission within eight weeks.

2. The District Magistrate, Chittoor shall promptly take steps to disburse financial assistance to the dependents of 13 victims who belonged to Scheduled Tribe under rule 12(4) r/w Annexure I of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Rules and submit action taken report to the Commission within eight weeks.

3. The Government of India and the Government of Andhra Pradesh shall have FIR No. 42/15, 43/15 and 46/15 registered at P.S. Chandragiri investigated by the CBI after completion of necessary formalities and shall submit an action taken report to the Commission within four weeks.

4. The present Investigating Officer of FIR No. 42/15, 43/15 and 46/15 shall get the statements of witnesses recorded u/s 164 Cr.P.C before a competent Magistrate in Tamil Nadu at the earliest.

5. The DGP, Tamil Nadu shall continue to provide adequate protection to the witnesses namely Shri Sekhar, Shri A. Balachandran and Shri M. Illango, their families and the Presidents of the Panchyats where they are living.

6. The Chief Secretary, Government of Andhra Pradesh and the DGP Andhra Pradesh shall appear in person before the Commission on 9 June 2015 at 11:00 am to furnish the information and produce the record as

directed by the Commission in its proceedings dated 13 April 2015 and 23 April 2015.

The Commission received a FAX message from the Chief Secretary, Government of Andhra Pradesh forwarding copy of the order dated 5 June 2015, passed by the High Court of Judicature at Hyderabad for the State of Telangana and the State of Andhra Pradesh in Writ Petition No.15767/2015. The Order of the Court showed that notice had been issued to the Respondent - The National Human Rights Commission – returnable on 3 July 2015 and till the next date of hearing the directions issued by the Commission in the order dated 29 May 2015 had been stayed.

Upon consideration of the said order of the High Court, the Commission vide its proceedings dated 9 June 2015 observed and directed as under:

“In view of the Order of the High Court, the Commission cannot proceed with this case. Since notice and copy of the Writ Petition have not been received by the Commission, the case is adjourned to 16 June 2015.

In the meanwhile, the Registrar (Law) is requested to examine the matter and suggest further steps to be taken by the Commission in this case. The Registry is directed to request the Andhra Pradesh State Human Rights Commission to intimate to this Commission the date of its taking cognizance in the case relating to the killing of 20 persons in Seshachalam forest area in Chittoor District of Andhra Pradesh on 7 April 2015. The Secretary, State Human Rights Commission may be requested to furnish the information before 16 June 2015.”

Upon consideration of the notice issued to the Commission by the High Court of Judicature at Hyderabad for the State of Telangana and the State of Andhra Pradesh in Writ Petition No. 15767 of 2015 filed by the Chief Secretary to the Government, State of Andhra Pradesh, Hyderabad and two others challenging the Order of the Commission dated 28 May 2015 and also the Order dated 5 June 2015 passed by the High Court in the above Writ Petition staying the Commission’s Order dated 28 May 2015 and perusing the Affidavit filed on behalf of the petitioners in the above Writ Petition No. 15767 of 2015, the Commission vide proceedings dated 22 June 2015 directed and authorized the Registrar (Law) to make necessary arrangements for filing a Counter-Affidavit in the Writ Petition before the High Court and to oppose the Interim Order passed by the High Court. On behalf of the Commission, counter affidavit was filed and the matter at present is under consideration of the High Court.

Case No. 7 : Killing of Sixteen Year Boy in Fake Encounter by BSF Jawan in Srinagar, Jammu & Kashmir²⁸⁸

The Commission received a complaint from Shri R.H. Bansal, Chief Editor, Human Rights Observer, alleging that an innocent boy named Zahid Farooq Ahmed Sheikh, aged about sixteen years was killed by a BSF Jawan in a fake encounter. Another complaint regarding the same incident was made by Shri Prabir Kumar. Both the cases were linked up.

The Commission took cognizance of the matter by registering Case No.35/9/13/2010-PF and issued notices to the Director General, BSF, New Delhi, the District Magistrate and Sr. Superintendent of Police, Srinagar, Jammu & Kashmir to conduct an enquiry into the incident and submit the report in eight weeks time.

Pursuant to the directions of the Commission, the DG, BSF vide his communication dated 9 April 2010 informed that the police investigation was in progress. The Addl. Deputy Commissioner, Srinagar vide communication dated 1 April 2010 informed that ex-gratia relief amounting to Rs. 1,00,000/- (Rupees One Lakh only) had been sanctioned in favour of Zahid Farooq Ahmad Sheikh, s/o Farooq Ahmad Sheikh vide order dated 20 March 2009 by the Government of Jammu and Kashmir.

The DIG (Ops.), BSF on 21 July 2010 informed the Commission that the investigation had been completed and chargesheet submitted in the Court of Chief Judicial Magistrate, Srinagar on 6 April 2010 u/s 302, 201 and 109 RPC against R.K. Birdi, Commandant and Constable Lakhwinder Kumar. It was further submitted that BSF had filed an application u/s 80 of the BSF Act, 1948 in the Court of Chief Judicial Magistrate, Srinagar on 7 April 2010 to claim the case for trial by a Security Force Court.

Thereafter, on 13 December 2010, DIG (Ops.), BSF informed that the Chief Judicial Magistrate had transferred the case to BSF Court for trial. The accused, R.K. Birdi, Commandant and Lakhwinder Singh, Constable had been taken into custody from Central Jail, Srinagar on 25 November 2010 and they had been placed under arrest on 25 November 2010 by DIG, BSF, Srinagar. At present, they were in BSF custody at Panthachowk. Srinagar and proceedings under the BSF Act had already commenced. It was further submitted that a criminal revision petition had been filed in the High Court of Jammu and Kashmir, Srinagar against the order of

²⁸⁸. Case No.35/9/13/2010-PF reported in National Human Rights Commission's Annual Report 2015-2016

Chief Judicial Magistrate, Srinagar dated 25 November 2010 by the State Government where the High Court had directed to stay further proceedings till the next date of hearing.

Upon consideration of the reports, the Commission vide its proceedings dated 22 July 2011 observed and directed as under:

“On the basis of above, it is a case of committing death of a 16 year old boy, Zahid Farooq Ahmad Sheikh by Commandant R.K. Birdi and Constable Lakhwinder Kumar by AK-47 rifle. The amount of Rs. 1,00,000/- (Rupees One Lakh only) is inappropriate for the death of a minor child. This indicates a clear case of violation of human rights by public servants/BSF personnel and it is a fit case in which notice u/s 18 of Protection of Human Rights Act, 1993 be issued. Accordingly, it is directed that a notice u/s 18(a) (i) of the Protection of Human Rights Act, 1993 be issued to the Secretary, Ministry of Home Affairs, Government of India calling upon him to show cause as to why compensation may not be recommended in favour of the next-of-kin of the deceased. Response to be submitted within six weeks.”

In response to the show cause notice, DIG (Ops.) submitted a communication dated 6 September 2011 that the incident regarding the death of Zahid Farooq Ahmed Sheikh had been investigated by the State Police and chargesheet submitted in the Court of Chief Judicial Magistrate, Srinagar. As revealed from the chargesheet, Commandant R.K. Birdi and Constable Lakhwinder Kumar had been charged u/s 302/301/109 of RPC for alleged killing of Zahid Farooq Ahmed. It was further stated in the communication dated 6 September 2011 that the State Government had filed a Criminal Revision Petition in the High Court of Jammu and Kashmir against the order of Chief Judicial Magistrate and the High Court had stayed the proceedings with liberty to the BSF to complete the Record of Evidence. It was also communicated that the statements of 74 witnesses had been recorded and it was contended that the matter was subjudice and it would be premature to comment on the evidence or on the final outcome of the case. The Commission was requested to keep the issue of compensation in abeyance.

Upon consideration of the reply to the show cause notice, the Commission vide proceedings dated 1 April 2015 observed and directed as under:

“We are of the considered opinion that the pendency of the criminal case need not detain us from recommending compensation. The BSF itself admits that its officers were found guilty after police investigation. Therefore, the violation of human right is prima facie established. The

Commission always proceeds on the broad probabilities of the case without insisting on rigorous proof. Since the guilt of the BSF officials has been established in police investigation, the Commission need not wait for any further evidence. Considering all the circumstances, we recommend to the Ministry of Home Affairs, Government of India to pay a sum of Rs. 5,00,000/- as monetary relief to the next-of-kin of deceased Zahid Farooq Ahmed. The Secretary, Ministry of Home Affairs, Government of India shall submit the compliance report with proof of payment within eight weeks.”

In response to the recommendation of the Commission, the Under Secretary, Ministry of Home Affairs, Government of India forwarded a report from the Directorate General, BSF. It was submitted that compensation should not be paid to the next-of-kin of deceased Zahid Farooq Ahmed as the disciplinary case against Commandant R. K. Birdi, and Constable Lakhwinder Kumar were pending. It was also submitted that in case the accused persons are found guilty of the offence later on, compensation could be paid at that juncture.

The Commission considered the matter on 14 January 2016 when it observed and directed as under:

“The Commission has considered the stand taken by the Directorate General, BSF. Under the provisions of the Protection of Human Rights Act, 1993, the Commission is competent and entitled to recommend payment of compensation to the victims of violation of human rights, if the Commission is prima facie satisfied that there was violation of human rights. In this case, after considering all the materials available, the Commission was satisfied that there was violation of human rights and hence, recommendation was made to pay compensation. The satisfaction of the Commission or the recommendation of the Commission cannot be dependent on the outcome of any disciplinary case or criminal case. The Commission’s satisfaction and its recommendation are based on the materials and evidence brought before the Commission. If the payment of monetary relief has to wait and depends on the outcome of a criminal case or disciplinary case, it would result in serious breach and hardship to the victims of violation of human rights and it will be against the spirit of the provisions contained in the Protection of Human Rights Act, 1993, particularly Section 18.

Therefore, the Commission hereby reiterates its recommendation to the Ministry of Home Affairs, Government of India to pay monetary relief to the next-of-kin of the deceased Zahid Farooq Ahmed and requests

the Secretary, Ministry of Home Affairs, Government of India to submit the compliance report along with the proof of payment within eight weeks.”

Case No. 8 : Death of a Person in Police Encounter in Varanasi, Uttar Pradesh²⁸⁹

The Commission received an intimation dated 22.5.2006, from Senior Superintendent of Police, Varanasi about the death of one Budhesh Mishra in an encounter with police in the area of Police Station Lanka, Varanasi, Uttar Pradesh. As per the intimation, two motorcycle borne criminals were seen in suspicious circumstances. They ignored the signal to stop and on being chased by the police, they fired at the police party. In the ensuing encounter, one of them was killed and the other managed to escape. Later on, it was found that shortly before the alleged encounter, deceased Budhesh Mishra and his companion had robbed one Himanshu Pandey of his motorcycle bearing No. UP65Z3169. This very motorcycle was recovered from the place of alleged encounter.

The Commission took cognizance of the intimation by registering Case No. 7477/24/2006-2007 and directed Director General of Police, Uttar Pradesh, and Senior Superintendent of Police, Varanasi, Uttar Pradesh to take appropriate action with regard to the investigation of the case as per guidelines laid down by the Commission.

Pursuant to the directions of the Commission, Senior Superintendent of Police, Varanasi reported that investigation of Crime Nos. 185 & 186 of 2006 u/s 307 IPC and 3/25 Arms Act respectively registered in connection with the aforesaid incident were transferred to SIB and District Magistrate, Varanasi was also requested to order magisterial inquiry into the death in an encounter.

During the course of magisterial inquiry, the relatives of the deceased alleged that Budhesh Mishra had been picked up by the police from the village on the night preceding the encounter. Their testimony was discarded by the Magistrate.

The Commission felt that objective analysis of the evidence had not been made by the Magistrate. Therefore, the Commission vide its proceedings dated 22.07.2010 directed the State Government to have the incident investigated by CB CID.

²⁸⁹. Case No. 7477/24/2006-2007 reported in National Human Rights Commission's Annual Report 2014-2015

The report of CB CID investigation was forwarded to the Commission by Special Secretary, Government of Uttar Pradesh vide communication dated 30.3.2012. The investigating agency concluded that the encounter was genuine.

Upon consideration of the CB CID report, the Commission vide its proceedings dated 29 August 2013 rejected the CB CID report and directed as under:

“On careful examination of the CB CID report, however, we are unable to agree with the findings. We are of the considered opinion that CB CID only tried to hush up the matter and did not make an honest effort to unravel the truth. Himanshu Pandey, owner of motorcycle No. UP 65 Z 3169 was examined by CB CID during inquiry. He stated that he had been robbed of his motorcycle on 22.5.2006 at gun point but, did not make any report to the police. He further stated that after the alleged encounter, he made an application to the court for custody of the motorcycle.

In the application before the court, he stated that the motorcycle had been snatched from him by the police on 22.5.2006 and later on the motorcycle was planted at the scene of the encounter. He explained further that he had so written in the application on the advice of his lawyer.

CB CID is considered to be an independent agency. When a matter is entrusted to it for investigation, it is expected that the investigation will be efficient and fair. In the instant case, however, we see that the investigation by CB CID lacked the element of fairness. As a matter of fact, it is nothing but an attempt to hush up the matter. It is said that “man may tell lie, but documents do not”. Himanshu Pandey stated in his application before the court that the motorcycle had been snatched from him by policemen and that the same had been planted at the place of alleged encounter. This application was completely ignored by the investigating agency. Instead of relying on the application, CB CID obtained an explanation from Himanshu Pandey to the effect that the contents of the application were written on the advice of a lawyer. Such explanation could have been believed only by a naïve person. If we go by the contents of the application made by Himanshu Pandey before the court, the very foundation of the police story is knocked out.

In view of the above observation, we are unable to accept the investigation report of CB CID. The statement of Himanshu Pandey

leaves no doubt that the motorcycle which the deceased Budhesh Mishra and his companion are stated to be riding at the time of the alleged encounter was in fact snatched from Himanshu Pandey by the police themselves and later on it was planted at the place of occurrence. The police story that two motorcycle borne criminals were seen in suspicious circumstances and were chased by the police stands completely discredited. We are convinced that the encounter was fake. A notice be, therefore, issued to the Govt. of Uttar Pradesh requiring it to show cause why monetary relief u/s 18 of the Protection of Human Rights Act, 1993 be not recommended to be paid to the next of kin of deceased Budhesh Mishra. Chief Secretary, Govt. of Uttar Pradesh shall respond to the notice within six weeks"

In response to the show cause notice, the State Government vide its communication dated 20.6.2014, highlighted the criminal antecedents of the deceased. The State Government also forwarded a report of DIG, CB CID. The DIG relied on CB CID investigation, which was conducted in pursuance of the Commission's direction in that case. The investigation report of CB CID was discussed in detail by the Commission and it was held that the investigating agency had tried to hush up the case.

Since the State Government did not make any comment about the observation of the Commission regarding the planting of a motorcycle at the place of occurrence, the Commission in its proceedings dated 18.02.2015 observed that the State admitted that the encounter in which Budesh Mishra was killed was not genuine as the planting of the motorcycle knocked out the very foundation of the police version. Therefore, the Commission recommended to the Govt. of Uttar Pradesh to pay a sum of Rs. five lakhs as monetary relief to the next of kin of the deceased Budesh Mishra.

Case No. 9 : Death of a Person by SOG Police in Alleged Fake Encounter in Aligarh, Uttar Pradesh²⁹⁰

The Commission received a telegraphic complaint from one Viresh alleging that his younger brother Rakesh alias Chache had been picked up by the SOG (Special Operations Group) Police from the house of his relative on 10.02.2009 and eliminated in a fake encounter. Later on, another complaint was received from Smt. Kailashi Devi, mother of deceased Rakesh on 01.02.2010. She alleged that her son had been picked up by the police from the house of a relative named Sudhir Pachori on

²⁹⁰. Case No. 47628/24/3/08-09-AFE reported in National Human Rights Commission's Annual Report 2014-2015

10.02.2009 in the presence of her daughter Rachna. The complainant further alleged that on receiving information from her daughter Rachna, she had gone to P.S. Sasni Gate, Aligarh, along with Narender S/o Hotilal, Gaindalal Baghel, Mahboob and Hanuman on 10.02.2009 at 9:30 pm and she had seen Rakesh in the lock-up. She further claimed that the SHO had promised to release her son after enquiry. Addl. Superintendent of Police (City), Aligarh also sent an intimation regarding death of Rakesh in an encounter with SOG personnel.

The Commission took cognizance of the incident by registering Case No. 47628/24/3/08-09-AFE and requested its Director General (Investigation) to collect requisite reports from concerned authorities.

According to the police version, on 11.02.2009, SOG In-charge Avdesh Kumar along with his team was present in front of the main branch of State Bank of India in Aligarh when he received secret information that two criminals were standing with a motorcycle in front of the Mazar gate of Civil Court. On receipt of this information, the SOG team proceeded towards the court and saw two persons standing there with a motorcycle. On seeing the police, they started the motorcycle and sped towards Jamalpur. The pillion rider fired at the police party. The police team chased them and flashed a message to the control room at 12:20 a.m. When the police team zeroed in, the pillion rider again fired and the bullet hit the police jeep. When the criminals reached Bhatedi turning, they found that a police party was already present there. Finding themselves cornered on both sides, the criminals turned the motorcycle towards Manjoor Garhi Railway station. The pillion rider continued to fire at the police party. The police retaliated the fire in self defense, as a result of which the pillion rider fell from the motorcycle. He took position in a pit and started firing indiscriminately. One bullet hit Constable Rakesh Kumar. The police fired again in self defense. At about 12:40 a.m., the firing stopped. The police then saw in the light of the jeep that a criminal was lying injured. A pistol of 32 bore was lying near his right hand. He was subsequently identified as Rakesh alias Cheche. He was sent to the hospital but there he was declared dead. The injured Constable was also sent to hospital for treatment.

An enquiry into the incident was conducted by Sub Divisional Magistrate, Aligarh and he believed the police version. The post mortem, however, revealed blackening in three fire arm wounds on the chest of the deceased. Therefore, vide proceedings dated 22.09.2011, the Commission asked the State Government to have the incident investigated by CB-CID.

The report of CB-CID investigation was forwarded to Commission by Special Secretary Home (HR), Government of Uttar Pradesh vide communication dated 30.10.2013.

The investigating agency concluded that the encounter was genuine and the police had fired in exercise of the right of self defense.

Upon consideration of the CB-CID report, the Commission found the following infirmities in it:-

- (i) The record of the police control room containing the message said to have been flashed by the SOG team at 0:20 a.m. on 11.2.09 was not seized by the local I.O. who had initially investigated the case. CBCID noted this lapse on the part of the local I.O. but did not appreciate the adverse impact which the omission to seize the record would have on the police version.
- (ii) A photograph of the police vehicle allegedly hit by the bullet fired by the deceased was not taken.
- (iii) Rachna, daughter of complainant Kailashi Devi was not examined by CBCID.
- (iv) Latter part of the statement of Kailashi Devi wherein she reiterated the allegations made in the complaint, was completely ignored by CB-CID.
- (v) CBCID ignored the telegraphic complaint sent to the Commission on 10.02.2009. Viresh may have stated before CB/CID that he had not sent the telegram but the fact remains that the telegram complaining of fake encounter was received in the Commission.
- (vi) Kailashi Devi had stated that she was accompanied by Narender Singh s/o Hotilal to P.S. Sasni Gate on 10.02.2009. CB-CID however recorded statement of Narender Singh s/o Ghanshyam Das.
- (vii) CB-CID did not examine Gaindalal Baghel or Hanuman who had gone with Kailashi Devi to the police station on 10.02.2009.
- (viii) Constable Rakesh who allegedly sustained a bullet injury in the incident stated during the magisterial enquiry that he had been taken to J.M. Medical College Aligarh for treatment. The medical record of J.N. Medical College was not seized by CBCID. Instead the record of Varun Hospital was seized.

In view of infirmities mentioned above, the Commission in its proceedings dated 18.12.2013 declined to accept the investigation report of CB-CID. On consideration of statements made by Kailashi Devi and other independent witnesses during magisterial enquiry, the Commission found that the police version of the incident was not credible.

Hence, the Commission directed to issue a notice u/s 18 of Protection of Human Rights Act, 1993 to the Government of Uttar Pradesh requiring it to show cause why monetary relief be not given to the next of kin of deceased Rakesh alias Chache.

In its response to the show cause notice, the State Government contended that the encounter was genuine and also forwarded a report of Superintendent of Police, CB-CID with its reply.

Superintendent of Police, CBCID submitted in the report that the record of police control room was weeded out in accordance with rules. He also pointed out that the police vehicle which was damaged by a bullet in the incident was mechanically inspected by Sr. Foreman Raj Kumar Jain on 13.03.2009. It was further stated in the report that Kailashi Devi had admitted in her statement before CBCID that she had not gone to the police station or police post on 10.02.2009. As regards non examination of Gainda Lal Baghel and Hanuman, it was explained that Hanuman was a co-accused with deceased Rakesh alias Chache in several criminal cases.

Upon consideration of the response of the State Government, the Commission vide its proceedings dated 30.04.2014 observed as under:

“We are not impressed by the explanation given by S.P. CBCID. The record of police control room may have been weeded out on 16.02.2010 in accordance with rules. The police should have however realized that the matter was under consideration of the Commission and therefore all vital evidence should have been preserved. CBCID has itself recommended departmental action against the local I.O. for omission to seize the record of control room. As regards the mechanical inspection of the police vehicle, we may point out that the incident took place on 11.02.2009 but the police vehicle was sent for mechanical examination on 13.03.2009. The intervening gap of one month has not been explained. In any case, no explanation has been given for omitting to take a photograph of the damaged police vehicle. As regards the statement of Kailashi Devi, CBCID has taken into consideration only a part of her statement. It has completely ignored the latter part in which she has reiterated the allegations made by her in the complaint. The other

points raised by the Commission in its proceedings dated 18.12.2013 have not been answered at all.”

Hence, the Commission found no reason as to why monetary relief should not be recommended to be paid to the next of kin of deceased Rakesh alias Chache and recommended to the government of Uttar Pradesh to pay a sum of Rupees Five Lakhs as monetary relief to the next of kin of deceased Rakesh alias Chache. Chief Secretary Government of Uttar Pradesh was asked submit compliance report along with proof of payment within eight weeks but the same is still awaited.

Case No. 10 : Police Encounter Leads to Death in Dilshad Garden, Delhi²⁹¹

The Commission received an intimation dated 19.03.2006 from the Joint Commissioner of Police, Special Cell, Delhi regarding the death of one Ashok alias Bunti in an encounter with police on 18.03.2006. As per intimation, the police received an information that Ashok alias Bunti would be coming to Sports Complex, Dilshad Garden to meet an associate. A trap was laid to nab him. At about 09.45 p.m., a green Maruti car came towards the Sports Complex from the side of Tahirpur. One person alighted from the car and stood waiting for someone. He was identified by the informer as Ashok alias Bunti. The police asked him to surrender, but he started firing and tried to flee. The police party returned the fire in self defence. In the ensuing encounter Ashok alias Bunti was injured. He was taken to GTB Hospital and there he was declared dead.

The NHRC registered Case No. 4693/30/2005-2006.

Pursuant to the Commission's direction, the Additional Commissioner of Police, Vigilance, Delhi reported that the case file was missing and new case file had been reconstructed. The post mortem report was also sent, which reveals ten ante mortem injuries. The cause of death, according to medical opinion was "*shock as a result of haemorrhage caused by multiple injuries and extensive craniocerebral damage*". Magisterial enquiry was not held in this case. The re-investigation was conducted by the local police after reconstruction of the case file. It was reported that the incident being seven-and-a-half years old, no independent witness came forward to depose or reveal new facts. The Investigation Officer relied on statements of police witnesses and CFSL report. The doctors had preserved the hand wash of the deceased during post mortem. In reply to the Commission's

²⁹¹. Case No. 4693/30/2005-2006 reported in National Human Rights Commission's Annual Report 2014-2015

show cause notice, reply was received from the Deputy Commissioner of Police (Vigilance), Delhi.

On consideration of the material on record, the Commission observed that State Government is conspicuously silent on the absence of gunshot residue in the hand wash of the deceased. If Ashok alias Bunti had used firearm to attack the police, the gunshot residue must have been necessarily found in the hand wash. The police could have justified its action only by invoking the plea of self defense. Such plea would be available to the police only if it was able to prove that deceased Ashok alias Bunti had fired at them. The absence of gunshot residue in the hand wash, however, indicates that he had not fired at the police and, therefore, the police could not have opened fire and then justified such act by taking the plea of self defense. As regards non-production of any public witness, Deputy Commissioner of Police, Vigilance explained that if any person from the public had been made to join the investigation, his life would have been at risk. If the police was so conscious of risk to the life of public witnesses, it should not have asked any public witness at all to join. The FIR, however, mentioned that the police did request some public witnesses to join them. As stated above, the incident took place in the month of March at about 09.45 p.m., a number of public persons must have seen the occurrence at that time. They could have been asked to join investigation because after the death of Ashok alias Bunti, there was no likelihood of their being exposed to any risk. It was pointed out by Deputy Commissioner of Police, Vigilance in the reply that there were five entry wounds and corresponding exit wounds on the body of the deceased Ashok. Out of these five wounds, two were on the hands of the deceased and one was on the shoulder. The remaining two entry wounds were on the neck and chest. It was also pointed out that there is no mention of blackening or tattooing on the margins of the firearm entry wounds in the post mortem report. It was contended that the post mortem report substantially corroborated the police version. The Commission, however, found no merit in the contention.

As observed above, the police would have been justified in opening fire at deceased Ashok alias Bunti, only if there was a reasonable danger to their life. In other words, the firing by police could have been justified only if Ashok alias Bunti had attacked the police. In the instant case, the absence of gunshot residue in the hand wash of the deceased showed that he had not used firearm to attack the police. Therefore, even if the Commission believed that the police had shot at Ashok alias Bunti from a distant range, their action would not have the sanction of law. Ashok alias Bunti might have been a dreaded criminal, but the police did not

have the license to kill him. It ought to have acted within the four corners of law. Considering all circumstances of the case, the Commission did not accept the plea given by the Deputy Commissioner of Police, Vigilance in his response. The Commission thus recommended the Government of NCT, Delhi to pay a sum of Rs. 5 lakhs as monetary relief to the next of kin of deceased Ashok alias Bunti.

Case No. 11 : Death of Five Alleged MULTA & NDFB Activists in an Encounter with Assam Rifles Personnel At Akabasti In Sonitpur District, Assam²⁹²

The Commission noticed from the newsletter of Assam Police on its website that five Muslim United Liberation Tigers Association (MULTA) and National Democratic Front of Bodoland (NDFB) activists were killed in an encounter with Assam Rifles personnel on 19 April 2009 at Akabasti under Rangapara Police Station in Sonitpur District.

The Commission took cognizance of the incident, registered Case No. 247/3/16/2011-PF and directed the Secretary, Ministry of Home Affairs, Govt. of India, New Delhi, DGP, Assam, District Magistrate, Sonitpur and Superintendent of Police, Sonitpur to take appropriate action with regard to the investigation of the case as per the guidelines of the Commission and submit relevant reports. The Director General of Police, Assam was also asked to explain as to why intimation about the said incident has not been sent to the Commission as per the extant guidelines.

The Inspector General of Police (Logistics), Assam forwarded relevant reports and also regretted for non-submission of intimation about the said incident to the Commission as per its guidelines.

The Commission also received a detailed report from the Assam Rifles, and noted that there were very substantial differences on points of facts between what was claimed therein and the reports sent by the civil authorities.

Upon consideration of the report, the Commission observed that firstly, the Assam Rifles reported that all five men escaped from the house, with the encounter taking place in the adjoining fields, where Captain Kamal Gautam killed three of the militants and Major M. Zabiulla the other two. However, three villagers, including the lady of the house in which these five men had taken shelter, told the magisterial enquiry that the shooting took place inside the house. While the two neighbours were

²⁹². Case No. 247/3/16/2011-PF reported in National Human Rights Commission's Annual Report 2013-2014

not allowed to approach the house, and might therefore not have known where exactly the shooting was taking place, Smt. Jeleka Khatun, who was in the kitchen of the house, would have known if it was outside her house.

The Commission further observed that there was nothing to show that Smt. Jeleka Khatun was not an innocent housewife, whose home some strangers had visited that evening. The Commission assumed, therefore, that her testimony would be objective. She did not tell the Magistrate that the men were armed or that they had other materiel with them. It was important because the Assam Rifles reported having recovered not only five small arms, but also 5 kg of explosives, 10 detonators, a Chinese grenade and 140 rounds of live AK 47 ammunition from these men. These could not have been hidden.

The Commission also observed that inquest carried out from 10.40 a.m. on the 20 April 2009, the morning after the incident, recorded that i) one of the men was wearing underwear and a jacket; ii) the second man was wearing a “long pant”, a T-shirt and underwear; iii) the third man was wearing a singlet and a lungi; iv) the fourth man was naked but had been covered by a lungi; and v) the fifth man was wearing a yellow shirt and underwear.

The Commission further observed that with only one man fully dressed, two found only in underwear, one in a lungi and the fifth naked, it would have been impossible for them men to have carried the arms, ammunition and explosives that the Assam Rifles claimed to have found. And, even if it was assumed that, because of the hot weather, it was the local custom for men to walk around in their underwear, there was no reason why one of the men, after an encounter, should have been found without any clothes at all.

The Commission also noted that the inquest did not record that the clothes were wet, though some were blood-stained. That point was important because the Assam Rifles had reported that there was “incessant rain” when the encounter took place. The villagers saw the bodies on the roadside outside the house the next morning. If they had been killed in the fields, therefore, the bodies had not been brought in. The clothes should therefore have been both wet and muddy. Since the inquest did not record any such finding, the bodies could not have been recovered from the fields. The Commission observed that the claim made by the two officers of the Assam Rifles that these men escaped into the fields, where they were killed in an encounter in “zero visibility night conditions” and in heavy rain, could not, therefore, be accepted.

The Commission further observed that their account was further undermined because they had also reported that the alleged militants took cover in dense foliage. If those were fields adjoining village homes, there would have been standing crops, since by late April the winter crop would have been in full growth. It was extremely implausible that in that kind of terrain, in the midst of lush vegetation, and in an encounter that allegedly took place in heavy rain, which would have turned the ground into mud, the Assam Rifles could have recovered 21 spent cartridges, apart from even larger quantities of live ammunition.

The Superintendent of Police reported that the police conducted none of the tests that were standard in a thorough criminal investigation. No tests were conducted in a forensic laboratory to confirm that: i) the pistols were in working order and had been fired; ii) the spent cartridges had been fired from these pistols; iii) fingerprints on the pistols matched those of the dead men, proving that they had handled them; and iv) tests for gunshot residue on their fingers established that they had fired weapons.

The Commission held that in the absence of any of those tests, there was no proof that any of those five men had either had handled or fired the weapons allegedly recovered from the scene of the occurrence.

Rejecting the report of the Assam Rifles, the Commission observed that the Magistrate who conducted the enquiry had held that four out of the five men might have had involvement with an extremist organisation, he had not examined the circumstances of their deaths. Even if those men had extremist links, it was difficult to accept the claim that the men were killed in a genuine encounter after examination of the reports, sent by the Assam Rifles and by the police.

The Commission therefore issued a notice to the Ministry of Home Affairs to show cause as to why it should not recommend relief for the next of kin of Prabhat Basumatary, Deithan Basumatary, Krishna Basumatary, Junish Ali and Babul Ali. Though vide its communication dated 8 July 2013, the Ministry of Home Affairs requested for grant of extension of time to submit reply to the show cause notice by four weeks but no response was received by the Commission.

The Commission, therefore, expressed the view that the Ministry of Home Affairs had no explanation to offer on the observations of the Commission and vide its proceedings dated 8 January 2014 confirmed its findings and recommended to the Ministry of Home Affairs, Government of India, New Delhi to pay a sum of 5,00,000 each to the next of kin of the five

deceased namely, Prabhat Basumatary, Deithan Basumatary, Krishna Basumatary, Junish Ali and Babul Ali within a period of eight weeks.

Case No. 12 : Death of One Jasbir alias Jassad in an Encounter with Police in Jhajjar, Haryana²⁹³

The Commission on 18 December 2008 took cognizance of an intimation received from Superintendent of Police, Jhajjar, Haryana regarding death of one Jasbir alias Jassad in an encounter with police in the night intervening 12/13 December 2008 in the area falling within the jurisdiction of Police Station Jhajjar, Haryana and registered Case No. 2201/7/7/08-09-ED.

According to the police version of the incident, Jasbir alias Jassad had fired at the police party and Constable Ashok sustained a bullet injury. Jasbir's brother Sombir was also alleged to have caused a bullet injury to H.C. Ashok. A criminal case No.341/2009 u/s 304/34 IPC was registered against the police on the complaint of Birmati, mother of the deceased. After investigation of the case, the police filed chargesheet against three police officers in the court.

It was also informed that Smt. Birmati, mother of Jasbir had filed a petition u/s 482 Cr.P.C. in the High Court of Punjab & Haryana praying that the investigation of FIR No.341/2009 be transferred to some independent agency. The said petition was disposed of by the High Court on 18 June 2010 with the observation that the report u/s 173(2) Cr.P.C. on the basis of investigation had already been submitted in the court against three policemen.

The Commission directed Superintendent of Police, Jhajjar to submit the chargesheet filed in the court after investigation of crime No.341/2009 Police Station Jhajjar.

Upon consideration of the charge-sheet, the Commission found that Constable Ashok Kumar was being prosecuted u/s 304 IPC and S.I. Satbir Singh and Head Constable Ashok Kumar u/s 202/203/218 IPC.

The Commission considered the matter on 8 December 2011 when it observed that the magisterial enquiry and police investigation had disclosed that the police was liable for the homicidal death of Jasbir alias Jassad. The Commission expressed the view that the State must compensate the family of the deceased and directed to issue a notice to

²⁹³. Case No. 2201/7/7/08-09-ED reported in National Human Rights Commission's Annual Report 2013-2014

the government of Haryana requiring it to show cause why monetary relief u/s 18 of the Protection of Human Rights Act, 1993 be not given to the next of kin of deceased Jasbir alias Jassad.

In response to the show cause notice, Inspector General of Police, Rohtak Range submitted that the matter of providing monetary relief should be deferred till the conclusion of criminal trial arising from FIR No.341/09 P.S. Jhajjar.

Upon consideration of the reply of the State Government to the Show Cause Notice, the Commission vide its proceedings dated 06 December 2013 found no merit in the contention of the State Government and observed that the issue before the Commission was substantially different from the issue which was likely to arise in the criminal trial. The Commission further observed that the Criminal Court would decide on the criminal liability of the concerned police officers whereas it was primarily concerned about the violation of human rights. The Commission also observed that it makes its recommendation on a prima facie view of facts as the standard of proof required by the Commission was not as rigorous as that required in the criminal trial. Therefore, the Commission expressed the view that the pendency of criminal trial need not detain them from recommending relief.

Accordingly, the Commission vide its proceedings dated 06 September 2013 recommended to the Government of Haryana to pay a sum of Rs 5,00,000 as monetary relief to the next of kin of deceased Jasbir alias Jassad and submit the compliance report with proof of payment within six weeks.

The State Government conveyed the sanction accorded by the State Governor for payment of a sum of Rs 5,00,000 as monetary relief to the next of kin of deceased Jasbir.

Case No. 13 : Death of Four Persons in an Encounter with Police in Dehradun, Uttarakhand²⁹⁴

The Commission on 7 September 2006 took cognizance of an intimation received from Senior Superintendent of Police, Dehradun, Uttarakhand regarding death of two unidentified persons in an encounter with police on 24 August 2006 and registered Case No. 780/35/2006-2007. As per the intimation, two unidentified persons snatched a chain of one Smt. Sangeeta Chalna, resident of Vasant Vihar, Dehradun while she was going

²⁹⁴. Case No. 780/35/2006-2007 reported in National Human Rights Commission's Annual Report 2013-2014

for a morning walk. She reported the matter to Vasant Vihar Police Station and police started searching for the criminals. At around 04.45 p.m., two persons riding on a motorcycle were seen speeding towards Police Station Asha Rodi on Saharanpur Road. The police chased the persons. On seeing the police, the persons started firing on them which was retaliated by police in self defence. Consequently, motorcycle of the persons slipped and they fell down. During the exchange of fire, both the persons were killed and arms and ammunition were also recovered from them. Smt. Sangeeta identified the deceased persons as the same who had snatched her chain and belongings which were also recovered from the deceased. In connection with the aforesaid incident, case Cr.No. 59/06 u/s 307 IPC and case Cr No. 61/06 u/s 25 Arms Act were registered at Police Station Calamen town.

Pursuant to the directions of the Commission, concerned authorities forwarded relevant reports to the Commission. According to the police version, the two criminals had snatched the gold chain of a lady around 08.50 a.m. on 24 August 2006. The lady lodged a report at P.S. Vasant Vihar, Dehradun that she had been robbed of her golden chain by two motorcycle borne persons. The motorcycle was spotted by the police around 04.45 p.m. at Turner Road. It was chased by the police and then an encounter took place in which the two persons were killed.

Considering the time gap between the incident of robbery and alleged encounter, the Commission expressed the view that a thorough enquiry was required. The Commission directed that a team of its Investigation Division should visit Dehradun and examine Smt. Sangita Chalna who lodged FIR No.96/2006 at P.S. Vasant Vihar regarding the robbery of gold chain. The team was also required to make enquiry from the family members of the two slain persons.

The enquiry team found that the death of Ram Darshi and Jitender in the encounter was suspicious. The team also found that there were two more deaths (Sunder s/o Janardan & Parvinder alias Parveen s/o Jeet Ram) in police encounter within ten hours from the encounter deaths of Ram Darshi and Jitender. The team also found that all the four deceased were from the same village and seen together by their relatives before the alleged encounter.

Upon consideration of the report of the Investigation Division, the Commission vide its proceedings dated 9 March 2011 directed the Registry to take necessary steps to obtain the concurrence of the Central Government for investigation of the incident by CBI.

The Central Government gave its concurrence for CBI investigation of the two incidents. The Government of Uttarakhand, however, submitted that closure reports had been submitted by the local police in those two cases and the same had already been accepted by the court. It was also pointed out by the State Government that the police action had been justified in magisterial enquiry in both the cases. On these grounds, the State Government submitted that there was no need for a fresh investigation by CBI.

The Commission considered the matter on 25 January 2012 when it pointed out that CBI had registered two Preliminary Enquiries on the basis of reference made by NHRC. The preliminary enquiry by CBI revealed loopholes in the police version in both cases. The State Government was not probably aware of the preliminary enquiry report submitted by CBI and that appeared to be the reason for opposition of investigation by CBI.

The Commission, therefore, directed to send a copy of the preliminary enquiry report of CBI to the Government of Uttarakhand expressing hope that the State Government would duly consider the preliminary enquiry report of CBI and withdraw its objections to CBI investigation of the two incidents. The Government of Uttarakhand was also directed to convey its consent for CBI investigation of the two cases and also to issue the requisite notification u/s 5 & 6 of DSPE Act within two months.

However, the State Government declined to give its concurrence for CBI investigation but it was communicated that the State Government would have no objection if monetary relief was recommended by the Commission on humanitarian ground.

In view of the stand taken by the Government of Uttarakhand and on consideration of the preliminary enquiry reports submitted by CBI, the Commission vide its proceedings dated 27 June 2013 recommended to the Government of Uttarakhand to pay a sum of Rupees Five lakhs each as monetary relief to the next of kin of deceased Ram Darshi, Jitender, Sundar and Pravin.

In response, Senior Superintendent of Police (HR), Uttarakhand vide communication dated 26 October 2013 informed that a sum of Rupees Five lakhs had been paid to the father of deceased Sunder, as recommended by the Commission. The proof of payment was also sent. As regards Pravin, Jitender and Ram Darshi, the State Government sought

instructions from the Commission as to whom the monetary relief should be paid as the parents of the deceased persons are no more alive.

In response to the above queries, the Commission vide its proceedings dated 29 January 2014 directed Senior Superintendent of Police (HR), Uttarakhand to make the payment to the next of kin of the three deceased person as under:-

- i. In the case of deceased Pravin who was unmarried, the amount of monetary relief be paid to his brothers who are his surviving next of kin.
- ii. As regards deceased Jitender, who was also unmarried, the amount of compensation be paid to his elder brother Rajinder who is his surviving next of kin.
- iii. In the case of deceased Ram Darshi, the amount of compensation be paid to his wife Smt. Janaki Devi.

Case No. 14 : Death of Alleged Gangsters Killed in an Encounter with Police under the jurisdiction of Police Station Khajuri Khas, Delhi²⁹⁵

The Commission received multiple complaints regarding death of Ayub, Aslam, Manoj, Sanjay and Shehzad Babu in alleged fake encounters by the Delhi Police. The complainants claimed that the police took away Ayub, Aslam, Manoj, Sanjay and Shehzad Babu on 5 May 2006 killing them in a fake encounter within the jurisdiction of Police Station Khajuri Khas, Delhi. Smt. Prabha Jatav, widow of Sanjay Kumar alleged that her husband had been taken away from their house by the police and subsequently killed in a fake encounter. The registered Case No.8323/24/2006-2007 and related complaints i.e. 10824/24/2006-2007, 5193/24/2006-2007, 3718/24/2006-2007, 295/24/2005-2006 & 637/30/2006-2007.

Shri Jamil Ahmed in his two separate complaints alleged that his son Aslam had been picked up by the police of P.S. Bulandshahar and subsequently killed. Deputy Commissioner of Police, Special Cell, Delhi also sent an intimation regarding shoot out with notorious Ayub and Aslam Gang on 5 May 2006.

²⁹⁵. Case No.8323/24/2006-2007 and related complaints i.e. 10824/24/2006-2007, 5193/24/2006-2007, 3718/24/2006-2007, 295/24/2005-2006 & 637/30/2006-2007 reported in National Human Rights Commission's Annual Report 2013-2014

According to police report, the Special Cell of Delhi Police received secret information on the day of the incident, at around 8:00 pm, disclosing the time and place of arrival of the notorious Ayub-Aslam gang. A raid party, consisting of 41 officials, was set up, under the Assistant Commissioner of Police, of Khajuri Khas. This police party was in possession of one official Qualis, five private vehicles and 3 motorcycles. Upon seeing the Tata Sumo in which the alleged gang members were travelling, ACP gave warning to them to surrender, as per police statement. The first round of firing between police and criminals lasted for 15-20 minutes. After firing ceased, 4 gangsters were found to be injured and a search was made for the remaining gangsters. The second round of firing, which lasted for 5 minutes, occurred when the remaining two criminals fired upon the police party. In this, one more gangster was injured while the other managed to escape into the darkness. A large quantity of weapons was recovered from this gang and despite this heavy firing, neither the police vehicle nor the vehicle used by the criminals got damaged. No police personnel were injured.

As per the statement by SHO of Khajuri Khas, there were no signs of bullet hit marks at the site of the incident, however a large number of empty cartridges recovered from the site substantiated heavy firing.

The Commission observed that there were several discrepancies with the raid as well as the subsequent lack of forensic examination of equipment from the site. No police party was deployed in the 'Khadar' area, which was an open and deserted area beside the site of incident and reason for non-deployment at that strategic area was not explained by the Special Cell.

As per the post mortem reports, several injuries on all of the examined bodies of the deceased revealed injury due to blunt force, as either fall over a hard object or impact of lathi and rotatory injuries due to dragging across a hard object, like stone. Thus, the MER pointed out that, as per the deposition of post mortem doctor, the deceased were physically assaulted before they were hit and killed by police bullets.

With regard to the investigation into the encounter, the Commission observed that no efforts were made to trace the ownership of the seized Tata Sumo that was used by the deceased and no efforts were made to record the statements of family members of the deceased. While the family members of the deceased claimed to have met the IO and the officers of the Special Cell, the later categorically denied meeting with them.

The Commission further observed that the Inquest was conducted by the local police of Khajuri Khas and not by the SDM. The post-mortem samples were not sent to the Forensic Science Laboratory (FSL), till a year later when the Khajuri Khas Police Station submitted a final report on the matter and the samples were only submitted in 2009, 3 years after the incident.

In the Magisterial Enquiry Report (MER) the Enquiry Officer concluded that no due diligence was paid to any facts or circumstances in the investigation into the incident, rather, attempts were made to prove the allegations put forth in FIR lodged by Special Cell of Delhi Police. This utter subversion of due process extended to the post-mortem as well, wherein hand swabs of only 3 deceased was taken and not that of Aslam and Shehzad alias Babu, for which no explanation was given, by the doctor.

The Enquiry Officer raised doubts over the genuineness of the encounter and recommended a CBI enquiry, which was, however, denied by the Hon'ble LG of Delhi. The Ministry of Home Affairs also declined permission for a CBI enquiry along the same lines.

The Commission directed to ask why a CBI enquiry was denied by the Hon'ble LG of Delhi. It further directed that a spot visit be conducted at the site to ascertain the topography and geographical features so as to determine if the injuries to the deceased could have been caused by falling over the same.

The Ministry of Home Affairs responded to the Commission's enquiry as to the cause behind denial of a CBI enquiry stating that it agreed with the Hon'ble LG of Delhi in the matter and that a CBI enquiry was not needed as the said criminals were involved in 74 heinous crimes before said encounter.

While the Commission reluctantly accepted this denial of what it perceived to be a necessary CBI enquiry into the matter, it served a show cause notice to the Ministry of Home Affairs, asking why monetary compensation should not be awarded to the next of kin of the deceased. The Commission also referred to the guidelines it had laid down, way back in 2003, to hold magisterial enquiries in the aftermath of any encounter, involving loss of life, which had been complied with, by all State Governments except by the National Capital Territory, wherein, the Delhi Police have always opposed magisterial enquiry, exercising extraordinary veto on these decisions.

The Ministry of Home Affairs opposed award of compensation on the ground that the persons who were killed had serious criminal records and providing relief to the next of kin of such dreaded criminals would amount to providing incentive for such criminal activities and send a wrong signal.

The Commission in its proceedings dated 5 February 2014 reminded the Ministry that, under the law, criminals cannot be summarily executed. It was for the police to establish that those men were killed in the exercise of the right of self-defense and they have failed to do so. Rejecting the argument made by the Ministry that “providing relief to the next of kin of such dreaded criminals would amount to providing incentive for such criminal activities and send a wrong signal” the Commission reminded the Ministry that the only criminal activity that had been plausibly established in this case was the murder of five men by policemen appointed to uphold the law, not to break it.

The Commission held that a grievous violation of human rights was committed and, therefore, recommended a compensation of Rs. 1,00,000 each to the next of kin of the deceased Ayub, Shehzad Babu, Sanjay, Aslam and Manoj.

Case No. 15 : Death of Francis Tirkey in Encounter during a Joint Operation of Police and Army in Karbi Anglong, Assam²⁹⁶

The Commission received an intimation dated 6 January 2010 from the Superintendent of Police, Karbi Anglong, District Diphu, Assam stating that an extremist by the name of Francis Tirkey died on 25 November 2009 at Bokajan Karbi Anglong during firing by the police in self-defence and registered Case No. 272/3/8/2010-ED. It was reported that on the basis of information about the presence of extremists in the area of Kuwaram Basti, a joint operation was carried out by Bokajan Police and the army on 25 November 2009. At about 10.30 p.m., the joint team came across an extremist group and on being challenged, the extremists opened fire. The team fired in retaliation for their self-defence. During the encounter, an extremist named Francis Tirkey died on the spot. Arms and ammunition were recovered from the spot. In connection with the incident a case No. 117/09 u/s 120B/121/121A/122/307 IPC r/w 25 (1B) (a)/27 Arms Act was registered.

During the magisterial enquiry, the Magistrate accepted the Police account of the incident. However, the Commission noted that the enquiry officer

²⁹⁶. Case No. 272/3/8/2010-ED reported in National Human Rights Commission’s Annual Report 2012-2013

made no attempt to contact the three men who were arrested, though they would have been able to confirm if indeed such an encounter took place and Francis Tirkey was with them. Neither did the Magistrate examine any member of the family on the specious ground that they had left the village. This enquiry was, therefore, perfunctory and the Commission was unable to place much credence on it.

The Commission observed that the Armourer's Report on the pistol and ammunition allegedly recovered from Francis Tirkey only established that the weapon was in working order but it did not confirm if it had been fired or if the spent cartridges recovered had been fired from it.

Neither did the Police conduct tests that are standard in a thorough criminal investigation. No fingerprints were taken, nor were tests conducted on swabs for gunshot residue. There was therefore no evidence to confirm that, even if the pistol was serviceable, Francis Tirkey had handled or fired it. Therefore, the claim of the Police that they were forced to return fire in self-defense was not established.

The nature of the injuries found in the post-mortem made it clear that the account given by the Police was false. The autopsy found three entry wounds, all on the back. One hit the left thigh, the other on the back and the third on the head. These could not have been fired in a single burst because they were too widely dispersed. Bullets fired from three weapons simultaneously hit Francis Tirkey. That would have been extremely unlikely in a genuine encounter. The scenario that emerged was of a man who had three shots simultaneously fired into his body from the back. This is the pattern of an execution, not of an encounter.

For these reasons, the Commission held that there was a grievous violation of human rights. Accordingly, vide its proceeding dated 1 February 2012, the Commission called upon the Government of Assam to show cause as to why it should not recommend relief for the next of kin of late Francis Tirkey.

The stand taken by the Government of Assam in response to the show cause notice was considered by the Commission vide its proceeding dated 17 May 2012. The Commission did not find any merit in the stand since the Executive Magistrate had failed to examine the three arrested persons and the Police had not produced the witnesses before the Magistrate.

Further, the family members of the deceased were not examined by the Magistrate.

Moreover, no purpose was served by examination of weapons by the FSL after a lapse of more than two years. It is a known fact that if the weapon is examined after a delayed period no reliance could be placed on the opinion. Further, there is nothing to state positively about the finger prints and swab to find out the gunshot residue. Therefore, the Commission found it difficult to accept any of the contentions raised by the State.

Under the facts and circumstances of the case and on careful examination of the matter, the Commission vide its proceeding dated 17 May 2012, recommended to the Government of Assam to pay a sum of Rs. 5,00,000 to the next of kin of the deceased Francis Tirkey alias Akash.

As the compliance report along with the proof of payment was received, the case was closed by the Commission on 25 October 2012.

Case No. 16 : Death of Angad Sonkar during Police Encounter in Azamgarh, Uttar Pradesh²⁹⁷

The Commission received an intimation dated 30 May 2008 from the Superintendent of Police, Azamgarh, Uttar Pradesh, stating that one Angad Sonkar, s/o Nimbu Sonkar and r/o Mughal Sarai died on 30 May 2008 during an encounter with the Police in the area of Police Station Kotwali, Azamgarh, Uttar Pradesh. It was reported that the deceased, a notorious criminal was involved in 20 criminal cases. On 30 May 2008, the Police waylaid two criminals on a motor cycle who fired upon the Police personnel. During the ensuing encounter, one person died while the other managed to escape. The deceased was identified as Angad Sonkar. The Commission registered Case No. 9057/24/6/08-09-ED pertaining to the alleged encounter death.

Upon consideration of the 6 fire arm injuries reflected in the post-mortem report, the Commission called for Ballistic Expert report of the weapon allegedly seized from the possession of the deceased along with expert opinion on the hand wash collected from the hands of the deceased to show the gunshot residue as well as finger prints on the weapon for comparison with the finger prints of the deceased to confirm that the deceased had handled the weapon. In the absence of any ballistic examination reports and the injury certificates which could prove that the policemen were injured in the firing, the Commission observed that this was not a genuine encounter but an extra-judicial execution. Accordingly, the Commission vide its proceeding dated 8 December

²⁹⁷. Case No. 9057/24/6/08-09-ED reported in National Human Rights Commission's Annual Report 2012-2013

2011, called upon the Government of Uttar Pradesh to show cause why it should not recommend relief for the next of kin of the deceased for the most grievous violation of human rights.

Upon consideration of the response to the show cause notice, it became apparent that no scientific test was carried out for finding out the presence of gun powder on the hand of the victim who is alleged to have opened fire at the Police. It was also admitted that the finger prints were not taken and that no police personnel sustained injury in the incident.

The Commission, therefore, vide its proceeding dated 19 April 2012, recommended to the Government of Uttar Pradesh to pay a sum of Rs. 5,00,000 to the next of kin of the deceased.

As the compliance report along with the proof of payment of Rs. 5,00,000 to the father of the deceased was received, the case was closed on 19 September 2012.

Case No. 17 : Alleged Fake Encounter of a Tribal Youth in Odisha²⁹⁸

The Commission received a complaint dated 20 May 2010 from Asian Centre for Human Rights about alleged extrajudicial killing of a tribal youth, Matias Haro, aged 30 years, and beating up of Amar Topno by combined team of CRPF and Odisha Police on 12 May 2010 in Sundargarh District of Odisha. The Commission registered Case No. 702/18/14/2010-PF-AFE.

It was alleged that Matias Haro and four other youth were asked to accompany the police party from Digha village to show the road near Odisha-Jharkhand Border in Sundargarh District. The police party returned with all the youth except Matias Haro. The joint team claimed that Matias Haro belonged to Maoists cadre and was killed in an encounter on 12 May 2010. However, the residents of Digha village alleged that Matias was innocent and killed in a fake encounter after being picked up by the joint team.

Upon consideration of the various reports received, namely, the inquest, post-mortem and the magisterial enquiry reports and the status report of investigation of Bisra Police Station, a Case No. 36/2010 was registered in connection with the incident.

The Commission vide its proceedings dated 10 February 2011 requested the State Government to entrust the investigation of the case to the CB-CID.

²⁹⁸. Case No. 702/18/14/2010-PF-AFE reported in National Human Rights Commission's Annual Report 2012-2013

The CB-CID in their report reached three broad conclusions:

- i) Though the residents of Digha had claimed that Matias Haro was an innocent villager, who worked in a coal mine, the CB-CID found that no one at the mine had heard of him. On the other hand, there were cases against him in both Odisha and Jharkhand. He was, therefore, an extremist, and the villagers had lied when they claimed that he was innocent.
- ii) Since no one from Digha had been treated at any local hospital on the day, there was no proof that the joint force of the CRPF and Odisha Police had assaulted any of the villagers. The CB-CID had spoken to Etwah Jateh, the man whose hand was fractured, but confirmed that he had not been beaten.
- iii) Accepting the statements made by the villagers of Chirubeda, on which the CB-CID relied since the villagers of Digha had not been truthful about the antecedents of Matias Haro, it concluded that the joint force had never been to Digha.

The Commission vide its proceeding dated 26 April 2012, considered the observations made by the CB-CID in the light of the various statements / depositions recorded and the other material on record. In the absence of any material to establish that the deceased had handled or fired the weapon found near his body and the absence of standard forensic test for confirming that the gun was in working order; that finger prints taken from the weapon matched those of Matias Haro and the swab was taken from the finger print, the Commission did not accept the claim of the joint forces that Matias Haro had taken part in an encounter and had fired on the joint forces. The findings in the post-mortem indicating a single shot injury on the back of the head coupled with lack of evidence to support the version of the police and the CRPF lent support to the likelihood of an execution. The Commission, therefore, recommended to the Government of Odisha to pay an amount of Rs. 5,00,000 as relief to the next of kin of the deceased.

As the proof of payment of Rs. 5,00,000 to Tintose Haro, father of the deceased, was received, the case was closed on 19 December 2012 by the Commission.

Case No. 18 : Death of Avireni Sudhakar during Police Encounter in Nalgonda, Andhra Pradesh²⁹⁹

The Commission received a copy of an order dated 27 August 2007 issued by the Collector and District Magistrate, Nalgonda, Andhra Pradesh with regard to magisterial enquiry into the incident of encounter death which took place at Dharmaram (V), Mothkur Police Station, Nalgonda on 1 April 2005. The NHRC registered Case No. 781/1/14/07-08.

It was reported by the Superintendent of Police, Nalgonda that on 1 April 2005 at about 7.00 a.m., the then Sub-Inspector of Police Station, Thrumalagiri received information that one Avireni Sudhakar, s/o Somaiah, aged 32 years along with a Zonal Committee Member of CPI-ML was taking shelter in the house of one Mekala Prakash at Dharmaram (V). The police team reached the place to arrest the deceased. On seeing the police, Avireni Sudhakar opened fire at the police team from the house. Though he was called upon to surrender, yet he did not stop the firing and continued to fire. Thereafter, the police team retaliated in self-defence. After the firing stopped, the police entered the house and found the dead body of Sudhakar with bullet injuries. Arms and ammunition were recovered from the scene of offence.

Upon consideration of the post-mortem and magisterial enquiry reports received, the Commission found the police version doubtful since neither the provisions of the law were followed by the police nor any independent witnesses were examined. Further, it was to be noted that there is no evidence of forensic laboratory or the opinion from the ballistic expert confirming that the weapons recovered from the place of incident were fired before forwarding the same to the expert and that the empty rounds alleged to have been recovered from the scene of occurrence were fired from the same weapons. It was also essential to note that the police had not taken fingerprints of the deceased and fingerprints from the weapons to confirm that the fingerprints matched so as to say with certainty that it was the deceased who used the weapon.

The Commission also observed that there is another independent and scientific test which was required to be carried for finding out the gunshot residue on the hands of the deceased. A swab or hand wash is taken and forwarded to the expert to trace the gunshot residue. This test being scientific and independent ought to have been conducted to show that it was the deceased who used the weapon. In the absence of independent eye witnesses, these tests are very essential and important. However, in

²⁹⁹. Case No. 781/1/14/07-08 reported in National Human Rights Commission's Annual Report 2012-2013

the absence of the same, it is difficult to accept the version of the police. Considering the aforesaid aspects, the Commission prima facie opined that the human rights of the deceased had been violated.

Accordingly, the Commission issued a notice u/s 18 of the Protection of Human Rights Act, 1993 to the Government of Andhra Pradesh through its Chief Secretary to show cause why suitable monetary relief should not be recommended by the Commission to the next of kin of the deceased Avireni Sudhakar.

The Commission vide its proceeding dated 5 December 2012 considered the submissions made by the Government of Andhra Pradesh but was unable to accept the explanations in the light of the evidence on record. It observed that the evidence points to the likelihood that Avireni Sudhakar, who may well have had established criminal antecedents, was cornered in a hut and shot at close range. For this violation of human rights, the Commission believed that it would be appropriate for the State to make reparations. Accordingly, the Commission recommended to the Government of Andhra Pradesh to pay Rs. 5,00,000 as relief to the next of kin of late Avireni Sudhakar. Compliance report along with proof of payment is awaited in the case.

Case No. 19 : Killing of Ranveer Singh in a Fake Police Encounter in Dehradun, Uttarakhand³⁰⁰

The Commission on 6 July 2009 took suo motu cognizance of a news report (Case No. 482/35/5/09-10-AFE-FC) which appeared in 'Mail Today' under the caption 'C.O.P.S. shot him in cold blood'. According to the report, Ranveer Singh, a young MBA graduate was reportedly battered and then shot in cold blood by the Uttarakhand Police in the area of Raipur Police Station, District Dehradun on 3 July 2009. It was also reported that the Police attempted to cover up the killing insisting that Ranveer Singh was killed as he tried to flee from the Police during the course of cross firing.

The State Government informed the Commission that it had entrusted the investigation of the incident to CB-CID. Considering the gravity of the matter, however, the Commission felt that the matter should be enquired into by CBI which had the expertise and credentials to investigate such matters. The Commission, therefore, requested the Government of India to lend the services of CBI and convey its concurrence for CBI enquiry.

³⁰⁰. Case No. 482/35,(5,/09-10-AFE-FC) reported in National Human Rights Commission's Annual Report 2011-2012

An investigation by CBI, however, brought out that the story of encounter was concocted by the Police to justify its action. The investigating agency recommended prosecution of seven Police officers involved in the incident. On consideration of investigation report of CBI, the Commission issued a notice u/s 18 of the PHRA to the Chief Secretary, Government of Uttarakhand requiring him to show-cause why the monetary relief to the next of kin of the victim may not be recommended.

Since the State Government had no objection to the award of monetary relief, the Commission recommended to the Government of Uttarakhand to pay a sum of 5 lakhs as monetary relief to the next of kin of Ranveer Singh.

As the compliance report with proof of payment was received, the case was closed on 30 November 2011.

Case No. 20 : Death of Suspected UEFA Cadre during Encounter with Police in Tura, Meghalaya³⁰¹

The Commission received an intimation dated 5 October 2010 from Deputy Commissioner, West Garo Hills, Tura in Meghalaya stating that during an encounter which took place on 4 October 2010 with the District Police at Salbaripara, one person suspected to be an ULFA cadre was killed. The Commission registered Case No. 34/15/5/2010-ED-FC.

The Commission called for and received various reports, namely, inquest report, post-mortem report and the magisterial enquiry report.

The Commission considered the account given by the Police about the presence of ULFA militants in the house of Sunil Biswas, which led to raid on the village, resulting in firing by the militants and retaliatory firing by the Police causing injuries to and the death of a man later identified as Sadon Koch. From the sequence of events, it was not clear as to how the Police identified the house of Sunil Biswas and further how the residents were able to spot the Police approaching the house. The incident, as reported, was also brought out discrepancy in the different accounts given by the Police about the number of men they had faced and the arms and ammunition recovered, creating doubt that Sadon Koch was alone.

The Commission considering various depositions recorded by the Magistrate concluded that Sadon Koch was alone, and had not fired at the Policemen. The Commission also noted that none of the tests that

³⁰¹. Case No. 34/15/5/2010-ED-FC reported in National Human Rights Commission's Annual Report 2011-2012

are standard in a thorough criminal investigation were carried out. For instance:

- 1) no ballistics tests were carried out on the gun or the cartridges to establish that the gun was in working order, that it had been fired recently, and that the spent cartridges recovered had been fired from it;
- 2) the fingerprints of Sadon Koch did not match with those found on the Country Made Pistol (CMP), and it was not established that he had handled it;
- 3) no swabs were taken from his fingers for gunshot residue and tested, so there was no proof that he had fired a weapon.

Considering the nature of injuries as mentioned in the post-mortem report, the Commission found that a grave violation of human rights was committed, for which reparations should be made by the State, and relief given to the next of kin of the victim.

The Commission thus directed the Government of Meghalaya to show-cause why it should not recommend relief for his next of kin, i.e. two children who had been left fatherless by his death.

The submissions made by the State Government in response to the show-cause notice were considered with reference to the material on record. The Commission examined the reasons put forward by the Government of Meghalaya, but was constrained to point out that these were not tenable. While it maintained that the killing of Sadon Koch was a grave violation of human rights, for which reparations should be made to the children he had from Mamuni Biswas, the Commission recommended that Rs 5 lakhs be paid to the son and daughter of Mamuni Biswas, fathered by late Sadon Koch. Since they were minors, the money was directed to be deposited in two fixed deposits in their names, to be administered by their mother.

Case No. 21 : Death of Ali Hussain Mondal during an Alleged Encounter with BSF in West Bengal³⁰²

The Commission received a complaint dated 24 November 2007 from Manab Adhikar Suraksha Manch, Howrah, West Bengal stating that one Ali Hussain Mondal, s/o Babar Ali Mondal, r/o Tarnipur Village, P.S. Swaroop Nagar, 24 Parganas North, West Bengal was shot by BSF

³⁰². Case No. 837/25/15/07-08-PF-FC reported in National Human Rights Commission's Annual Report 2011-2012

personnel on 18 May 2007 without any fault and later the victim succumbed to his injuries. The Commission registered Case No. 837/25/15/07-08-PF-FC.

The BSF in its report claimed that in the encounter, they had arrested another smuggler, named Kabir Gaji, who later identified the dead man. However, the report received from the local Police made no reference to such an arrest.

The Commission thus asked the Superintendent of Police, 24 Parganas North to send the status of the investigation of the case lodged against Kabir Gaji.

The Commission observed that the BSF had in its report claimed that at 11:30 p.m., Jaipal Singh, a member of a BSF picket of four constables positioned near a bridge, saw a group of 10-12 smugglers trying to cross the Ichamati river with some cattle. He challenged them but they attacked him with *dahs*³⁰³ and *lathis*. Two of them dragged him into water and assaulted him with the dahs. The Constable evaded the blows from the dahs by taking them on his rifle which was hit at two places. He “somehow managed to come out of water.” However, fearing danger to his life and to protect his personal weapon, he fired two rounds on the smugglers in exercise of his right of self-defence. Constable Bhupinder Singh, who had joined him, also fired two rounds. The smugglers somehow managed to escape. When they searched the area, they recovered a dead body, together with some cattle, and caught the other smuggler, Kabir Gaji, who identified the dead man as Ali Hussain Mondal.

The Commission found on the other hand that the Superintendent of Police had reported that Kabir Gaji was not arrested in the case registered in connection with the late Ali Hussain Mondal. His report clarified that the Police had established the incident in which Ali Hussain Mondal was killed took place “between 6:18 p.m. and 6:23 p.m.”, not at 11:30 p.m. as claimed by the BSF. On the morning of 19 May, two BSF Constables handed over Kabir Gaji with a written complaint to the effect that he had been arrested around 11:30 p.m. while trying to cross the border without a valid passport and visa.

The circumstances established by the testimony of BSF and the investigation conducted by the Police, showed that the account given by the Constables was false, and this was compounded by attempts to suppress the truth. The Commission thus found it likely that Ali Hussain Mondal was executed by the BSF patrol party. For this kind of grievous violation

³⁰³. Dah means machete.

of human rights, the Commission directed the Secretary, Ministry of Home Affairs, Government of India, to show-cause why it should not recommend relief for the next of kin of the late Ali Hussain Mondal.

In response to the show-cause notice, the submissions made by the Ministry of Home Affairs were considered by the Commission in the light of the material on record. The Commission observed that even if it is accepted that Ali Hussain Mondal was a cattle smuggler, the analysis of the evidence before the Commission indicated clearly that the claim made by the BSF Constable that he had been surrounded and attacked by a group of 12 armed men was false. Further, it was also clear that Ali Hussain Mondal was not armed, and Constable Jaipal Singh was under no threat when he shot Ali Hussain Mondal.

The Commission finally held that Ali Hussain Mondal was killed by the BSF patrol, not in the exercise of self-defence, but in an extra-judicial execution. This was a grave violation of human rights.

Accordingly, the Commission recommended to the Ministry of Home Affairs to pay Rs. 5 lakhs as relief to the next of his kin. As the compliance report in the case was received from the Ministry of Home Affairs, the case was closed by the Commission.

Case No. 22 : Death of Yashvir Singh during Encounter with Delhi Police³⁰⁴

The Commission received an intimation dated 21 December 2006 from Joint Commissioner of Police, Delhi about the killing of a man named Yashvir Singh alias Fauzi by Delhi Police during an encounter on 20 December 2006 and registered Case No. 4441/30/2006-2007-FC.

Upon consideration of the FIR, the final report, the death report, the report of the forensic laboratory, the post-mortem report as well as the fact that no magisterial enquiry was held, the Commission invoked its powers u/s 14(1) of the PHRA. Consequently, it requested the Government of India to entrust the matter to the CBI for conducting of an inquiry. Accordingly, the CBI conducted an inquiry and submitted a detailed report.

For facilitating consideration of the findings in the CBI report, the Commission provided an opportunity of hearing to the Commissioner of Police, Delhi.

³⁰⁴. Case No. 4441/30/2006-2007-FC reported in National Human Rights Commission's Annual Report 2011-2012

Submissions were made by the Commissioner of Police, Delhi in respect of the timings recorded by the Police and by the Doctor in the hospital including the description of the weapon given by the Sub-Inspector. It was also submitted that the ballistic report clearly indicated that the weapon alleged to have been recovered from the victim was used by him and the cartridges were fired from that weapon.

The CBI in its report pointed out that despite repeated requests, only a part of the relevant records, the criminal records like Police files, Daily Diaries, General Diaries and log books were made available by Delhi Police to them. The inquiry was based on the documents supplied by the Commission and some of the documents supplied by Delhi Police, few documents supplied by the wife of the deceased and photo copies of the documents submitted by Delhi Police in the complaint case which was pending before the Court of Metropolitan Magistrate, Delhi. According to the report, Delhi Police was given ample opportunity to explain their point of view and in respect of the concern raised by the Commission and other facts related to the case. Thirty-four officials were examined during the inquiry.

The CBI considered the deposition of witnesses, along with the reports of the forensic expert on the examination of the arms and ammunition and the nature of the injuries inflicted upon the deceased. It was found that the intention was not to incapacitate the criminal from the point of view of arresting him but to kill him by firing shots at his chest.

The CBI also recorded that the deceased was with his friend Yogesh and Navneet in the morning of 20 December 2006. However, when Navneet was taken away by the officers to Special Cell of Delhi Police, it was reasonable to presume that Delhi Police would take all the criminals present at one place instead of arresting the persons by pick and choose method. The CBI had come to the conclusion that the victim remained in the custody of the Police till the night of 20 December 2006 and was shown as killed in encounter in the night of 20 December 2006.

Upon consideration of the matter on 1 September 2011, the Commission recommended to the Government of NCT of Delhi, through its Chief Secretary, to pay a sum of Rs. 5 lakhs as monetary relief to the next of kin of the deceased Yashvir Singh alias Fauzi within a period of six weeks. As the compliance report was received, the case was closed on 3 November 2011.

Case No. 23 : Death of Two Persons in an Alleged Encounter with Police in District Azamgarh, Uttar Pradesh³⁰⁵

The Commission received intimation about the death of two men, Shesanth Chouhan and Raj Srivastava in an alleged encounter with the Police on 25 October 2010 in District Azamgarh, Uttar Pradesh. The Commission registered Case No. 32646124/5312010-AD and considering the circumstances of the case, the Commission directed its team from the Investigation Division to conduct a spot enquiry.

It was found by the team that there were several inconsistencies in the version of the Police. The Police, though aware of the identity of the deceased persons had got the body of Shesanth Chouhan identified by his cousin after the post-mortem. However, it emerged from the report of the Circle Officer, that the Police was aware of the identity of the deceased, yet it did not inform the Doctors conducting the post-mortem. The post-mortem report thus revealed the body of Shesanth Chouhan as unidentified. It was clear that the Police knew Shesant earlier but had concealed his identity from the doctors to hide the fact that Shesanth was in their custody. Thus, it appears that the encounter in which the two alleged criminals were shot was fake.

The statements of the Police personnel involved in the alleged encounter further described that at the time of the alleged encounter the two men were at a higher location than the Police and fired at the Police in a sitting position. The Police in retaliation fired upwards at the two men. However, the post-mortem report showed that the two bullets which hit the right eye and the right chest of Shesanth travelled on a horizontal plane.

The Commission was also informed that the deceased were criminals and their crime was of serious nature and attracted rewards on being captured. However, it was found that the rewards were announced on the day the two men were killed and no record was found establishing the deceased persons were dreaded criminals.

Having considered the report of the Investigation Team and the material on record, the Commission held that the two men were abducted and killed by the Police in an extrajudicial execution. Accordingly, a show-cause notice was issued to the Government of Uttar Pradesh as to why relief should not be given to the next of kin of the families of the deceased. As it was alleged that the bodies of the two accused were not handed over to their families, the State Government was asked to submit a report

³⁰⁵ National Human Rights Commission, Annual Report 2011-2012

for their denial to the families the right of performing the last rites of the deceased and that it was a violation of human rights. Despite reminders, no response was received from the State Government. Consequently the Commission vide its proceedings dated 1 March 2012 recommended to the Government of Uttar Pradesh to pay a sum of Rs 5 lakhs each to the next of kin of both the deceased Sheshanth Chouhan and Raj Srivastava.

Case No. 24 : Death of Three Dacoits in an Encounter with Police near Bookharwar, P.S. Nayagaon, Satna, Madhya Pradesh³⁰⁶

The Commission received intimation from Satna Police informing about the death of three dacoits, including gang leader Gudda alias Maiyadeen Patel in an encounter with the Police on 29 September 2005, near Bookharwar, Police Station, Nayagaon, Satna, Madhya Pradesh. The Commission registered Case No. 1245/12/2005-2006-ED.

The Commission after considering the Police report and the magisterial enquiry report did not agree with the conclusion of the reports and vide its proceedings dated 17 February 2010 directed CB-CID Madhya Pradesh to conduct an investigation. These investigations were required to be carried out on observations that the firearm entry wounds on all dead bodies were blackened indicating that they were shot from close range. Further, a sharp incision on the scalp of a dacoit indicated that weapons other than firearms were used at close range and that though over 250 rounds were fired, only three criminals were killed and over thirty others managed to escape in broad daylight when the Police had cordoned off the area from three sides. Besides, although there was heavy exchange of fire for a considerably long time, not a single Policeman was injured.

In addition, on receipt of report from the CB-CID, the Commission again directed it to clarify whether the clothes worn by the deceased at the time of encounter were seized and sent to ballistic expert to find whether there was black amorphous material and component of powder was present or not on the entrance of the gunshot wounds.

The reports of CB-CID were considered by the Commission and vide its proceedings dated 11 August 2011, the Investigation Division of NHRC was directed to examine the reports and submit comments.

The analysis of Investigation Division threw light on the ballistic report as it found that some of the firearm injuries were caused by short range firing, i.e. within 9 feet and some were from long range. The presence of

³⁰⁶. Case No. 32646124/5312010-AD reported in National Human Rights Commission's Annual Report 2011-2012

nitrate and its absence in the firearm entry wounds were sufficient scientific proof to establish the range from which shots were fired.

The Commission, after considering all the reports concluded that it accepted that these men were criminals and that it was even possible that there was an exchange of fire. However, the autopsy reinforced by the examination of the clothes, confirmed that at the end of the encounter, the three men were executed from a close range. The Government of Madhya Pradesh was accordingly issued a show-cause notice as to why monetary relief should not be given to the next of kin of the three deceased dacoits.

The Commission received an endorsement of a letter dated 24 January 2012 issued by the Deputy Inspector General (Complaints) addressed to the Under Secretary (Home), in which it was argued that relief for the next of kin in this case was not justified for two reasons. Firstly, the magisterial enquiry had held that the Police action was justified and secondly, the Court subsequently sentenced two of the criminals who had been arrested.

Upon consideration of the above communication, the Commission vide its proceedings dated 01 March 2012 made the following observations:

“The Commission is unable to accept this as a substantive response. It had already explained in detail in its proceedings of 17 February 2010 why it was unable to accept the magisterial enquiry, which had not examined several critical points and it is for this reason that the Commission had asked the Government of Madhya Pradesh to have a further investigation carried out by the CB-CID.

As far as the sentencing of the two men is concerned, the Government of Madhya Pradesh will note, that in its proceedings, including others of 19 October 2011, the Commission had expected that the men here killed were indeed criminals and that it was also possible that there was an exchange of fire with the Police. Therefore, the fact that a Court had come to the same conclusion simply confirms a point already accepted by this Commission.

What the Commission had nevertheless found, after its initial examination and a subsequent clause analysis of the report of the CB-CID, was that at the end of a possible exchange of fire, three men were executed by the Police at a close range. This was not only illegal, but a grievous violation of human rights and it was for this reason that the Commission had recommended to the Government of Madhya Pradesh

that relief should be given to the next of kin of late Gudda alias Maiyadeen Patel and Bhullu.

The Government of Madhya Pradesh had not answered the substantive points on the basis of which the Commission made its recommendation. Therefore, the Commission sees no reason to reconsider its view that relief is indeed justified and necessary.”

Thus, the Commission recommended to the Government of Madhya Pradesh to pay Rs. 5 lakhs each as relief to the next of kin of late Gudda alias Maiyadeen Patel and Bhullu.

Case No. 25 : Alleged killing of two persons and injuries caused to a number of persons by Police in District Palamu, Jharkhand³⁰⁷

The Commission on 9 June 2003 received a complaint (Case No.172/34/2003-2004) from one Yashwant Kumar Mehta, a resident of Deepova village in Palamu District of Jharkhand, alleging that on 30 April 2003 his son Mani Kundal Mehta had gone to the market for shopping. At Pitch Road, Forest officials had stopped a tractor. Mani Mehta and one another person on seeing the crowd at Pitch Road stopped to watch. The police in the meantime, without any reason, abused and fired at Mani Kundal Mehta and shot him dead. The cleaner of the tractor, Roop Dev Yadav, was also shot by the police. Later, the police picked up Sanjay alias Viswanath Mehta from the Manjaouli village and killed him. The police also thrashed a number of innocent persons of the village.

In response to the notice issued by the Commission, the Deputy Inspector General of Police (Human Rights), Jharkhand, vide letter dated 12 February 2004 forwarded a report dated 19 September 2003 received from the Superintendent of Police, Palamu wherein it was stated that a case No. 91/03 u/s 364 IPC and section 17 of the Criminal Law Amendment Act was registered against the deceased Vishwanath Mehta and Mani Kundal Mehta for kidnapping one Vikram Singh. Another case No. 92/03 u/s 147/148/149/353/307 IPC and section 25,26,27,35 Arms Act was registered against the deceased Vishwanath Mehta and Mani Kundal Mehta and 32 others for an attack on the police party with the intention to kill them. During the course of investigation, both the cases were found to be true. It was further reported that on 30 April 2003, Sub-Inspector Dinesh Kumar Rana along with other police personnel on patrol duty received information from a ranger named Vikram Singh that he and his companions had been abducted by accused

³⁰⁷. Case No.172/34/2003-2004 reported in National Human Rights Commission's Annual Report 2010-2011

Vishwanath Mehta and Mani Kundal Mehta. The police then swung into action and rescued Vikram Singh. During the said operation, two criminals were killed on the spot and a large quantity of arms and ammunition was also recovered from them.

The Commission considered the above reports and directed that the matter be investigated by State CB-CID as per guidelines issued by it for deaths in police encounter as well as conduct a magisterial inquiry.

The CB-CID report revealed that during the investigation of FIR No. 91/2003 and 92/2003 the allegations against Vishwanath Mehta were substantiated but no incriminating evidence was found against Mani Kundal Mehta, that is, the deceased son of the complainant. As regards the murder case registered against the police on the complaint of Yashwant Kumar Mehta, it was communicated that incriminating evidence had been found against Sub-Inspector Dinesh Kumar Rana.

While considering the matter on 30 June 2010, the Commission observed that the investigation conducted by the State CB-CID had clearly shown that Mani Kundal Mehta was neither involved in the kidnapping of the ranger nor he had made any murderous assault on the police party, the police therefore had no reason to kill Mani Kundal Mehta on the plea of self-defence. The Commission decided to issue a show-cause notice to the Chief Secretary, Government of Jharkhand as to why suitable compensation should not be granted to the next of kin of the deceased.

The Government of Jharkhand vide communication dated 10 September 2010 expressed that it had no objection for the payment of compensation to the next of kin of the deceased.

Accordingly, the Commission recommended to the Government of Jharkhand to pay a sum of Rs. 5,00,000 as monetary relief to the next of kin of the deceased Mani Kundal Mehta.

Case No. 26 : Encounter Death of Tarun Shah and Mohammad Khalid in District Hazaribagh, Jharkhand³⁰⁸

The Commission received an intimation dated 19 January 2008 from the Superintendent of Police, District Hazaribagh in Jharkhand, inter alia, conveying that on the night of 17 January 2008, Station House Officer of Police Station Barachati received information about movement of criminals and thus proceeded in given direction in a Qualis vehicle

³⁰⁸. Case No. 1466/34/11/07-08 reported in National Human Rights Commission's Annual Report 2010-2011

after making necessary entries in the applicable record. The police personnel erected a barricade for apprehending the criminals. When the vehicle in which the criminals were travelling hit the barricade tried to escape, the police chased their vehicle. The criminals retaliated by firing at the police personnel and the police fired back in self-defence. According to the police, two criminals managed to escape in the jungle. One criminal was killed on the spot and the other sustained serious injuries. He was taken to the sub-divisional hospital, where he too expired. Further, as per the police version, several arms and ammunitions were recovered from the spot.

The Commission registered Case No. 1466/34/11/07-08.

Pursuant to the directions given by the Commission, it received the post-mortem reports of both the deceased as well as the magisterial enquiry report. The Magistrate in his report held that the action of the police was justified. However, the officer, who conducted the enquiry, utterly failed in appreciating the medical evidence and the manner in which the incident was alleged to have taken place.

Taking into consideration the background of the encounter as narrated by the police as well as the conclusion arrived at by the Magistrate, the Commission on 4 November 2010 observed that there is independent evidence in the form of autopsy report, which is scientific. Both the post-mortem reports indicate that the firing took place from a very close range. The finding of blackening of the wounds of entry in both the post-mortem reports clearly point out that the story suggested by the police was not correct. It appears that they were very close to the police when the firing took place. Ordinarily the blackening appears if firing has taken place from 3" to 6" distance. It also needs to be noted that on account of alleged firing by the criminals, no police personnel sustained any injury. Besides, weapons and cartridges were not forwarded to the ballistic expert to know whether the weapons were in working condition and the cartridges fired were from the same weapon. These aspects would have clinched the issue if proper investigations had been carried out and the opinion of the expert was sought.

No swab was taken from the fingers of the persons alleged to have fired at the police so as to know the presence of carbon and lend assurance to the fact that the deceased fired the weapon. The absence of scientific and expert's evidence suggest that the investigation was not independent.

Given the facts of the case, the Commission did not accept that the firing had taken place from some distance. In view of the medical evidence on

record, it was clear that the firing took place from a close range. Accordingly, the Commission directed that a notice be issued to the Government of Jharkhand through its Chief Secretary to show-cause within a period of six weeks as to why Commission should not recommend monetary relief to the next of kin of the deceased, namely, Tarun Shah, son of Priyonath Shah, Police Station Benipur, District Howrah in North 24- Parganas (West Bengal) and Mohd. Khalid, son of Ayub Khan, resident of village Basimpur in Pratapgarh District of Uttar Pradesh.

Since no response was received from the Government of Jharkhand, the Commission vide its proceedings dated 10 February 2011 recommended to the Government of Jharkhand to pay a sum of Rs. 5,00,000 each to the next of kin of both the deceased.

Case No. 27 : Death of Salim during an Alleged Encounter with Police in District Mahoba, Uttar Pradesh³⁰⁹

The Commission received a complaint dated 11 July 2006 (Case No. 17513/24/08-09) from Nathu Khan inter alia alleging that on 20 May 2006 the police killed his son Salim in a fake encounter. It was further stated that one Mangal Singh acted in connivance with the police and administered drug to Salim whereby he became unconscious. He was then axed by Mangal Singh. Thereafter, one police official of P.S. Srinagar, namely, Shanti Swarup Tiwari, under instructions from the Station House Officer Chandrabhan Singh shot him so as to make out a case of genuine encounter.

The Superintendent of Police, District Mahoba vide communication dated 15 September 2006 reported that Salim died in a bona fide police encounter on 20 May 2006 at 11.30 p.m.

Upon consideration of the reports received, the Commission on 3 June 2010 observed as under:

“So far as the case put up by the police is concerned, it is indicated that the deceased was a criminal. He used to beat people and extort money. On the date of the incident there was also a fight between Mangal Singh and Salim. The police on information took action by forming different parties and called upon the deceased to surrender, who opened fire on the police party. The police taking shelter of a tree used the weapon and he died on account of gunshot wound. Village people also arrived and the deceased was identified as Salim, son of Natthu. One

³⁰⁹. Case No. 17513/24/08-09 reported in National Human Rights Commission's Annual Report 2010-2011

country made .315 rifles was recovered along with 21 live and empty cartridges.

To appreciate the case put up by the police when we examined the post-mortem report we found entry wound as under:-

‘ A firearm entry wound of 1x1 cm. at medial aspect of left thigh with burning around it and 28 cm. above from the left knee joint with track directing laterally upward and outward.’

Thus, reading the description of entry wound, it is very clear that the weapon was used from an extremely close range. Obviously, on account of injury there would be severe bleeding.

The Medical Officer has opined that the deceased died on account of shock and haemorrhage due to ante-mortem injuries. The Magistrate, who conducted the inquiry, has not explained other injuries on the person of the deceased. Suffice it to say that the claim of the police that they fired from a distance is not acceptable in view of the entry wound found on the person of the deceased. It is clear that the deceased was executed. Therefore, the Commission is of the view that it is a fit case where monetary relief is required to be given.”

Accordingly, the Commission directed that a notice u/s 18 of the PHRA be issued to the Chief Secretary, Government of Uttar Pradesh to show-cause as to why monetary relief should not be recommended to the next of kin of Salim.

Vide proceedings dated 29 December 2010, the Commission considered the response received from Government of Uttar Pradesh to its show-cause notice wherein it was stated that late Salim was a person with a criminal bent of mind, had many criminal cases registered against him, and was engaged in extortion of money from villagers when the police confronted him in the encounter that led to his death.

The Commission observed that this was an extra-judicial execution and therefore the most heinous violation of human rights. Only the judiciary in India has the power to pronounce a sentence of death. Policemen are not permitted to take the law into their own hands or to pre-empt the judicial process. It is for these reasons that the Commission was of the view that in this case monetary relief had to be given to the next of kin.

Accordingly, the Commission recommended to the Government of Uttar Pradesh to pay Rs. 5,00,000 to the next of kin of the late Salim.

The compliance report along with proof of payment is awaited in the case.

Case No. 28 : Death of Five Persons in Alleged Police Encounter in Sironcha Forest Area in District Gadchiroli, Maharashtra³¹⁰

The Commission received a complaint dated 29 November 2003 from T. Duryodhana Reddy, a human rights activist of Ganjam District in the State of Odisha. A copy of the news item published in The Hindu dated 19 November 2003 relating to the death of five persons in an alleged police encounter in Gadchiroli District of Maharashtra was enclosed with the complaint. As per the news item, during a combing operation in Sironcha forest area, the police had sighted a few suspected Naxalites. They fired at the police party and the retaliatory firing by the police resulted in the death of five Naxals.

Taking cognizance of the matter (Case No.2103/13/2003-2004), the Commission conveyed the complaint to the Senior Superintendent of Police in Gadchiroli and called for an action taken report on the incident. In response, the report received from the Superintendent of Police revealed that the Naxalites had unleashed a reign of terror in the District and on 28 November 2003, when the police party of Police Station Zingnoor was conducting anti-Naxal operation in Kosagota Pahari jungle, some unknown armed Naxalites of Janshakti Naxal Dalam fired at the police party with the intent of killing them and looting the arms and ammunition. The police too fired back in self-defence and five persons including a female member of Janshakti Naxal Dalam were gunned down during the course of the encounter. The Commission then directed the Director General of Police, Maharashtra to get the entire matter investigated in accordance with the guidelines issued by the NHRC on encounter and accordingly submit a report. In the post-mortem report sent subsequently, it was mentioned that there were blackish wounds on two of the bodies which probably indicated that the firing was from a close range. The Commission consequently opined that the matter needs to be investigated by the State CID.

The State Government, however, did not get the matter investigated by the CB-CID. It was then directed by the Commission to seek the opinion of an expert with regard to the word 'blackish' used in the post-mortem report. The expert, a doctor on the panel of the Commission, stated that in this case, the injuries could have been caused by the firearm from a

³¹⁰. Case No.2103/13/2003-2004 reported in National Human Rights Commission's Annual Report 2010-2011

range of blackening and tattooing. However, the exact range which caused blackish wounds could be commented only by the ballistic expert after examining the type of firearm used. The police in the given case had not sent the firearms for a ballistic examination.

Keeping all the facts in view, the Commission directed to issue a notice to the Government of Maharashtra to show-cause as to why monetary relief should not be recommended to the next of kin of the five deceased persons, namely, Chandranna, Devendra, Vikram Sunga Made, Ramesh and Smakka. As there was no response to the show-cause notice issued by the Commission, vide its proceedings dated 5 January 2011 the Government of Maharashtra was recommended to pay Rs. 5,00,000 each to the next of kin of the five deceased persons.

Case No. 29 : Death of Five Dacoits in Dohikata Kadaldhowa Reserve Forests in District Goalpara, Assam³¹¹

The Commission received intimation from the Additional Director General of Police, Incharge Human Rights Cell of Assam Police Headquarters in Guwahati regarding the encounter death of five dacoits. It was reported that on 28 June 2009 the police party accompanied by the Army and Central Reserve Police Force laid an ambush in Dohikata Kadaldhowa Reserve Forest to nab some dacoits who had taken shelter in the jungle area for committing dacoity. At about 10.00 p.m., five to six dacoits were seen coming through the jungle. As they saw the ambush party, they opened fire. During the ensuing melee, five dacoits, namely, Allauddin S. K., Sahjamal Haque, Promtone Sangma, Jahangir and Salim Khan died on the spot due to bullet injuries. During the search, three pistols, one revolver, nineteen live ammunition, seven blank cartridges, one 0.12 bore SBBL gun, one grenade and one Indica car were recovered and seized. Case No. 65/09 u/s 399/307/34 IPC read with section 25 (1-A)/27 of the Arms Act and section 4/5 Explosive Substances Act was registered at Police Station Mornoi in District Goalpara of Assam.

The Commission registered Case No.75/3/6/2010-ED-FC.

The post-mortem report in respect of all the five deceased persons revealed that – (i) there were two entry wounds and two exit wounds on three bodies; (ii) one entry wound and one exit wound each were found on two bodies. However, there was no blackening/tattooing or charring around the wounds.

³¹¹. Case No.75/3/6/2010-ED-FC reported in National Human Rights Commission's Annual Report 2010-2011

The cause of death as per the post-mortem reports of all the five cases was stated as 'shock and haemorrhage as a result of bullet injuries sustained by the deceased which were ante-mortem and homicidal in nature'.

The Magistrate, who conducted the enquiry, did not associate any of the family members of the five deceased persons as they lived far away. He, however, asked the Superintendent of Police of Goalpara to provide the criminal details of the five deceased but no report in this respect was received by him. There was no mention as to whether arms recovered from the spot were sent for ballistic examination. The police claimed that the encounter took place in pitch darkness. It was therefore astonishing to know as to how the police party was able to inflict lethal injuries on five men without suffering any kind of injuries themselves in an encounter that continued in a jungle for half an hour in complete darkness. The level of accuracy in firing at the target was also surprising. Most importantly, each of the shots fired were from the back as the men killed had their backs turned to those who shot them. The Commission opined that this was an execution, not an encounter, and a serious violation of human rights. The Commission asked the Government of Assam to show-cause as to why relief to the next of kin of all the five deceased persons should not be recommended.

In response to the show-cause notice issued by the Commission, the Assam police maintained that the dead men had a criminal background. The Commission held that if the deceased persons had a criminal history, why it was not intimated to the inquiry Magistrate. The Commission also held that the inquiry Magistrate did not associate any of the family members of the deceased persons on the ground that they lived far away then how the dead bodies were handed over to the family members the very next day. The Commission moreover expressed its concern that it was not informed by the State agencies as to how the family members came to know of the incident. No ballistic examination of the fire arms was conducted and no swab or finger prints were taken after the incident. How the deceased persons were shot in the back in pitch darkness was also not answered by the concerned State agencies. The Commission noted with concern that none of the substantive points made by it had been addressed by the Government of Assam. Accordingly, it recommended that a sum of Rs. 5,00,000 each be given as monetary relief to the next of kin of the five deceased persons by the Government of Assam.

Case No. 30 : Death of Kuldeep Singh in Alleged Fake Encounter by Uttar Pradesh Police³¹²

The Commission took cognizance of a press report captioned “U.P. Police Accused of Fake Killing”, which appeared in The Asian Age Delhi on 3 May 2010 and registered Case No. 16593/24/18/2010-AFE. The press report inter alia stated that one Jawan of Rajputana Rifles, named Kuldeep Singh, aged 32 years, was killed by Uttar Pradesh Police in a fake encounter in Bulandshaher District on 1 May 2010. He was reportedly on a two months, leave. He had left his house at Bharari village of Kherka area in Aligarh District of Uttar Pradesh on the morning of 30 April 2010 to make some purchases but he did not return and was later reportedly killed in an encounter with the police.

The Commission afterwards received a message from the Senior Superintendent of Police, Bulandshaher, about the death of Kuldeep Singh in an encounter with the police. The Commission also received a number of complaints alleging fake encounter

The Commission took cognizance of the matter and directed the Director General of Police, Uttar Pradesh; District Magistrate, Bulandshaher and Senior Superintendent of Police, Bulandshaher to take appropriate action with regard to the investigation of the case and that the investigations should be conducted as per guidelines laid down by the Commission. Pursuant to its directions, the Senior Superintendent of Police, Bulandshaher submitted the inquest report, post-mortem report and a copy of the FIR.

The inquest report revealed that the deceased died of firearm injuries on the right side and middle of the chest and two wounds on the back. The post-mortem report further revealed that the deceased died due to haemorrhage as a result of ante-mortem gunshot injuries. The magisterial enquiry report was not received in the case.

The Commission then directed its Director General (Investigation) to send a team of officers for conducting a spot investigation into the matter.

Pursuant to the directions of the Commission, a team from its Investigation Division conducted an on-the-spot enquiry and after recording the statements of witnesses and collecting the relevant documents/records, concluded as follows:

³¹². Case No. 16593/24/18/2010-AFE reported in National Human Rights Commission's Annual Report 2010-2011

“The deceased Kuldeep Singh, a young soldier of Indian Army (32 years old), had got married just eight months prior to the encounter. He was on two months leave. He was probably killed in a fabricated and false case of police encounter. It was recommended that the call details of the complainant, the witness of the robbery, and all the police officials involved, should be thoroughly probed in order to unearth the genuineness of the case. It was recommended that the matter needs further probe by some independent agency, on the anomalies pointed out by the team of NHRC.”

On the basis of the above report, the Commission observed that it is a matter of great concern that deceased Kuldeep, a young soldier, was killed in a fake encounter. No acceptable justification was given by the police during the course of enquiry by the team of NHRC.

The Commission thus issued a notice u/s 18 (a) (i) of the PHRA to the Chief Secretary, Government of Uttar Pradesh to show-cause as to why the next of kin of the deceased be not recommended monetary relief. The Commission also directed the State Secretary Home to order CB-CID investigation for determining the culpability of the police personnel involved.

The payment has not been made as on date.

Case No. 31 : Death of Manisha in Agra, Uttar Pradesh³¹³

The Commission received a complaint dated 15 September 2000 from one Shri Gafoor, a resident of Agra in Uttar Pradesh alleging that his mother Manisha, aged 40 years, was shot dead by the local police within the jurisdiction of Tajganj Police Station in Agra on 8 September 2000. He prayed to the Commission that a thorough enquiry be conducted in the incident and the Commission registered Case No. 21198/24/2000-2001.

The report submitted by the police to the Commission claimed that it was a case of death in encounter. According to the police, Manisha had illicit relations with one Shiv Narayan and on the night when she had gone with Shiv Narayan and other accomplices of his to a tube well, Champa Ram, the owner of the tube well was present in the vicinity. Suddenly, when the lights went off, Champa Ram fearing that some criminals had taken shelter at the site of his tube well raised an alarm. Two Constables, namely, Netrapal and V3endra happened to pass by. On

³¹³. Case No. 21198/24/2000-2001 reported in National Human Rights Commission's Annual Report 2009-2010

noticing some movement at the site of the tube well they both asked the persons there to surrender. As a result, there was firing from the side of the tube well. The Constables fired one round each in self-defence. Manisha was hit by one bullet and Shiv Narayan was apprehended at the tube well while the other accomplices managed to run away. An FIR No.336/2000 u/s 307 IPC was registered at Tajganj Police Station after the incident. On investigation, Shiv Narayan was sent for trial, but he was acquitted by the court.

Pursuant to the directions of the Commission, the case was probed by the State CBCID. It was found that Manisha and Shiv Narayan had no arms with them and the police had concocted a false story of encounter. The investigation of CB-CID also revealed that the seizure memos and other police records had been fabricated. The CB-CID recommended prosecution of the two Constables under section 304 IPC.

Upon consideration of the investigation report of CB-CID, the Commission found that Manisha was deprived of her life for no fault of hers. This had resulted in grave violation of her human rights. The Commission therefore issued a notice u/s 18 of the PHRA, 1993 to Government of Uttar Pradesh requiring it to show-cause why it should not recommend monetary relief to the next of kin of the deceased Manisha.

In response to the show-cause notice issued by the Commission to the Government of Uttar Pradesh, the State conceded in its communication dated 2 April 2009 that the next of kin of the deceased Manisha are entitled for payment of compensation. Accordingly, the Commission vide its proceedings dated 15 July 2009 recommended that an amount of Rs. 3,00,000/- be paid to the next of kin of Manisha as monetary relief.

As the compliance report along with proof of payment was received, the case was closed by the Commission on 18 March 2010.

Case No. 32 : Death of Innocent Persons in Police Encounter in Begusarai, Bihar³¹⁴

The Commission received a complaint dated 5 March 2003 from Shri Nirmal Kumar alleging that the police had killed two innocent persons, namely, Rajni Rajan and Rakesh Kumar in Begusarai District and the Commission registered Case No. 622/4/2003-2004. A preliminary enquiry was conducted by the concerned Superintendent of Police, but no action was taken against the guilty police officers even after the submission of the enquiry report.

³¹⁴. Case No. 622/4/2003-2004 reported in National Human Rights Commission's Annual Report 2009-2010

Pursuant to the directions given by Commission, the concerned Sub-Divisional Police Officer submitted a report dated 9 May 2006 stating that a criminal case No.130/2002 u/s 302/307/34 IPC had been registered against some police officers at Cheria Baryarpur Police Station and the investigation was entrusted to the Central Bureau of Investigation. The report submitted by CBI stated that on 23 December 2002 at about 8 p.m. a firing had taken place in Majghaul falling under the jurisdiction of Cheria Baryarpur Police Station due to which Rajni Rajan and Rakesh Kumar who were travelling in a vehicle were killed and two others were injured. On 24 December 2002 at about 1.30 p.m., a criminal case No.130/2002 was registered against the Deputy Superintendent of Police Maheshwar Mehto and some other police personnel on the basis of a written complaint made by Rajiv Ranjan, one of the injured. On completion of the investigation, the CBI filed a chargesheet in the Court of Judicial Magistrate, Patna against the Deputy Superintendent of Police Maheshwar Mehto and six others.

As the culpable liability of police officers was disclosed by CBI investigation, the Commission on 5 December 2007 issued a notice u/s 18 of the PHRA and called upon the Chief Secretary, Government of Bihar to show-cause why monetary compensation should not be given to the two injured persons and the next of kin of the two deceased.

While the State Government did not respond to the show-cause notice, the Commission on 9 September 2009 observed that the police personnel opened fire without any justification and in the course of action two persons were deprived of their lives and two others had to suffer injuries for no fault of theirs. Considering the facts and circumstances of the case, the Commission recommended to the Government of Bihar to pay a sum of Rs. 5,00,000/- each to the next of kin of the deceased Rajni Rajan and Rakesh Kumar and to pay Rs. 1,00,000/- each to the injured Rajiv Ranjan and Md. Firoz as monetary relief.

Case No. 33 : Death of Jaipal in Fake Encounter in Hathras, Uttar Pradesh³¹⁵

The Commission received a complaint dated 15 December 2003 from Dr. Shahid Hussain, a resident of Muradabad, Uttar Pradesh stating that one Jaipal was picked up by the police from his house in village Sithrapur in Hathras on 10 December 2003 at about 8 p.m. and within an hour thereafter, he was killed in the guise of an encounter.

³¹⁵. Case No. 29826/24/2003-2004 reported in National Human Rights Commission's Annual Report 2009-2010

The NHRC registered Case No. 29826/24/2003-2004.

Pursuant to the directions given by the Commission, the incident was probed by the Sub Divisional Magistrate of Hathras. The Magistrate in his magisterial enquiry report concluded that the police action was justified. As the magisterial enquiry report was not found convincing by the Commission, vide its proceedings dated 29 April 2005 it directed the State Government to get the matter investigated by an independent agency. In pursuance to the directions given by the Commission, an investigation was conducted by the Crime Branch.

The investigation by Crime Branch revealed that the deceased Jaipal was kidnapped by Inspector N.K. Yadav and killed in a fake encounter. A criminal case No.C-1/2004 was registered against Inspector N.K. Yadav and other police officers at Sahabad Police Station under applicable sections of the IPC. As the investigation report established gross violation of human rights of the deceased, the Commission while observing that his next of kin are entitled to be compensated monetarily by the State, directed to issue a notice u/s 18 (a) (i) of the PHRA to the Chief Secretary, Government of Uttar Pradesh, requiring him to show-cause as to why suitable monetary compensation should not be granted to the next of kin of the deceased.

In reply to the show-cause notice, the State Government honestly admitted that the next of kin of the deceased deserved to be compensated. In view of the confession made by the State Government and considering the circumstances of the case, the Commission on 22 June 2009 recommended to the Government of Uttar Pradesh to pay a sum of Rs. 3,00,000/- as monetary relief to the next of kin of the deceased Jaipal. The Director General of Police, Uttar Pradesh was also directed to inform the status of the criminal case arising out of FIR No. C-1/2004 registered at P.S. Sahabad.

Case No. 34 : Yogesh in Fake Encounter at Indore, Madhya Pradesh³¹⁶

The Commission registered Case No.1247/12/2002-2003 with respect to encounter killing of one Yogesh Chaudhary by a police man on 15 October 2002 within the jurisdiction of Police Station Annapurna in Indore District of Madhya Pradesh. The police took the plea of self-defence. According to the police, Yogesh Chaudhary and one other person had committed robbery and when they were asked to surrender, they attacked the police party.

³¹⁶. Case No.1247/12/2002-2003 reported in National Human Rights Commission's Annual Report 2008-2009

The police resorted to firing in self-defence.

On examination of the post-mortem report, the Commission found that blackening, charring and tattooing had been observed around the fire arm entry wound on the body of the deceased. It was also found that the victim had fallen after being hit by one bullet and yet two more bullets were fired at him. The Commission found that the police version of the incident was doubtful. It also observed that the guidelines issued by it for investigation of cases of death resulting from police encounter had not been scrupulously complied with. As such, the Commission recommended monetary relief of Rs. 3,00,000 for the next of kin of the deceased.

The compliance report and proof of payment has been received. The case was thus closed by the Commission on 29 December 2008.

Case No. 35 : Killing of Kodati Venkata Krishna alias Zinnah in Police Custody in Nalgonda, Andhra Pradesh³¹⁷

The Commission received information from the General Secretary, People's Union for Civil Liberties (PUCL), that Kodati Venkata Krishna alias Zinnah was a victim of an encounter conducted by the Nalgonda District Police on 19 October 2002 at the outskirts of Cudappah District, Andhra Pradesh. The complaint also stated one Nagesh, who was in police custody, was likely to meet the same fate.

The Commission registered Case No.489/1/2002-2003.

On consideration of the report received from the Superintendent of Police as well as the Magisterial Enquiry Report (MER), the Commission noted that while the MER stated that Zinnah had fired one round and the police party 11 rounds in retaliation, there was no mention about Zinnah having fired any round in the report submitted by the Superintendent of Police. Thus, the factum of Zinnah having fired any round at the police party appeared to be very doubtful. Other than this, there was no justification for the police to fire 11 rounds. Thus, in view of the Commission, it cannot be ruled out that Zinnah was deprived of life other than in accordance with the procedure established by law.

In response to the notice u/s 18(c) of the PHRA issued to the Chief Secretary, Andhra Pradesh, requesting him to show-cause as to why immediate monetary relief should not be recommended to be paid to the

³¹⁷. Case No.489/1/2002-2003 reported in National Human Rights Commission's Annual Report 2007-2008

next of kin of Zinnah, the Principal Secretary to the Government of Andhra Pradesh stated that Rs. 20,000 had been paid to his next of kin. The Commission observed that this amount was grossly inadequate and recommended that the State must pay Rs. 2,00,000 as monetary relief, which has been compiled with.

Case No. 36 : Atrocities committed by Joint Special Task Force of State of Karnataka and Tamilnadu for apprehending Veerappan³¹⁸

The Commission received a number of representations from non-government organisations and individuals regarding atrocities committed by the Joint Special Task Force set up by the States of Karnataka and Tamil Nadu to apprehend the forest brigand Veerappan.

Taking cognizance of the complaints (Case No. 795/22/1998-1999), the Commission constituted two-member panel of inquiry comprising Hon'ble Mr. Justice A.J. Sadashiva, former Judge of Karnataka High Court as Chairman and Mr. C.V. Narasimhan, former CBI Director as Member to inquire into the matter and make its recommendations to the Commission. The panel during its inquiry recorded the statements of 243 persons, including 193 alleged victims, 4 representatives of NGOs and 38 police officers.

The inquiry panel submitted its report on 1 December 2003 and the Commission sought comments of the two states in the report.

The Chief Secretaries, Govt, of Tamil Nadu and Additional Chief Secretary, Govt, of Karnataka appeared before the Commission and conveyed that both the governments are ready and willing to respect the decision/recommendation to be made by the Commission with regard to the interim relief to the victim of atrocities alleged to have been committed by the Joint Special Task Force. The Chief Secretary, Govt of Tamil Nadu also stated before the Commission that the Government of Tamil Nadu had already dispersed a sum of Rs.20 lakh to 12 victims/next of kin. The Commission directed that the amount already paid by the Government of Tamil Nadu shall be adjusted while making payment of interim relief recommend by the Commission.

Vide proceedings dated 15 January 2007, the Commission recommended immediate interim relief to 89 victims amounting to Rs. 2 crore and 80 lakhs. These victims included women victims of repeated rape, women

³¹⁸. Case No. 795/22/1998-1999 reported in National Human Rights Commission's Annual Report 2006-2007

subjected to assault, application of assault and application of electric current and outrage of modesty, persons who suffered illegal detention, assault and electric shock, persons who suffered permanent disability as a result of torture, persons unlawfully detained as well as 36 persons allegedly killed in suspicious encounters by the Special Task Force. The Commission recommended interim relief varying between one lakh to five lakhs to these 89 persons to mitigate the suffering and hardship suffered by them or their families.

The Commission also clarified that the Government of Tamil Nadu shall pay interim compensation to those victims who live in Tamil Nadu and the Government of Karnataka shall pay to the victim living in Karnataka.

The Commission further opined that both the State Governments in their discretion may consider taking development activities, such as laying roads, establishment of school, hospital etc. in the affected tribal and border areas of both the States.

Case No. 37 : Disappearance of Mohammed Tayab Ali³¹⁹

The Commission received a complaint from Smt. Mina Khatoon, resident of District Imphal (East), which was referred to it by the Manipur State Human Rights Commission, alleging the disappearance of her husband Mohammed Tayab Ali on 25 July 1999 after he was taken away to the headquarters of the 17 Assam Rifles Battalion. He had not been seen thereafter. The Commission registered Case No. 32/14/1999-2000.

The Commission considered the report submitted by the Ministry of Defence and, in the light of the evidence on record, including the deposition of witnesses, who stated that they had seen Mohammed Tayab Ali being picked-up by security men, held that the security forces were liable for the disappearance of Mohammed Tayab Ali. The Commission accordingly awarded a sum of Rs.3 lakhs as immediate interim relief, u/s 18(3) of the Act, to the complainant. A compliance report is awaited.

Given the importance of this case, particularly in respect of the procedure to be followed in regard to complaints submitted against the armed forces, relevant extracts of the proceedings of the Commission in this case are being reproduced verbatim below:

Mohammed Tayab Ali was seen being picked up in the Maruti van and being taken to the battalion headquarters of 17 Assam

³¹⁹. Case No. 32/14/1999-2000 reported in National Human Rights Commission's Annual Report 2001-2002

Rifles. His relatives and friends also made attempts to reach him at 17, Assam Rifles on the same day, but failed. Pursuant to a notice issued by the Manipur State Human Rights Commission to the Inspector General of Police (Law and Order) to ascertain the whereabouts of Mohd. Tayab Ali, the Inspector General of Police (Law and Order), Manipur submitted his inquiry report to the State Commission. It stated that the Director General of Police, Manipur, Imphal had issued crash messages to all concerned police authorities in the State of Manipur for flashing the information regarding whereabouts of Mohd. Tayab Ali. It had also taken up the matter with the Commander, Manipur Range. On 22 August 1999, the Staff Officer of Commander, Manipur Range, Imphal informed the Director General of Police, Manipur that the case of the alleged arrest of Mohd. Tayab Ali of Kairang Muslim village was investigated and inquiries were made from 17 Assam Rifles and all other units in that behalf. It was confirmed by them that no individual by the name of Mohd. Tayab Ali was picked up by 17 Assam Rifles or any other Assam Rifles unit.

After receipt of this report, the State Commission summoned the complainant Smt. Mina Khatoon in order to find out if her husband had been located. She appeared before the Commission and reiterated that her husband was last seen being carried in a Maruti van to 17 Assam Rifles campus at Kangla, Imphal. She also filed some photographs of her husband.

On consideration of the entire matter, the State Commission referred the case to this Commission as it relates to the 'armed forces'. On receipt of the reference from the Manipur State Human Rights Commission this Commission issued notices to the Ministries of Defence and Home Affairs, Government of India and called for a report in accordance with Section 19 of the Protection of Human Rights Act, 1993. The report of the Ministry of Defence received with their letter dated 11 April 2000 stated that on 25 July 1999, at around 9.45 hours, information was received that some valley based insurgents after firing on CRPF personnel at Langjing were fleeing towards Dimapur. A column of 17 Assam Rifles accordingly established a Mobile Check Post. Apparently, one of the vehicles attempted to speed towards Dimapur. The security team stopped the vehicle. There was an exchange of fire and one individual died. The driver of the vehicle managed to escape with the vehicle. This body was later identified

as that of Mohd. Tayab Ali. It was handed over to Kangpokpi police station on 25 July 1999. Thus the Defence Ministry's report concluded that Mohd. Tayab Ali had died in retaliatory fire opened by the personnel of the armed forces. Hence no cognisance could be taken of the complaint submitted by Smt. Mina Khatoon. This was a totally different and inconsistent stand taken by the Defence authorities from the earlier report of DGP Manipur which had denied that any person by the name of Mohd. Tayab Ali was picked up by 17 Assam Rifles or any other Assam Rifles unit.

As per the report of the Defence authorities, the body of the person killed in the encounter was handed over to Kangpokpi police station. No attempt seems to have been made by Kangpokpi police station to identify the body despite information having been flashed to all the police stations about the disappearance of Mohd. Tayab Ali. The body was disposed of as unidentified. This Commission, therefore, directed by its order dated 13 December 2000, that the photographs of the dead body of the person killed in the encounter on 25 July 1999 should be shown to the complainant to ascertain whether the photographs were of Mohd. Tayab Ali. The Commission received a letter dated 15 January 2001 from the Director General of Police, Manipur, Imphal stating that the Kangpokpi police station had shown the photographs of the unidentified dead body to the close relatives of Mohd. Tayab Ali, i.e. the complainant Mrs. Mina Khatoon, his wife, Mohd. Tahir Ali, the father and Mohd. Vazir Ahmed, the elder brother of Mohd. Tayab Ali. But none of them could identify the deceased in the photograph and they stated that the body was not of Mohd. Tayab Ali. Thus, it is proved that the person who was killed in an encounter on 25 July 1999 was not Mohd. Tayab Ali.

Thus, facts clearly indicate that Mohd. Tayab Ali while he was travelling on a Luna Moped was picked up apparently by some armed forces men in a Maruti van without any registration number and was taken to the Headquarter of 17, Assam Rifles. There is the un rebutted testimony of several witnesses who had seen him being taken in this fashion. Since then Mohd. Tayab Ali is missing. The stand taken by the Defence authorities that Mohd. Tayab Ali was killed in an encounter on 25 July 1999 must be rejected since the dead body of the person killed in that encounter was not that of Mohd. Tayab Ali. It must, therefore, be concluded

that 17 Assam Rifles in whose custody Mohd. Tayab Ali was last seen, has failed to account for him, thereafter.

In the case of the *Union of India vs. Luitbukla (Smt.) and others*, (1999) 9 SCC 273, the Supreme Court considered a similar case where the husband of the first respondent had been taken away by the army personnel. His brother had visited the army camp on the next day and inquired about his brother but no information was given to him. Thereafter, a complaint was lodged with the officer in charge of the local police station. Various attempts were made to locate the missing person but to no effect. The Supreme Court upheld the High Court's finding that the missing person was last seen in the custody of security forces and was not seen since then. The security forces were, therefore, held liable for his disappearance, and payment of compensation to the wife of the missing person. In the present case also, the facts are similar. The security forces in the present case are, therefore, liable to pay 'immediate interim relief' to the complainant for the disappearance of her husband Mohd. Tayab Ali while in the custody of 17, Assam Rifles.

Since the violation of human rights is by members of the armed forces, it is appropriate to examine the provisions of sections 17 to 19 of the Protection of Human Rights Act, 1993. Sections 17, 18 and 19 are contained in Chapter IV relating to the procedure to be followed by the Commission for inquiry into the complaints of violation of human rights, which is one of the functions of the Commission specified in sub-section (a) of section 12 of the Act. Section 17 prescribes the general procedure for inquiring into the complaints; section 18 specifies the steps after inquiry that may be taken by the Commission; and section 19 prescribes the special procedure with respect to armed forces while dealing with such complaints. These sections have to be read together for a proper understanding of the scope of section 19 and the limitations in the special procedure.

Sections 17 to 19 are as follows:

Section 17. Inquiry into complaints.

The commission while inquiring into the complaints of violations of human rights may: (1) call for information or report from the Central Government or any State Government or any other authority or organisation subordinate thereto within such time as may be specified by it;

Provided that:

(a) if the information or report is not received within the time stipulated by the Commission, it may proceed to inquire into the complaint on its own;

(b) if, on receipt of information or report, the Commission is satisfied either that no further inquiry is required or that the required action has been initiated or taken by the concerned Government or authority, it may not proceed with the complaint and inform the complainant accordingly;

(2) without prejudice to anything contained in clause (i), if it considers necessary, having regard to the nature of the complaint, initiate an inquiry.

Section 18. Steps after inquiry

The Commission may take any of the following steps upon the completion of an Inquiry held under this Act namely:

(1) where the inquiry discloses, the commission of violation of human rights or negligence in the prevention of violation of human rights by a public servant, it may recommend to the concerned Government or authority the initiation of proceedings for prosecution or such other action as the Commission may deem fit against the concerned person or persons;

(2) approach the Supreme Court or the High Court concerned for such directions, orders or writs as that Court may deem necessary;

(3) recommend to the concerned Government or authority for the grant of such immediate interim relief to the victim or the members of his family as the Commission may consider necessary;

(4) subject to the provisions of clause (5), provide a copy of the inquiry report to the petitioner or his representative;

(5) the Commission shall send a copy of its inquiry report together with its recommendations to the concerned Government or authority and the concerned Government or authority shall, within a period of one month, or such further time as the Commission may allow, forward its comments on the report, including the action taken or proposed to be taken thereon, to the Commission;

(6) the Commission shall publish its inquiry report together with the comments of the concerned Government or authority, if any, and the action taken or proposed to be taken by the concerned Government or authority on the recommendations of the Commission.

Section 19. Procedure with respect to armed forces

1. Notwithstanding anything contained in this Act, while dealing with complaints of violation of human rights by members of the armed forces, the Commission shall adopt the following procedure, namely:
 - (a) it may, either on its own motion or on receipt of a petition, seek a report from the Central Government;
 - (b) after the receipt of the report, it may, either not proceed with the complaint or, as the case may be, make its recommendations to that Government.
2. The Central Government shall inform the Commission of the action taken on the recommendations within three months or such further time as the Commission may allow.
3. The Commission shall publish its report together with its recommendations made to the Central Government and the action taken by that Government on such recommendations.
4. The Commission shall provide a copy of the report published under subsection (3) to the petitioner or his representative.

Section 17 which prescribes the general procedure for inquiry into complaints of violations of human rights says that the Commission may call for information or report from the concerned government or authority etc.; and on receipt of information or report, if the Commission is satisfied that no further inquiry is required or the necessary action has been taken, it may not proceed further with the complaint. It further says that if it considers necessary, then the Commission may initiate an inquiry. Section 18 mentions the steps after completion of the inquiry. It empowers making of recommendations by the Commission,

which include that for initiation of action against the concerned person and also for grant of such immediate interim relief to the victim as may be considered necessary. In the case of armed forces, section 19 prescribes the special procedure, which to the extent indicated therein overrides the general procedure. It is necessary now to examine the restriction made by section 19.

Section 19 begins with the non-obstante clause which indicates that the special procedure prescribed therein overrides the general procedure in its application to complaints of violation of human rights by members of the armed forces. The first step in this procedure prescribed by clause (a) of sub-section (1) is to seek a report from the Central Government as against calling for 'information' or 'report' prescribed in section 17. Clause (b) of sub-section (1) of section 19 then prescribes the next step, that 'after the receipt of the report, it may, either not proceed with the complaint or, as the case may be, make its recommendations to that Government.' Thus, on receipt of the report there are two options: the first is not to proceed with the complaint, and the other is to make 'recommendations' to the Central Government. The first option of not proceeding with the complaint is similar to that in proviso (b) to clause (i) of section 17. Obviously, it refers to the situation where on receipt of the report the Commission is satisfied that there is no need to proceed further with the complaint in order to make its recommendations to the Government. This situation being similar under both provisions, it presents no difficulty. The question is of the scope of Commission's powers when it is not satisfied with the report received from the Central Government and there is need to adopt the second course, which may lead to making its recommendations to the Government. It is this area which needs a closer look.

It is clear that the function of the Commission prescribed in clause (a) of section 12 to inquire into any complaint of violation of human rights includes the power to inquire into such complaints made even against members of the armed forces; and section 19 merely prescribes the special procedure for dealing with such complaints overriding the general procedure under section 17. The power to make recommendations, when necessary, in section 19 must be read along with subsections (1) and (3) of section 18 which deal with the nature of recommendations on conclusion of the inquiry, when closure of the complaint is not considered appropriate. There is nothing restrictive in section 19

to curtail this power of the Commission and the express power to make recommendations leads necessarily to this conclusion. In other words, the only limitation in section 19 vis-à-vis section 17, is that under section 19, the Commission cannot proceed to 'initiate an inquiry' itself, as it can under section 17(ii) of the Act.

Implicit in section 19 is the responsibility of proper investigation by the Central Government to enable it to make the report required under section 19 after examination of the complaint in a fair and objective manner in the light of all relevant facts. This requires ascertainment of the relevant facts and examination of the material disclosed by the complainant. The conclusions reached in the Report forwarded by the Central Government to the Commission, must be the logical outcome of the materials and duly supported by the reasons given in its support.

It is settled, that when there is power to do an act, there is power to do all that is necessary for the performance of that act. This is implicit in the provision conferring the power to act. Thus, all that is necessary to make 'recommendations' for compliance by the Central Government is implicit in the power conferred in section 19(1)(b) to make recommendations, in case the Commission is not satisfied with the report that it is not necessary to proceed with the complaint. To decide whether to accept the report and not proceed with the complaint or to proceed further, itself requires an objective determination which must be based on relevant materials. The 'report' of the Central Government must, therefore, satisfy this requirement and contain all relevant materials to enable performance of the exercise by the Commission.

The dictionary meaning of the word 'report' includes: 'to write an account of occurrences; to make a formal report; a statement of facts.' There is nothing in the context to alter the ordinary meaning. The 'report' required to be submitted by the Central Government to the Commission must contain a statement of facts and an account of occurrences and not merely the findings or conclusions reached by the Central Government on facts which are not disclosed to the Commission. This meaning given to the word 'report' in section 19 is in consonance with its purpose of enabling the Commission to perform the task of dealing with such a complaint against members of the armed forces. The object of enacting the Protection of Human Rights Act, 1993 (POHRA)

is the better protection of human rights and constitution of National Human Rights Commission (NHRC) is for this purpose. Jurisdiction of the NHRC to deal with the complaints against armed forces is subject only to a restricted procedure. The construction made of section 19 and the meaning given to the word 'report' therein, promotes the object of the enactment. It has to be preferred. This is a settled canon of interpretation of statutes.

Another aspect needs mention. A complaint of violation of human rights is based invariably on the allegation of harm to the victim resulting from some act or omission of the alleged violator. Once the harm attributed to the violator is proved or admitted, the burden of proving that the harm resulted from a justified act permitted under the law, is on the person against whom the allegation is made. Unless that burden is discharged by proof of facts or circumstances, which provide justification for the act under the law, the initial presumption of the violators' accountability remains unrebutted.

An obvious illustration is the case of unnatural death caused by use of force or disappearance from custody. As soon as it is proved or admitted that the victim was in the custody of someone, the burden is on that person to prove how he dealt with the detainee, and unless it can be satisfactorily shown that the custodian is not responsible for the harm or disappearance from the custody, the initial presumption of accountability remains unrebutted. The present case is of that kind.

Mohd. Tayab Ali, husband of the complainant is proved to have been taken in custody by the 17 Assam Rifles, and the custodian has been unable to prove satisfactorily the lawful termination of custody, when he was alive. These facts alone are sufficient to uphold the liability of 17 Assam Rifles and to hold it accountable for his disappearance.

Section 105 of the Indian Evidence Act, 1872 places the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code or any other justification on the 17 Assam Rifles, which burden it has failed to discharge. Section 106 of Evidence Act places the burden of proving the facts especially within knowledge of any person upon him, irrespective of the general burden of proof being on the other side. This provision also casts the obligation on the

custodian to prove how he dealt with the detainee or the victim. Viewed at, in any manner, the 17 Assam Rifles has failed to discharge the burden and the initial presumption of its liability for the disappearance of Mohd. Tayab Ali remains unrebutted.

This case falls within the ambit of the second part of section 19(1)(b) since on receipt of the report from the Central Government the Commission is of the considered opinion that it is a fit case for making recommendations in terms of subsection (1) and (3) of section 18 of the Act. The Commission therefore, makes the necessary consequential recommendations.”

The complainant has lost her husband at a young age. At the time of her husband’s disappearance, she had five children and she was pregnant. The loss of the sole breadwinner rendered the family destitute. Since the violation of human rights in the present case is by members of the armed forces, the Commission, in exercise of its powers under section 19 of the Protection of Human Rights Act recommends that it would be just and proper in the circumstances of the case to award immediate interim relief of Rs.3 lakhs to the complainant and her children. We make this recommendation to the Ministry of Defence and the Ministry of Home Affairs, Government of India for compliance. The action taken should be communicated to the Commission within three months.

Case No. 38 : Death of a labourer in a fake encounter in Bihar³²⁰

The Commission received a complaint from Smt. Manva Devi alleging that Assistant Sub Inspector Surender Paswan of Police Station Rivil Ganj, Chapra had dragged her husband out of their home and shot him dead. She added that her complaint was initially not registered by the Station House Officer (SHO) at Rivil Ganj Police Station but that the FIR was lodged only on the directions of the Judicial Magistrate, Saran. The police, she stated, had tried to hush-up the case. The NHRC registered Case No. 3879/4/98-99.

In response to a notice from the Commission, a report was received from the Director General of Police, Bihar. It stated that an investigation had been conducted by the Deputy Superintendent of Police (DSP), Saran and that the investigation indicated that the victim, Parsu Ram, was a dreaded criminal who was suspected in 10-12 criminal cases and against whom a case had been registered. It was added that the ASI Surendra Paswan had gone to arrest Parsu Ram under the instructions of the

³²⁰. Case No. 3879/4/98-99 reported in National Human Rights Commission’s Annual Report 2000-2001

Inspector at Sadar Police Station. A chase had ensued and Parsu Ram had opened fire. ASI Surender Paswan had then fired in self-defence and Parsu Ram had died in the encounter. It was stated that a country-made pistol and three bullets had been found near the body of the deceased.

The Commission, on studying the reply, came to the view that this was, *prima facie*, a case of a death in a fake encounter. Further investigation by the Investigation Division of the Commission revealed that the complainant's husband was a daily labourer who was staying with his family in District Saran (Chapra). He was not named in any of the cases referred to by the police and there was no merit in the contention of the police that Parsu Ram Nut was indeed Bacha Nut, who was involved in a number of criminal cases. In fact, the newspaper 'Hindustan' of 12 June 2000 had indicated that Bacha Nut was active in the area and was still engaged in his criminal activities. Moreover, there were independent witnesses who had seen ASI Surender Paswan dragging the victim out of his house by his collar. The investigation also confirmed that the complaint originally made by the complainant was not entertained by the police station and that the investigation supposedly undertaken by the police was shoddy and suffered from a lack of impartiality. Indeed the police had submitted a final report seeking to close the case.

In these circumstances, the Commission concluded that the State police had tried to hush-up the case and had given a false report. The Commission therefore directed the Director General of Police, Bihar, to ask the CBCID to conduct a fresh investigation of the case and to submit its report to the CJM. Concluding that this was, *prima facie*, a case involving a fake encounter, the Commission considered it appropriate to award immediate interim compensation to the next-of-kin of the deceased under section 18(3) of the Protection of Human Rights Act, 1993. The Commission accordingly issued a show cause notice to the Government of Bihar asking as to why payment in the amount of Rs. 1 lakh should not be made to the next of kin of the deceased.

Case No. 39 : Killing of 35 Members of Sikh Community in Anantnag District of Jammu & Kashmir by Militants³²¹

The Commission took suo motu cognizance of a newspaper report in 'The Times of India' dated 22 March 2000 in respect of the killing of 35 persons of the Sikh community in Anantnag District, Jammu & Kashmir by militants (Case No. 206/9/1999-2000).

³²¹. Case No. 206/9/1999-2000 reported in National Human Rights Commission's Annual Report 2000-2001

Upon notice being issued to the State Government, a report was received saying that a Commission of Inquiry consisting of Justice Shri S.R. Pandian, a retired Judge of Supreme Court, had been appointed by the Government of Jammu & Kashmir to enquire into causes and circumstances leading to the event of firing on 3 April 2000 which led to the death of 8 persons, justification for use of force and fixation of responsibility for use of excessive force, if any.

On considering this report, the Commission observed that Justice Pandian Commission of Inquiry had not been mandated to enquire into either the incident of 20 March 2000 in respect of the massacre of 35 innocent Sikhs or the incident of 25 March 2000 in which reportedly 5 foreign mercenaries were killed by the Security Forces.

A subsequent report submitted by the Director General of Police, Jammu & Kashmir indicated that a case had been registered in respect of the killing of the 35 Sikhs and that investigation was in progress. The report further indicated that, of the twenty accused persons identified in connection with the killing of 35 Sikhs, 6 were killed in subsequent encounters; 2 were further detained under the Public Safety Act and 12 were absconding. A chargesheet had been filed in the case on 13 November 2000. The report stated that three Pakistan nationals belonging to Lashkar-e-Toiba had confessed their involvement in the killings. The State Government had made adequate security arrangements for the protection of villagers residing in vulnerable areas and provided an ex-gratia payment of Rs. 1 lakh to the next of kin of the deceased and Rs. 75,000 to those permanently disabled.

Upon considering the report submitted by the State Government, the Commission directed that Government furnish a report on the action taken on the findings and recommendations of Justice Pandian Commission as well as to furnish a progress report in respect of the case before the CJM, Anantnag in respect of the killing of 5 persons on 25 March 2000.

The Commission continues to monitor these matters.

Case No. 40 : Brutal Killing of Santosh Kumar Singh by Police in Bihar³²²

The Commission took cognizance of a complaint (Case No.2968/4/98-99/ACD) received from one Dhirendra Prasad Singh of the village Joitali

³²². Case No.2968/4/98-99/ACD reported in National Human Rights Commission's Annual Report 1998-1999

from the state of Bihar. A police party led by SI Mukhal Paswan visited the village Joitali on 12 December 1998 after receiving information about the activities of the gang of Tolwa Singh in the area. The SI suspected the father of the deceased, Shri Dharendra Prasad Singh, (complainant before the Commission), who was also the uncle-in-law of Tolwa Singh, to be harbouring the said criminal. Shri Santosh Kumar, the complainant's son, a totally innocent young man, with no previous criminal record, was stopped near the house of Jagdish Jha and was asked for his identity in harsh and abusive language. A verbal altercation ensued between Santosh Kumar and SI Mukhlal, after Santosh objected to the SI's behaviour. The SI thereupon shot at Santosh and injured him. The SI also took a sample of blood stained earth from the place where Santosh Kumar had fallen upon being injured. Santosh Kumar, who was still alive, was put in a jeep and taken towards Purnea along with four others. One of the four was allowed to get down in the village itself. Santosh Kumar died on the way to Purnea. SI Paswan did not permit water to be given to the injured Santosh despite his repeated pleas. Also at Purnea, the jeep was kept standing near the bungalow of the SP for one hour for consultation and guidance before Santosh's body was taken for post-mortem. The dead body of Santosh Kumar was handed over to persons from the village Jotaili, after autopsy, late in the evening on 13 December 1998. Sensing the intensity of public anger over the incident which had caused protests and demonstrations, the police compelled the villagers to cremate the dead body at Purnea itself, at about 11.00 PM on 13 December 1998, without giving the next of kin of the deceased a chance to have a last glimpse of him.

The foregoing chain of events relating to the killing of Santosh Kumar, as contained in the report of Shri S.V.M. Tripathi, former DGP, UP who was entrusted by the Commission to make an on-the-spot inquiry, were found to be convincing by the Commission. Shri Tripathi who visited the spot obtained from SI Mukhlal and other police personnel their version of the case which was described in the FIR of cases registered at 18.00 hrs on 12 December 1998 by SI Mukhlal under sections 399/402/353/307/34 IPC and 26(2b)/27 Arms Act. The FIR, written in first person by SI Mukhlal, briefly stated that information was received by him at 22.10 hrs on 11 December 1998 that the accused, Tolwa Singh, wanted in a number cases, fully armed, was staying with his gang near Chai Tola, village Bhatsara, and was planning a heinous crime. On the basis of this information and a request to senior officers, SI Mukhlal was provided a special force and he along with one SI and 2 ASIs from his police station left for verification of the information received. When the SI alongwith his colleagues reached Chai Tola at 05.00 hrs there was a heavy fog. The

police party, hearing same voices, asked them to stop. The gang at this stage started firing and did not surrender as asked by the police. The miscreants tried to escape on motorcycles firing intermittently, and were followed with difficulty by the police due to the thick fog. When the police reached a village and started looking for them, the criminals again opened fire indiscriminately. In self defence, SI Sanjay Kumar fired one round and Constable Ram Prakash fired two rounds from their rifles and the criminals ran away in the thick fog. The police party received the information that one criminal was lying injured in the village. On enquiry, he disclosed his name to be Santosh Kumar and provided other particulars. He was immediately sent, with some police personnel, in a jeep for treatment to Purnea Sadar Hospital. According to the police version, a country-made pistol with a fired cartridge was recovered from Santosh Kumar. A recovery memorandum was prepared and signed by three independent witnesses. Blood stained earth was also recovered. Shri Tripathi visited the spot of the initial encounter (Chai Tola) mentioned in the FIR and talked to a number of villagers in connection with this incident.

While Shri Tripathi did not doubt that SI Mukhlal must have received information about the movement of a gang, he considered the story of the near-encounter of the police with the gang somewhat improbable. It is worth noting that Shri Tripathi was not shown the case diaries relating to the case in spite of his asking for them.

After carefully considering the original complaint of Shri Dharendra Prasad, father of Shri Santosh Kumar, the assessment of Shri N.K. Singh, former CBI Director, who had visited the village after the incident, and the report of Shri Tripathi which was found to be convincing, the Commission made the following observations:

1. There is substantial evidence to prove that Shri Santosh Kumar was killed by SI Mukhlal Paswan, officer-in-charge of PS Barhara because he had expressed his resentment and objected to the use of harsh and abusive language by the SI.
2. The story of a police encounter in the village Chai Tola was a clever fabrication and concoction of evidence to cover up the totally unjustified killing of Shri Santosh Kumar. SI Mukhlal Paswan had, by collecting the blood stained earth from the place where Santosh was injured and was still alive, revealed his intention to fabricate the story of an encounter, which he subsequently carried out.

3. Shri Santosh Kumar had no previous criminal record whatsoever. FIR of case crime No.130/98 u/s 399/ 402/ 353/ 307/ 34 IPC and 26 (2b) / 27 registered by the officer in charge Mukhlal Paswan at his PS Barhara on 12 December 1998 was based on facts found unverified by the report of Shri S.V.M. Tripathi. The recovery of a country-made pistol with blank and live cartridges from Santosh Kumar was found to be false from the statement of the witnesses of the recovery memorandum, namely V.N. Jha, Deepak Kumar Thakur and Ravinder Kumar Thakur made before Shri Tripathi. They flatly denied any such recovery. It was thus reasonable to suspect that the story of the recovery of the pistol was a planted one.

4. Shri Vivekanand Jha, Deepak Kumar Thakur and Ravinder Kumar Thakur were forcibly taken to Purnea by the police party and kept in illegal custody at PS Krityanand. Their statement that they were forced to sign some blank papers while they were in custody, appeared credible enough considering all the facts and circumstances of this case.

5. The conduct of the Purnea police lacked humanity in withholding from the next of kin of the deceased the information about the condition and whereabouts of Santosh Kumar. It was also proved with sufficient clarity that the deceased was not provided immediate medical aid after he was injured. The denial of water to him despite his repeated pleas was a disturbing instance of police insensitivity as was their decision to get the body cremated at Purnea itself, denying his mother, wife and grandfather the solace of having a last glimpse of the deceased.

6. Keeping the PS Bihariganj in the dark about the raid on a village in its area of jurisdiction was a violation of a well-established police procedure by the police of district Purnea, which deserved to be viewed with seriousness.

7. Shri Tripathi's report offered sufficient material to suspect the connivance of Shri R.S. Bhati, Supdt. of Police, Purnea in the concoction of evidence to cover up the killing of Santosh Kumar. The Special Report meant for the DIG Range and other superior officers, which was required to be sent at the earliest after the registration of the case, was sent after a lapse of 14 days on 26 December 1998. It contained just a copy of the FIR with the remark that the DSP, Mohd Asghar Imam, would supervise this case. The Supdt. of Police did not mention whether Shri Imam

had, by then, even visited the spot and supervised the investigation of this case, which had been registered a fortnight earlier. In fact, he was expected to report on the quality and usefulness of the DSP's supervision, which he totally ignored. The Supdt. of Police admitted that he himself had not visited the village Joitali, even though he was aware that a case of murder was registered against the police personnel in respect of the main action which took place in that village. The fact of Shri Santosh Kumar's death in police custody was not disputed. It was the responsibility of the district Supdt., of Police to get the mandatory Magisterial inquiry conducted in respect of the incident. The blame for no such inquiry having been held rested primarily with him. The conduct of Shri R.S. Bhati revealed a number of professional lapses compounded by a certain degree of callousness.

The Commission, thus convinced of the serious violation of human rights of the deceased, Shri Santosh Kumar, and also of the rights of his relatives, made the following recommendations:

- a) The Commission feels that the case of murder registered against the police personnel of Purnea at PS Bihariganj of Madhepura district is a fit case for transfer to the CBI. The other false case of a police encounter registered at PS Barhara (FIR case Crime No. 130/98 dated 12 December 1998) has also to be covered by the same investigation team.
- b) The Commission further recommends that the Government should immediately consider placing SI Mukhlal Paswan, who is the main accused in the murder case, under suspension pending the final outcome of the case of murder of Shri Santosh Kumar Singh. He should also be moved out from district Purnea and Madhepura.
- c) Shri R.S. Bhati, Supdt. of Police, Purnea about whom there are serious suspicions of connivance in the cover-up of the murder of Santosh Kumar, should immediately be transferred away from Purnea in the interest of a prompt and impartial investigation by the CBI.
- d) The deceased, Santosh Kumar, was supporting the entire family. He has left behind his young widow and a small child. The Commission recommends that an immediate interim relief of Rs.5.00 lakhs should be given to the widow without prejudice to her other rights at law.

Case No. 41 : Mass cremation of unclaimed/unidentified bodies by Punjab Police³²³

A reference to this case was made in the Annual Reports of the Commission for the years 1996-97 and 1997-98 (*Case No.1/97/NHRC*). During the year under review, the Supreme Court heard a petition filed by the Ministry of Home Affairs seeking clarification of the Supreme Court's order dated 12 December 1996, in the light of the Commission's order dated 04 August 1997 in which the latter had laid down the modalities which it intended to follow in pursuing the enquiry into this case. On 10 September 1998, the Supreme Court disposed of the said petition, upholding the stand of the Commission that it was a body sui-generis, in addition to it being a body sui-juris created under the Act of Parliament. The Supreme Court criticised the Union Home Ministry for the various objections raised by it before the Commission, and for later approaching the Court for clarifications which had led to delay in providing relief to the affected families.

Thereafter, the Commission proceeded to examine the scope of the enquiry which it was required to undertake under the remit of the Supreme Court's order dated 12 December 1996. While it was contended on behalf of the petitioners that the Commission was required to inquire into all incidents of what were referred to as 'extra-judicial eliminations', or involuntary disappearances, 'fake encounters', 'abductions' and 'killings' etc., alleged against the Punjab Police during the decade 1984-1994, the Union Government and the State of Punjab contended that the inquiry should be restricted only to the 2097 cases of cremation of bodies - 585 fully identified, 274 partially identified and 1238 un-identified – in the police districts of Amritsar, Tarn Taran and Majitha.

After hearing the Counsel for the parties, the Commission in its order dated 13 January 1999 settled the scope of inquiry under the Supreme Court's direction, by holding that it was limited only to those illegal killings/ disappearances that culminated in the cremation of 2097 bodies (585 bodies fully identified, 275 bodies partially identified and 1238 bodies unidentified) in the crematoria located at Durgyana Mandir, Patti Municipal Committee Crematorium and Tara Taran which were also the subject matter of inquiry by the CBI in pursuance of the order of Supreme Court dated 15 November 1995. The contention that the Commission should undertake the investigation of all the alleged police killings in the

³²³. Case No.1/97/NHRC reported in National Human Rights Commission's Annual Report 1998-1999

State of Punjab was not found to square or reconcile with the express terms of the Court's remit.

As a sequel to the order on the scope of the inquiry, the Commission in a separate order of 13 January 1999 laid down the modalities for the conduct of further proceedings. The Commission directed that a public notice be published in the newspapers having circulation in and around the District of Amritsar for inviting applications/claims, by 10 March 1999. The Commission clarified that the initial burden was on the State Government to establish that the cremations, undertaken by the police were in accordance with the procedure prescribed by law. The Commission directed the State Government to file on or before 10 March 1999 a list of all the cremations done by the police in respect of un-claimed/ unidentified bodies in the crematoria of the police districts of Amritsar/ Majitha/Tarn Taran between June 1994 and December 1994. The order also provided for the setting up of a separate cell for dealing with this inquiry, and directed the Government of Punjab to deposit initially a sum of Rs. 25 lakhs with the Commission before 15 February 1999. This was complied with by the Government of Punjab.

The petitioners moved a petition for a review of Commission's order dated 13 January 1999 seeking enlargement of the scope of the inquiry so as to cover the extra judicial killings and disappearance in whole of the State of Punjab. The Commission, vide its order dated 24 March 1999, declined any such extension of the scope of the inquiry.

Pursuant to the public notice issued by the Commission, 88 claims were received which have been processed. The State of Punjab sought extension of time to file the information sought from them.

Case No. 42 : Chittisinghpura killing, Jammu and Kashmir³²⁴

The Commission also continued to pursue matters of which it had taken cognisance earlier. Notable among these were the aftermath of the killing of 35 Sikhs in Chittisinghpura on 20/21 March 2000 and the killing of 5 persons in Patribal by the security forces on 25 March 2000, who were stated to be responsible for the killings in Chittisinghpura. In respect of these matters, the Commission had directed the State Government to furnish it with a copy of the report of the Commission of Inquiry headed by Shri Justice S.R. Pandian, as well as to keep it informed in respect of the case before the Chief Judicial Magistrate, Anantnag concerning the killing of the five persons in Patribal.

³²⁴. Reported in National Human Rights Commission's Annual Report 2001-2002

On 14 July 2001, the State Government informed the Commission that it had decided to accept the report and recommendations of the Pandian Commission of Inquiry in totality. It further informed the Commission that personnel of the Jammu and Kashmir police had been formally charge-sheeted and a full-fledged departmental inquiry had been instituted against them; that an FIR had been registered and a special team of investigators had been appointed to complete the investigation; and that, in so far as personnel of Central Security Forces were concerned, the Ministry of Home Affairs, Government of India had been requested to take appropriate action against them. It was further stated that ex-gratia relief of Rs.1.00 lakh had been paid to the next-of-kin of those who had been killed. The Commission, accordingly, in its proceedings of 25 July 2001, closed its consideration of this matter.

The Commission was, however, deeply disturbed to read press reports to the effect that those reportedly killed in encounters in Patrival were identified as villagers who had, according to the people of the area, been killed in ‘fake encounters’ and wrongly blamed for the Chittisinghpura killings. On further enquiries by the Commission, the Government indicated that samples had been taken for DNA testing in respect of those who had been killed in Patrival. It remained a matter of the gravest concern to the Commission, as expressed in its annual report for the year 2000-2001 that despite the passage of many months, the results of the DNA testing had not been made public. In its preceding report, therefore, the Commission had observed that the manner in which the Patrival incident had been handled: ‘... has done great harm to the cause of human rights in the State and to the reputation of the armed forces and the Governmental authorities, both at the Centre and in the State.’ The Commission went on to: ‘... urge the Government to disclose the facts relating to the deaths in Patrival and take appropriate action if wrong has been done. The longterm interests of the State and the security of the nation can never be advanced by the concealment of possible wrongdoing. It is a serious mistake to think otherwise.’

The Commission’s worst suspicions in respect of this matter gained credence when an article appeared in the Times of India of 6 March 2002 stating that officials had tampered with the DNA samples of the relatives of those killed in Patrival in order to prove the test results negative, and that for more than one year, the Jammu and Kashmir Government had ‘been sitting over a damning report from Hyderabad.’ The Commission therefore took up this matter again on 13 March 2002, directing the State Government, as well as the Ministry of Defence and the Ministry of Home Affairs, Government of India, to submit comprehensive up-to-

date reports on the action taken in this matter, together with the action being contemplated, to correctly identify the five deceased persons. The reports were awaited. The Commission has every intention of pursuing this matter till justice is done.

10. Annexure 1: Guidelines of the National Human Rights Commission for Dealing with Encounter Cases

10.1 Procedures to be followed in cases of deaths in police encounters, 29.3.1997

Letter to Chief Ministers regarding the Procedure to be followed in cases of deaths in police encounters

Justice M.N. Venkatachaliah **National Human Rights Commission**
Chairperson, Sardar Patel Bhawan, Sansad Marg,
(Former Chief Justice of India) New Delhi-110001.

March 29, 1997

Dear Chief Minister,

The Commission has been receiving complaints from the members of the general public and from the non-governmental organisations that instances of fake encounters by the police are on the increase and that police kill persons instead of subjecting them to due process of law if offences are alleged against them. No investigation whatsoever is made as to who caused these unnatural deaths and as to whether the deceased had committed any offences.

2. Complaint Nos. 234 (1 to 6)/93-94 brought before the Commission by the Andhra Pradesh Civil Liberties Committee (APCLC), referred to one such instance. It was stated in the complaint that the police had shot and killed some persons alleging that they were members of the outlawed People's War Group who attempted to kill the police party that was attempting to arrest them. The case of the APCLC, on the other hand, was that these are cases of unjustified and unprovoked murders in what they describe as 'fake encounters'.

3. The practice obtaining in Andhra Pradesh, as perhaps elsewhere also is that when an encounter death takes place, the leader of the police party engaged in the encounter furnishes information to the Police Station about the encounter and the persons that died. The stand taken by the police in all these cases brought by the APCLC was that the deceased persons, on sighting the police, opened fire at them with a view to killing them and were, therefore, guilty of the offence of attempt to murder under Section 307 IPC. The police justified their firing and killing as

done in exercise of their right of self-defence. This information was recorded in the Police Station describing the persons killed by the bullets fired by the police as accused and FIRs were drawn up accordingly. Without any more investigation, the cases were closed as having abated, in view of the death of accused. No attempt whatsoever was made to ascertain if the police officers who fired the bullets that resulted in the killings, were justified in law to doing so, and if otherwise whether and if so what offences were committed by them.

4. Under our laws the police have not been conferred any right to take away the life of another person. If, by his act, the policeman kills a person, he commits the offence of culpable homicide whether amounting to the offence of murder or not unless it is proved that such killing was not an offence under the law. Under the scheme of criminal law prevailing in India, it would not be an offence if death is caused in the exercise of the right of private defence. Another provision under which the police officer can justify the causing of death of another person, is Section 46 of the Criminal Procedure Code. This provision authorises the police to use force, extending upto the causing of death, as may be necessary to arrest the person accused of an offence punishable with death or imprisonment for life. It is, therefore, clear that when death is caused in an encounter, and if it is not justified as having been caused in exercise of the legitimate right of private defence, or in proper exercise of the power of arrest under Section 46 of the Cr.P.C., the police officer causing the death, would be guilty of the offence of culpable homicide. Whether the causing of death in the encounter in a particular case was justified as falling under any one of the two conditions, can only be ascertained by proper investigation and not otherwise.

5. The validity of the above procedure followed by the police in Andhra Pradesh was challenged before the Commission. After hearing all the parties and examining the relevant statutory provisions in the context of the obligation of the State to conform to Article 21 of the Constitution, the Commission, by its order dated 5.11.1996, found that the procedure followed in Andhra Pradesh was wrong and the Commission laid down and indicated the correct procedure to be followed in all such cases. A copy of the order of the Commission furnishing the reasons and the correct procedure to be followed is enclosed. These recommendations have been accepted by the Andhra Pradesh Government.

6. As the decision of the Commission bears on important issues of Human Rights which arise frequently in other parts of the country as well, the Commission decided to recommend the correct procedure to

be followed in this behalf to all the States. The procedure, briefly stated, is as follows:

- A. When the police officer in charge of a Police Station receives information about the deaths in an encounter between the Police party and others, he shall enter that information in the appropriate register.
- B. The information as received shall be regarded as sufficient to suspect the commission of a cognizable offence and immediate steps should be taken to investigate the facts and circumstances leading to the death to ascertain what, if any, offence was committed and by whom.
- C. As the police officers belonging to the same Police Station are the members of the encounter party, it is appropriate that the cases are made over for investigation to some other independent investigation agency, such as State CID.
- D. Question of granting of compensation to the dependents of the deceased may be considered in cases ending in conviction, if police officers are prosecuted on the basis of the results of the investigation.

7. May I request you kindly to issue directions, through the Director General of Police, to all the Police Stations in your State to follow the procedure as indicated above in regard to all cases where the death is caused in police encounters and similar situations?

With regards,

Your sincerely, Sd/-

(M.N. Venkatachaliah)

To

Chief Ministers of all States/Union Territories

10.2 Revised Guidelines/Procedures to be followed in dealing with deaths occurring in encounter deaths, 2.12.2003

Revised Guidelines/Procedures to be followed in dealing with deaths occurring in encounter deaths

The guidelines issued by the Commission in respect of procedures to be followed by the State Govts. in dealing with deaths occurring in encounters with the police were circulated to all Chief Secretaries of States and Administrators of Union Territories on 29.3.1997.

Subsequently on 2.12.2003, revised guidelines of the Commission have been issued and it was emphasised that the States must send intimation to the Commission of all cases of deaths arising out of police encounters. The Commission also recommended the modified procedure to be followed by State Govts. in all cases of deaths, in the course of police action, and it was made clear that where the police officer belonging to the same police station are members of the encounter party, whose action resulted in deaths, such cases be handed over for investigation to some other independent investigating agency, such as State CBCID, and 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 I.P.C. Such case shall invariably be investigated by the State CBCID. A Magisterial Inquiry must invariably be held in all cases of deaths which occur in the course of police action. The next of kin of the deceased must invariably be associated in such inquiry.

All the Chief Ministers and Administrators have been directed to send a six monthly statement of all cases of deaths in police action in the States/UTs through the Director General of Police to the Commission by the 15th Day of January and July respectively in the proforma devised for the purpose.

Justice A.S. Anand
Chairperson
(Former Chief Justice of India)

2nd December, 2003

Dear Chief Minister,

Death during the course of a police action is always a cause of concern to a civil society. It attracts criticism from all quarters like Media, the general public and the NGO sector.

The police does not have a right to take away the life of a person. If, by his act, the policeman kills a person, he commits an offence of culpable homicide or not amounting to murder, unless it is established that such killing was not an offence under the law. Under the scheme of criminal law prevailing in India, it would not be an offence if the death is caused in exercise of right of private defence. Another provision under which the police officer can justify causing the death of a person, is section 46 of the Criminal Procedure Code. This provision authorizes the police to use reasonable force, even extending up to the causing of death, if found necessary to arrest the person accused of an offence punishable with death or imprisonment for life. Thus, it is evident that death caused in an encounter if not justified would amount to an offence of culpable homicide.

The Commission while dealing with complaint 234 (1 to 6)/ 93-94 and taking note of grave human rights issue involved in alleged encounter deaths, decided to recommend procedure to be followed in the cases of encounter death to all the states. Accordingly, Hon'ble Justice Shri M.N. Venkatachaliah, the then Chairperson NHRC, wrote a letter dated 29/3/ 1997 to all the Chief Ministers recommending the procedure to be followed by the states in "cases of encounter deaths" (copy enclosed for ready reference).

Experience of the Commission in the past six years in the matters of encounter deaths has not been encouraging. The Commission finds that most of the states are not following the guidelines issued by it in the true spirit. It is of the opinion that in order to bring in transparency and accountability of public servants, the existing guidelines require some modifications.

Though under the existing guidelines, it is implicit that the States must send intimation to the Commission of all cases of deaths arising out of police encounters, yet some States do not send intimation on the pretext that there is no such specific direction. As a result, authentic statistics of deaths occurring in various states as a result of police action are not readily available in the Commission. The Commission is of the view that these statistics are necessary for effective protection of human rights in exercise of the discharge of its duties.

On a careful consideration of the whole matter, the Commission recommends following modified procedure to be followed by the State Governments in all cases of deaths in the course of police action:-

- A. When the police officer in charge of a Police Station receives information about the deaths in an encounter between the Police party and others, he shall enter that information in the appropriate register.
- B. Where the police officers belonging to the same Police Station are members of the encounter party, whose action resulted in deaths, it is desirable that such cases are made over for investigation to some other independent investigating agency, such as State CBCID.
- C. 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 I.P.C. Such case shall invariably be investigated by State CBCID.
- D. A Magisterial Inquiry must invariably be held in all cases of death which occur in the course of police action. The next of kin of the deceased must invariably be associated in such inquiry.
- E. Prompt prosecution and disciplinary action must be initiated against all delinquent officers found guilty in the magisterial enquiry/ police investigation.
- F. Question of granting of compensation to the dependents of the deceased would depend upon the facts and circumstances of each case.
- G. 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.
- H. A six monthly statement of all cases of deaths in police action in the State shall be sent by the Director General of Police to the Commission, so as to reach its office by the 15th day of January and July respectively. The statement may be sent in the following format along with post-mortem reports and inquest reports, wherever available and also the inquiry reports:-
 - 1. Date and place of occurrence
 - 2. Police Station, District.
 - 3. Circumstances leading to deaths:

- i. Self defence in encounter
 - ii. In the course of dispersal of unlawful assembly
 - iii. In the course of effecting arrest.
4. Brief facts of the incident
5. Criminal Case No.
6. Investigating Agency
7. Findings of the magisterial Inquiry/enquiry by Senior Officers:
 - a. disclosing in particular names and designation of police officials, if found responsible for the death; and
 - b. whether use of force was justified and action taken was lawful.

It is requested that the concerned authorities of the State are given appropriate instructions in this regard so that these guidelines are adhered to both in letter and in spirit.

With regards,

Yours sincerely,

Sd/-

(A.S. Anand)

To

All Chief Ministers of States/UTs

10.3 Revised Guidelines/Procedures to be followed in cases of deaths caused in police action, 12.5.2010

Justice G.P. Mathur
Acting Chairperson
(Former Judge, Supreme
Court of India)

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New Delhi-110 001
Phone: 91-11-23387328
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E-mail: gp.mathur@nic.in

D.O. NO.4/7/2008-PRP&P

12th May, 2010

Dear Chief Minister,

The National Human Rights Commission is concerned about the death during the course of a police action. The police does not have a right to

take away the life of a person. Under the scheme of criminal law prevailing in India, it would not be an offence if the death is caused in exercise of right of private defence. Another provision under which the police officer can justify causing the death of a person, is section 46 of the Criminal Procedure Code. This provision authorizes the police to use reasonable force, even extending up to the causing of death, if found necessary to arrest the person accused of an offence punishable with death or imprisonment for life. Thus, it is evident that death caused in an encounter if not justified would amount to an offence of culpable homicide.

The Commission considered the issue and recommended a procedure to be followed in the cases of encounter death by all the States/UTs in the country. The guidelines were conveyed to all the States/UTs vide letter dated 29.3.1997, which were further revised vide letter dated 2.12.2003.

The Commission finds that most of the States are not following the recommendations issued by it in the true spirit. The matter was again considered by the Commission and it was felt that the existing guidelines require some modifications. After a careful consideration of the whole matter, the Commission has revised the procedure to be followed by the States/UTs in all cases of deaths in the course of police action. Revised guidelines are enclosed herewith.

It is requested that the concerned authorities of the State/UT may be given appropriate instructions to follow the enclosed guidelines in all cases where death is caused in police action.

With regards,

Yours sincerely,

(G P Mathur)

Shri K. Rosaiah,
Chief Minister,
Government of Andhra Pradesh, CI Secretariat,
Hyderabad-500 022

- A. Revised Guidelines/Procedures to be followed in cases of deaths caused in police action.**
- B. When the police officer in charge of a Police Station receives information about death in an encounter with the Police, he shall enter that information in the appropriate register.

- C. 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.
- D. 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 I.P.C. Such case shall be investigated by State CBCID or any other specialised investigation agency.
- E. 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 encounter, police station records etc. must be examined while conducting such enquiry.
- F. Prompt prosecution and disciplinary action must be initiated against all delinquent officers found guilty in the magisterial enquiry/ police investigation.
- G. 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.
- H. (a) All cases of deaths in police action in the states shall be reported to the
- I. Commission by the Senior Superintendent of Police/ Superintendent of Police of the District within 48 hours of such death in the following format:
 - 1. Date and place of occurrence
 - 2. Police station, district
 - 3. Circumstances leading to death:
 - (i) Self defence in encounter
 - (ii) In course of dispersal of unlawful assembly
 - (iii) In the course of effecting arrest

(iv) Any other circumstances

4. Brief facts of the incident
5. Criminal case No.
6. 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 following information:

1. Postmortem report
2. Inquest report
3. Findings of the magisterial enquiry/ enquiry by senior officers disclosing:-
 - i. Names and designation of police official, if found responsible for the death;
 - ii. Whether use of force was justified and action taken was lawful;
 - iii. 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
 - iv. Report of the Ballistic Expert on examination of the weapons alleged to have been used by the deceased and his companions.

11. Annexure 2: Key judgments of the High Courts and Supreme Courts

11.1 Supreme Court judgment in People's Union for Civil Liberties Vs Union of India, 5.2.1997

Supreme Court of India

People's Union for Civil Liberties vs Union of India and Anr
on 5 February, 1997

Bench: B.P. Jeevan Reddy, S.C. Sen

CASE NO.: Writ Petition (crl.) 612 of 1992

PETITIONER: PEOPLE'S UNION FOR CIVIL LIBERTIES

RESPONDENT: UNION OF INDIA AND ANR.

DATE OF JUDGMENT: 05/02/1997

BENCH: B.P. JEEVAN REDDY & S.C. SEN

JUDGMENT :

JUDGMENT 1997(1) SCR 923 The Judgment was delivered by B. P. JEEVAN REDDY, J.

B. P. JEEVAN REDDY, J. -

1. People's Union for Civil Liberties has filed this writ petition under Article 32 of the Constitution of India for issuance of a writ of mandamus or other appropriate order or direction (1) to institute a judicial inquiry into the fake encounter by Imphal Police on 3-4-1991 in which two persons of Lunthilian Village were killed, (2) to direct appropriate action to be taken against the erring police officials and (3) to award compensation to the members of the families of the deceased. According to the petitioner, there was in truth no encounter but it was a case where certain villagers were caught by the police during the night of 3-4-1991, taken in a truck to a distant place and two of them killed there. It is alleged that three other persons who were also caught and taken away along with two deceased persons were kept in police custody for a number of days and taken to Mizoram. They were released on bail only on 22-7-1991. It is further submitted that Hmar Peoples' Convention is political party active in Mizoram. It is not an unlawful organization. Even

according to the news released by the said organization, it was a case of deliberate killing. Though representations were made to the Chief Minister of Manipur and other officials, no action was taken. Along with the writ petition, affidavit of the persons who were taken into custody along with the deceased, taken in a truck and kept in custody for a number of days, were filed. Affidavits of the wives of the deceased were also filed setting out the miserable condition of their families after the death of their respective husbands

2. On notice being given, counter-affidavit was filed by the Joint Secretary (Home), Government of Manipur denying the allegations. The allegation of “flake encounter” was denied. It was submitted that there was genuine cross-firing between the police and the activists of Hmar Peoples’ Convention during which the said two deaths took place. The report of the Superintendent of Police, Churachandpur was relied upon in support of the said averment. It was submitted that Hmar Peoples’ Convention was indulging in illegal and terrorist activities and in acts disturbing the public order. Particulars of several FIRs issued in respect of crimes committed by them under different police stations in that area were set out. The truth and correctness of the supporting affidavits was also disputed. Along with the counter-affidavit, copies of post-mortem reports were filed.

3. After hearing the counsel for both parties, this Court directed, by its order dated 30-5-1995, that the learned District and Sessions Judge, Churachandpur shall make an inquiry into the alleged incident and submit his report as to what exactly happened on that day. Subsequently, that inquiry was entrusted to the learned District and Sessions Judge, Manipur (West), who has submitted this report dated 8-4-1996. The learned District and Sessions Judge has concluded that “there was no encounter in the night between 3-4-1991 and 4-4-1991 at Nungthulien Village. The two deceased, namely, Lalbeiklien and Saikaplien were shot dead by the police while in custody on 4-4-1991”. The State of Manipur has filed its objections to the report along with certain documents which according to them purport to disprove the correctness of finding recorded by the learned District and Sessions Judge.

4. We have heard the counsel for the parties. We are satisfied that there are any reasons for not accepting of the learned District and Sessions Judge which means that the said deceased persons were taken into custody on the night of 3-4-1991, taken in a truck to a long distance away and shot there. The question is what are the reliefs that should be granted in this writ petition?

5. It is submitted by Ms. S. Janani, the learned counsel for the State of Manipur, that Manipur is a disturbed area, that there are several terrorist groups operating in the State, that Hmar Peoples' Convention is one of such terrorist organizations, that they have been indulging in a number of crimes affecting the public order - indeed, affecting the security of the State. It is submitted that there have regular encounters and exchange of fire between police and terrorists on a number of occasions. A number of citizens have suffered at the hands of terrorists and many people have been killed. The situation is not a normal one. Information was received by the police that terrorists were gathering in the house on that night and on the basis of that information, police conducted the raid. The raiding party was fortunate that the people inside the house including the deceased did not notice the police, in which case the police would have suffered serious casualties. The police party was successful in surprising the terrorists. There was exchange of fire resulting in the death of the terrorists.

6. In view of the fact that we have accepted the finding recorded by the learned District and Sessions Judge, it is not possible to accede to the contention of Ms. Janani insofar as the manner in which the incident had taken place. It is true that Manipur is a disturbed area, that there appears to be a good amount of terrorist activity affecting public order and, may be, even security of that State. It may also be that under these conditions, certain additional and unusual powers have to be given to the police to deal with terrorism. It may be necessary to fight terrorism with a strong hand which may involve vesting of good amount of discretion in the police officers or other paramilitary forces engaged in fighting them. If the version of the police with respect to the incident in question were true, there could have been no question of any interference by the court. Nobody can say that the police should wait till they are shot at. It is for the force on the spot to decide when to act, how to act and where to act. It is not for the court to say how the terrorists should be fought. We cannot be blind to the fact that even after fifty years of our independence, our territorial integrity is not fully secure. There are several types of separatist and terrorist activities in several parts of the country. They have to be subdued. Whether they should be fought politically or be dealt with by force is a matter of policy for the Government to determine. The courts may not be the appropriate forum to determine those questions. All this is beyond dispute. But the present case appears to be one where two persons along with some others were just seized from a hut, taken to a long distance away in a truck and shot there. This type of activity cannot certainly be countenanced by the courts even in

the case of disturbed areas. If the police had information that terrorists were gathering at a particular place and if they had surprised them and arrested them, the proper course for them was to deal with them according to law. “Administrative liquidation” was certainly not a course open to them

7. Shri Rajinder Sachar, learned counsel for the petitioner, submits that in view of the findings of the learned District and Sessions Judge, this is a proper case where this Court should order the prosecution of the police officials concerned and also award compensation to the families of the deceased.

8. In *Challa Ramkonda Reddy v. State of A. P.* 1989 AIR(AP) 235 : (1989) 2 Andh LT 1], a decision of the Division Bench of the Andhra Pradesh High Court, one of us (B. P. Jeevan Reddy, J.) dealt with the liability of the State where it deprives a citizen of his right to life guaranteed by Article 21. It was held “In our opinion, the right to life and liberty guaranteed by Article 21 is so fundamental and basis that no compromise is possible with this right. It is ‘non-negotiable’. The State has no right to take any action which will deprive a citizen of the enjoyment of this basis right except in accordance with a law which is reasonable, fair and just.”

The decision also dealt with the question whether the plea of sovereign immunity is available in such a case. The following observations are relevant “The question, however, arises whether it is open to the State to deprive a citizen of his life and liberty otherwise than in accordance with the procedure prescribed by a law and yet claim an immunity on the ground that the said deprivation of life occurred while the officers of the State were exercising the sovereign power of the State?

Can the fundamental right to life guaranteed by Article 21 be defeated by pleading the archaic defence of sovereign functions? Does it mean that the said theory clothes the State with the right to violate the fundamental right to life and liberty, guaranteed by Article 21? In other words, does the said concept constitute an exception to Article 21? We think not. Article 21 does not recognize any exception, and no such exception can be read into it by reference to clause (1) of Article 300. 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.”

9. Reliance was placed in the said decision upon the decision of the Privy Council in *Maharaj v. Attorney General of Trinidad and Tobago* [[1978] 2 All E.R. 670: 1978 (2) WLR 902: [1979] A.C. 385, PC]. After setting out the relevant provisions of the Constitution of Trinidad and Tobago, it was pointed out that Section (1) of that Constitution corresponds inter alia to Section 21 of our Constitution, while Section 2 and Section 6 of that Constitution correspond to Articles 13 and 32/226 of our Constitution. Applying the reasoning of the Privy Council, it was held by the High Court “The fundamental rights are sacrosanct. They have been variously described as basis, inalienable and inderogable. 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 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.”

10. In *Nilabati Behera v. State of Orissa* [1993 (2) SCC 746: 1993 SCC (Cri) 527] this Courts (J. S. Verma, Dr. A. S. Anand and N. Venkatachala, JJ.) held that award of compensation in a proceeding under Article 32 by the Supreme Court or under Article 226 by the High Court is a remedy available in public law based on strict liability for contravention of fundamental rights. It is held that the defence of sovereign immunity does not apply in such a case even though it may be available as a defence in private law in an action based on tort. It is held further that the award of damages by the Supreme Court or the High Court in a writ proceeding is distinct from and in addition to the remedy in private law for damages. It is one mode of enforcing the fundamental rights by this Court or High Court. Reliance is placed upon Article 9(5) of the International Covenant on Civil and Political Rights, 1966 which says, “anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation”. The two opinions rendered by J. S. Verma, J. Dr. A. S. Anand, J. are unanimous on the aforesaid dicta. The same view has been reiterated very recently by a Bench comprising Kuldeep Singh and Dr. A. S. Anand, JJ. in *D. K. Basu v. State of W. B.* [1997 (1) SCC 416: 1997 SCC (Cri) 92: (1996) 9 Scale 298]. The observations in para 54 of the judgment are apposite and may be quoted: (SCC P. 443, para 54) “Thus, to sum up, it is now a well-accepted proposition in most of

the jurisdictions, that monetary or pecuniary compensation is an appropriate and indeed an effective and sometimes perhaps the only suitable remedy for redressal of the established infringement of the fundamental right to life of a citizen by the public servants and the State is vicariously liable for their acts. The claim of the citizen is based on the principle of strict liability to which the defence of sovereign immunity is not available and the citizen must receive the amount of compensation from the State, which shall have the right to be indemnified by the wrongdoer. In the assessment of compensation, the emphasis has to be on the compensatory and not on punitive element. The objective is to apply balm to the wounds and not to punish the transgressor or the offender, as awarding appropriate punishment for the offence (irrespective of compensation) must be left to the criminal courts in which the offender is prosecuted, which the State, in law, is duty-bound to do. The award of compensation in the public law jurisdiction is also without prejudice to any other action like civil suit for damages which is lawfully available to the victim or the heirs of the deceased victim with respect to the same matter for the tortuous act committed by the functionaries of the State. The quantum of compensation will, of course, depend upon the peculiar facts of each case and no strait-jacket formula can be evolved in that behalf. The relief to redress the wrong for the established invasion of the fundamental rights of the citizens, under the public law jurisdiction is, thus, in addition to the traditional remedies and not in derogation of them. The amount of compensation as awarded by the Court and paid by the State to redress the wrong done, may in a given case, be adjusted against any amount which may be awarded to the claimant by way of damages in a civil suit.”

11. The reference to and reliance upon Article 9(5) of the International Covenant on Civil and Political Rights, 1996 in Nilabati Behera [1993 (2) SCC 746 : 1993 SCC(Cri) 527] raises an interesting question, viz., to what extent can the provisions of such international covenants/conventions be read into national laws. This issue has been the subject-matter of a recent decision in Australia, viz., Minister for Immigration and Ethnic Affairs v. Teoh [(1995) 69 Aus LJ 423]. The United Nations Convention on the Rights of the Child was ratified by the Commonwealth Executive in December 1990 and had force in Australia from 16-1-1991 pursuant to declaration made on 22-12-1992 by the Attorney General pursuant to Section 47(1) of the Human Rights and Equal Opportunity Commission Act, 1986 to the effect that the said convention is an international instrument relating to human rights. Respondent Teoh, a Malaysian citizen was found to have imported and be in possession of heroin, for which he was convicted. A deportation

order was passed on that basis. The Immigration Review Panel opined that deportation of Teoh would deprive his young children (who were Australian citizens) of their only financial support, landing them in bleak misery. Article 3 of the aforesaid Convention provides that “1. In all actions concerning children, whether undertaken by public or private social welfare institution, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

Teoh invoked this article to ward off his deportation. The matter was carried to the High Court where the question of enforceability of the Convention by the national courts was thoroughly debated. Mason, C.J., speaking for himself and Dean, J., stated the position in the following words “It is well established that the provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into our municipal law by statute. (Chow Hung Ching v. King [1948 (77) CLR 449], CLR at p. 478; Bradley v. Commonwealth [1973 (128) CLR 557], CLR 582; Simsek v. Macphee [1982 (148) CLR 636], CLR at pp. 641-642; Koowarta v. Bjelke- Petersen [1982 (153) CLR 168], CLR at pp. 211-212, 224-25; Kioa v. West [1985 (159) CLR 550], CLR at p. 570; Dietrich v. Queen [1992 (177) CLR 292], CLR at p. 305; J. H. Rayner Ltd. v. Deptt. of Trade [[1990] 2 A.C. 418 : [1989] 3 All E.R. 523 : 1989 (3) WLR 969], AC at

550.) This principle has its foundation in the proposition that in our constitutional system the making and ratification of treaties fall within the province of the Executive in the exercise of its prerogative power whereas the making and the alternation of the law fall within the province of Parliament, not the Executive. (Simsek v. Macphee [1982 (148) CLR 636], CLR at pp. 641-42.) So, a treaty which has not been incorporated into our municipal law cannot operate as a direct source of individual rights and obligations under that law. In this case, it is common ground that the provisions of the Convention have not been incorporated in this way. It is not suggested that the declaration made pursuant to Section 47(1) of the Human Rights and Equal Opportunity Commission Act has this effect But the fact that the Convention has not been incorporated into Australian law does not mean that its ratification holds no significance for Australian law. Where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia’s obligations under a treaty or international convention to which Australia is a party (Chu Kheng Lim v. Minister for Immigration [1992 (176) CLR 1] CLR at p. 38), at least in those cases in which the legislation is

enacted after, or in contemplation of, entry into, or ratification of, the relevant international instrument. That is because Parliament, *prima facie*, intends to give effect to Australia's obligations under international law. It is accepted that a statute is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with the established rules of international law (*Polites v. Commonwealth* [1945 (70) CLR 60], CLR at pp. 68-69, 77, 80-81) Apart from influencing the construction of a statute or subordinate legislation, an international convention may play a part in the development by the courts of the common law. The provisions of an international convention to which Australia is a party, especially one which declares universal fundamental rights, may be used by the courts as a legitimate guide in developing the common law. [*Mabo v. Queensland (No. 2)* [1991 (175) CLR 1], CLR at p. 42, per Brennan, J. (with whom Mason C.J. and McHugh, J. agreed); *Dietrich v. Queen* [1992 (177) CLR 292] (CLR at p. 321), per Brennan J., at p. 360, per Toohey, J.; *Jago v. District Court of New South Wales* [(1988) 12 NSW LR 558] (NSWLR at p. 569), per Kirby, J.; *Derbyshire Country Council v. Times Newspapers Ltd.* [1992 QB 770]]. But the courts should act in this fashion with due circumspection when Parliament itself has not seen fit to incorporate the provisions of a convention into our domestic law. Judicial development of the common law must not be seen as a backdoor means of importing an unincorporated convention into Australian law. A cautious approach to the development of the common law by reference to international conventions would be consistent with the approach which the courts have hitherto adopted to the development of the common law by reference to statutory policy and statutory materials (*Lamb v. Cotogno* [1987 (164) CLR 1], CLR at pp. 11-12). Much will depend upon the nature of relevant provision, the extent to which it has been accepted by the international community, the purpose which it is intended to serve and its relationship to the existing principles of our domestic law.”

12. Toohey, J. and Gaudron, J. Broadly concurred with the above opinion. Toohey, J. spoke of such Conventions giving rise to legitimate expectation among the people that the Executive will honour the commitment while taking any action concerning children while Gaudron, J. relegated the Convention to a subsidiary position vis-a-vis Australian statute law. (McHung, J. dissented altogether.)

13. The main criticism against reading such conventions and covenants into national laws is one pointed out by Mason, C.J. himself, viz., the ratification of these conventions and covenants is done, in most of the countries by the Executive acting alone and that the prerogative of making

the law is that of Parliament alone; unless Parliament legislates, no law can come into existence. It is not clear whether our Parliament has approved the action of the Government of India ratifying the said 1966 Covenant. Indeed, it appears that at the time of ratification of the said Covenant in 1979, the Government of India had made a specific reservation to the effect that the Indian legal system does not recognize a right to compensation for victims of unlawful arrest or detention. This reservation has, of course, been held to be of little relevance now in view of the decision *Nilabati Behera* [1993 (2) SCC 746 : 1993 SCC(Cri) 527]. [See page 313, para 43 SCC(p) 438, para 42) in *D. K. Basu* [1997 (1) SCC 416 : 1997 SCC(Cri) 92 : (1996) 9 Scale 298].] Assuming that it has, the question may yet arise whether such approval can be equated to legislation and invests the Covenant with the sanctity of a law made by Parliament. As pointed out by this Court in *S. R. Bommai v. Union of India* [1994 (3) SCC 1], every action of Parliament cannot be equated to legislation. Legislation is no doubt the main function of Parliament but it also performs many other functions all of which do not amount to legislation. In our opinion, this aspect requires deeper scrutiny than has been possible in this case. For the present, it would suffice to state the provisions of the covenant, which elucidate and go to effectuate the fundamental rights guaranteed by our Constitution, can certainly be relied upon by courts as facets of those fundamental rights and hence, enforceable as such. So far as multilateral treaties are concerned, the law is, of course, different - and definite. See United States Supreme Court decisions in *Elisa Chan v. Korean Airlines Ltd.* [(104 L Ed 2d 113] and *Eastern Airlines v. Floyd* [113 L Ed 2d 569] and the House of Lords decision in *Equal Opportunities Commission v. Secy. of State for Employment* [1994 ICR 317 : [1994] 1 All E.R. 910 following its earlier decisions, including *Factortame (No. 2)* [*Factortame Ltd. v. Secy. of State for Transport (No. 2)*], [1991] 1 A.C. 603 : [1991] 1 All E.R. 70 : 1990 (3) WLR 818]

14. Now coming to the facts of the case, we are of the opinion that award of compensation of Rs. 1,00,000 (Rupees one lakh only) to the families of each of the deceased would be appropriate and just. The same shall be paid by the Government of Manipur. The Collector/District Magistrate, Churachandpur shall hand over the cheques to the respective families of the deceased, namely Lalbeiklien and Saikaplien, within two months from today. The writ petition is disposed of accordingly. The People's Union for Civil Liberties, which has filed this writ petition and pursued it all these years shall be entitled to its costs, assessed at Rs. 10, 000 (Rupees ten thousand only) payable by the State of Manipur within the same period.

11.2 Andhra Pradesh High Court judgment in A.P. Civil Liberties Committee Vs. Government of A.P. dated 6.2.2009

A.P. Civil Liberties Committee (APCLC) Rep. by Its President, Mr. S. Subhash Chandra Bose and ors. Vs. Government of A.P. Rep by Its Principal Secretary, Home Department and ors. - Court Judgment

Subject	Criminal
Court	Andhra Pradesh High Court
Decided On	Feb-06-2009
Case Number	Writ Petition Nos. 15419 of 2006, 26358 of 1999, 7906 of 2000, 14475 of 2002, 440 of 2003 and 857 of
Judge	Goda Raghuram, ;V.V.S. Rao, ;R. Subhash Reddy, ;Ramesh Ranganathan and ;G. Bhavani Prasad, JJ.
Reported in	2009(1)ALT754
Acts	Right to Information Act (RTI), 2005 - Sections 6, 6(3), 8(1) and 19; Evidence Act, 1872 - Sections 1, 21, 25, 81, 105, 123, 145 and 157; Arms Act, 1959 - Sections 25 and 27; Explosive Substances Act, 1908 - Sections 5; APPS - Sections 8; Commission of Inquiries Act, 1962; Customs Act, 1962 - Sections 106, 106(2) and 155; Gold (Control) Act, 1968 - Sections 108; Ku Klux Klan Act, 1871; Indian Penal Code (IPC), 1860 - Sections 6, 34, 52A, 76 to 106, 135, 147, 148, 149, 201, 202, 203, 204, 216, 217, 221, 299, 300, 302, 304, 304A, 307, 332, 408, 420, 452, 499, 500 and 506; Code of Criminal Procedure (CrPC) , 1973 - Sections 2, 37, 39, 40, 41, 43, 46, 46(1), 46(2), 46(3), 129 to 132, 132(1), 132, 132(2), 133, 134, 149, 151, 152, 153(3), 154, 154(1), 154(2), 154(3), 155, 156, 156(1), 156(3), 1

Appellant	A.P. Civil Liberties Committee (Apclc) Rep. by Its President, Mr. S. Subhash Chandra Bose and ors.
Respondent	Government of A.P. Rep by Its Principal Secretary, Home Department and ors.
Appellant Advocate	Bojja Tarakam, Sr. Counsel,; D. Suresh Kumar,; K. Balagopal,; K.G. Kannabiran, Sr. Counsel,; V. Raghunath, ;Balla Ravindranath and ; Kolla Savithri Devi, Advs.; C. Padmanabha Reddy, Sr. Counsel
Respondent Advocate	Adv. General, ;G.P. for Home and ;Uday Lali and ; K.G. Kannabiran, Sr. Counsel, ; Nitya Ramakrishana, ;Trideep Pais, ;C. Sadasiva Reddy, ;S.K. Ratna and ;T. Niranjana Reddy, Advs.

Judgment:

ORDER

Goda Raghuram, J.

Competing interpretations of recurrent-contemporaneous events:

1. Since the inception of the Naxalite movement in Andhra Pradesh in 1969, 551 police personnel were killed including one DIG, two S.Ps, five D.S.Ps; 16 Inspectors and 49 Sub-Inspectors. 2928 civilians were killed; public and private property worth hundred of crores of rupees was destroyed; the extremist groups indulged in mindless violence and committed brutal murders. The Naxal violence increased since 1991. They deliberately ambush and attack police with sophisticated firearms and explosives. In order to create terror the Maoists are also targeting functionaries of ruling political parties and killing them brutally - (counter affidavit of the Director General of Police in W.P. No. 15419/06 including Annexures 2 and 7)

2. The State Executive for the first time started extra-legal killing which is popularly known as Encounter since 1968 and as on today in the name of alleged encounter the State has snatched away lives of about 4000 people during the last four decades - (written submissions dated 4.3.2008 of Mr. V. Raghunath, Advocate for APCLC, in W.P. Nos. 7906/2000, 14475/02 and 440/03)

3. The lesson for the MHA (Ministry of Home Affairs) is thus clear: it should advise state governments that brutal repression is no answer to the Naxalite movement; that the Naxalite ideology must be fought politically; that Naxalite criminal actions must be dealt with under the existing criminal and human rights laws; and that Naxalite social base, which springs from exploitation, inequality and injustice must be countered by purposeful political and administrative action to implement the promises made in the Preamble and the Directive Principles of State Policy of the Constitution. Police repression is attractive and easy to adopt by a government armed to the teeth with paramilitary forces, equipment, firepower and mobility! However, police repression only goes to strengthen the Maoist thesis on the class character of the Indian State. It is counter-productive and helps to increase the mass base of the Naxalites, which arises out of the failure of the State to deliver the developmental goods as mandated by the Constitution - Political Violence and the Police in India K.S. Subramanian: Political Violence and the Police in India pp 139-140 - Sage Publications, 2007.

4. Steven Pinker observes: The most important and underappreciated trend in the history of our species: is the decline of violence. Cruelty as popular entertainment, human sacrifice to indulge superstition, slavery as a labor-saving device, genocide for convenience, torture and mutilation as routine forms of punishment, execution for trivial crimes and misdemeanors, assassination as a means of political succession, pogroms as an outlet for frustration, and homicide as the major means of conflict resolution - all were unexceptional features of life for most of human history. Yet today they are statistically rare in the West, less common elsewhere than they used to be, and widely condemned when they do occur Psychologist: Harvard University; The decline of Violence.

5. According to the eminent historian Eric Hobsbawm: The twentieth century was the most murderous in recorded history. The total number of deaths caused by or associated with its wars is estimated at 187 million, the equivalent of more than 10 percent of the world's population in 1913. - - At the start of the twenty-first century we find ourselves in a world where armed operations are no longer essentially in the hands of governments or their authorized agents, and where the contending parties have no common characteristics, status or objectives, except the willingness to use violence Eric Hobsbawm - Globalisation, Democracy and Terrorism - Little, Brown-2007.

6. State action against terrorism (including the domestic variety), blurs legal, moral and ethical definitions of appropriate substantive and

procedural rules of peacetime law-enforcement engagement under constitutional norms of governance on the one hand; and war on the other. War is also a species of conflict; it is supposed to take place primarily between sovereign states or, if they occurred within the territory of one particular state, between parties sufficiently organized to be accorded belligerent status by other sovereign states. Hobsbawm observes: In recent years, the situation has been further complicated by the tendency in public rhetoric for the term 'war' to be used to refer to the deployment of organized force against various national or international activities regarded as anti-social - 'the war against the Mafia', for example, or the 'war against the drug cartels'. Not only is the fight to control, or even to eliminate, such rganizations or networks, including small-scale terrorist groups, quite different from the major operations of war; it also confuses the actions of two types of armed force. One - let us call them soldiers' - is directed against other armed forces with the object of defeating them. The action of the other -let us call them 'police' - sets out to maintain or re-establish the required degree of law and public order within an existing political entity, typically a state. Victory, which has no necessary moral connotation, is the object of one force: bringing to justice the offenders against the law, which does have a moral connotation, is the object of the other - (Hobsbawm - 3 supra note 2, at pages 21, 22 - emphasis is supplied). The distinction, between war and peacetime law enforcement within the framework of a legal regime under a constitutional order is critical and an issue of profound significance for civil society.

7. Democratic regimes world over are experiencing a fundamental shift in the approach to controlling harmful conduct. The shift is from the traditional reliance on deterrent and reactive strategies and towards increasingly preventive and proactive strategies. The shift has clear and momentous implications in areas of human rights, criminal justice administration, and security - national and international, foreign policy and critically for civil liberties jurisprudence.

8. The conceptual shift in emphasis from a theory of deterrence to a theory of prevention influences and substrates actions that Governments take to control dangerous human behavior. These range from preventive warfare; proactive crime prevention techniques including phone tapping, stings, informers and moles; surgical, psychiatric or chemical methods for preventing sexual predation; racial, religious, ethnic or other forms of profiling; prior restraint on dangerous or offensive speech; use of torture or other extraordinary measures towards gathering intelligence considered essential to prevent imminent acts of terrorism; as also targeted killings of terrorists Alan M. Dershowitz- Preemption-W.W. Norton & Co, 2006.

9. Executive and even judicial sanctions against life and liberty, it is axiomatic, must be explicitly spelt out in legislative authority. This is the essence of civilized and constitutional governance. In the context of our constitutional scheme and qua Article 21, the State shall not deprive any person of life or liberty except in accordance with the procedure established by law. Considered in the context of the several other fundamental values which substrate the Indian constitutional architecture, including those in Articles 14 and 19, it is beyond disputation that an executive agency of the State (including the police) is not authorized to deprive a person of his life without substantive legislative authority and in accordance with the procedure established by law. This non-derogable constitutional value and the concomitant executive and governance obligation could be preserved only by eternal vigilance towards maintaining the sanctity of life and liberty, effectuated and operationalised by relentless pursuit and administering of the sanctions enjoined by law, against depredation of life and liberty, by the unlawful conduct of any person, agency or instrumentality.

10. In a rule of law society operating under a constitutional order, either deterrent or preemptive executive action against prohibited human conduct including terrorist acts must be pursued only within the matrix of legislatively spelt out substantive and procedural rules of engagement and sanction. The executive, whether political or the professional has no legitimate authority to act in derogation, independent of or beyond the sanction of law. This is the price civil society and all institutions of government willingly pay for a constitutional way of life.

11. In this case, the Court is called upon to identify the balance between the right to life of presumptive serious offenders of law and order and of the equilibrium of civil society; and the sovereign obligation of the State to maintain such law and order equilibrium, within the context of constitutional injunctions and legislative authority.

12. Robert Jackson, J., recorded a profound observation on the principles that must substrate the balancing between liberty and authority. The jurist said: The task of this Court to maintain a balance between liberty and authority is never done, because new conditions today upset the equilibriums of yesterday. The seesaw between freedom and power makes up most of the history of governments, which, as Bryce points out, on a long view consists of repeating a painful cycle from anarchy to tyranny and back again. The Court's day-to-day task is to reject as false, claims in the name of civil liberty which, if granted, would paralyze or impair authority to defend existence of our society, and to reject as false, claims

in the name of security which would undermine our freedoms and open the way to oppression. These are the competing considerations involved in judging any measures which government may take to suppress or disadvantage its opponents and critics. -American Communications Association v. Douds 339 U.S. 382 (1950).

Summary of the factual matrix of the cases on board:

13. W.P. No. 15419 of 2006 is instituted by the Andhra Pradesh Civil Liberties Committee (for short 'the APCLC) for a direction to the concerned police to register a crime into the offence of killing of eight (8) Maoist Naxalites in an alleged encounter that occurred on 23-07-2006 in the Nallamala Forest near Darboina Penta and Nekkanti Palutla villages of Yerragondapalem mandal, Prakasham District, by registering a case under Section 302 of the Indian Penal Code, 1860 (for short 'the IPC) against the police personnel who participated in the alleged encounter; to initiate proceedings for their prosecution; to call for all the records with regard to the crime registered on this encounter; and to pass such other order or orders as may be deemed fit and proper in the circumstances of the case.

14. The sister of one of the deceased Rajitha @ Shyamal filed W.P. No. 857 of 2008 in respect of the same incident as is covered by the above writ petition. The petitioner seeks disclosure of the identity of 15 members of District Special Police, S.I and P.C. Nos. 430 and 1843 of Yerragondapalem P.S. and a direction to register a case against the concerned police officers Under Section 302 IPC in view of their involvement in the death by encounter of petitioner's sister and 7 others.

15. W.P. No. 26358 of 1999 is filed for a declaration that the inaction of the respondents Nos. 3 and 6 in proceeding under law against the concerned Police officers of the 1st respondent P.S. (for having opened fire without provocation thereby severely injuring the petitioner's husband on 15.6.1999 evening at Gajasingavaram, Gambhirraopet Mandal, Karimnagar District) and failing to take financial and other responsibility for the medical care and well being of the injured, is arbitrary and illegal; for a direction to the 6th respondent to provide adequate medical treatment; for compensation in an amount of Rs. 2 lakhs towards damages and costs of the medical expenses incurred; and for a further direction to the respondents 3 and 6 to prosecute the concerned police personnel of the 1st respondent P.S. in accordance with law.

16. W.P. No. 7906 of 2000 also is by the APCLC for preservation of the bodies of the persons killed in an encounter that occurred in Kaukonda

Hills, Parkal Mandal, Warangal District; for handing over the bodies to the family members after identification; and for a direction to register a crime Under Section 302 IPC.

17. W.P. No. 14475 of 2002 is again by the APCLC to direct the 6th respondent to register a case Under Section 302 r/w Section 34 IPC against the respondents 1 to 5; direction to the State (R-7) to entrust the investigation in the said case to the C.B.I. (R-18) in relation to the death in encounter of one Durga Prasad @ Pilli Prasad at Vijayawada on 7.6.2002; and for suitable compensation to the family members of the deceased. The deceased Durga Prasad was arrested by the Vuyyur Town Police on 19.5.2002 in connection with Cr. No. 75/02 alleging his involvement in the murder of Sirikonda Venkanna. According to the version of the State during the course of investigation in Cr. No. 75/02 Durga Prasad was perceived to be concerned with Cr. No. 161/02 for the death of one Peyyala Ramu. He was taken into custody in respect of that crime too. While in police custody and in the early hours of 5.6.2002 when the accused Durga Prasad was being escorted out of the police lock up for answering calls of nature he escaped and Cr. No. 444/02 was registered against him. On 7.6.2002 during the efforts to trace the absconder Durga Prasad and on information the police party proceeded towards Gunadala Railway Station. On the night of 8.6.2002 the police found two persons consuming liquor. On questioning the identity of the two persons, one escaped under the cover of darkness and the other attacked the Inspector with a knife and inflicted bleeding injuries. The S.I. fired in private defence resulting in instantaneous death. The deceased was identified as Durga Prasad. Thereupon Cr. No. 448/02 was registered under Sections 332, 307 and 100 r/w 34 IPC and Section 134 Cr.P.C. and investigation taken up.

18. W.P. No. 440 of 2003 is by the APCLC for preservation of 6 bodies killed in two different alleged 'fake encounters' occurred on 5.1.2003 and 6.1.2003 within the jurisdiction of the respondents 1 and 2 P.S.; to direct post mortem by a team of forensic doctors duly videographed; to hand over the bodies to the family members; and to register a case Under Section 302 IPC against the Police Officers involved in the two incidents.

19. W.P. No. 15419 of 2006 (the lead writ petition) was admitted on 27-09-2006 and certain interlocutory directives were issued. By way of W.P.M.P. No. 20579 of 2007 the petitioner sought a direction to the respondent Nos. 3, 5 and 8 to reveal the names of the members of the police special party who participated in the operations that resulted in the death of eight (8) Maoist Naxalites on 23-07-2006. This Court by

an order dated 30-07-2007 rejected this application on the ground that the petitioner had made no such request to the concerned authority under the Right to Information Act, 2005 (for short 'the Information Act, 2005').

20. The petitioner submitted an application on 01-08-2007 to the 3rd and 5th respondents and the Deputy Superintendent of Police, Gurajala, Guntur district, the Investigating Officer in Cr. No. 30 of 2006 for particulars of the police officers who participated in the encounter. The 5th respondent who is the designated Information Officer under the Information Act 2005 rejected the application on 30-08-2007. The petitioner thereupon filed W.P.M.P. No. 29843 of 2007 for a direction to the respondents to reveal the names of the police officers. In response thereto, the first respondent-State filed W.P.M.P. No. 31250 of 2007 claiming privilege under Section 123 of the Indian Evidence Act regarding disclosure of names, on the ground that it would adversely affect the security, law and order in the State.

21. A Division Bench of this Court on 30-11-2007 directed the writ petition to be listed before a Full Bench having regard to the issues raised in the writ petition as also the claim of privilege by the State.

22. The Full Bench by its order dated 04-12-2007 referred the writ petition along with the interlocutory applications therein (W.P.M.P. Nos. 29843 of 2007 and 31250 of 2007) to be heard and decided by a Larger Bench of five Judges.

23. Earlier, a Full Bench of this Court in *A.P. Civil Liberties Committee v. State of A.P (APCLC) : 2007(5)ALT639* had considered the issue regarding the nature of the action to be taken in the event of death of an individual in an encounter with the police and per majority recorded the following conclusions:

- (a) No crime can be registered under Section 307 I.P.C. against a person killed in an encounter;
- (b) Whenever a person is found dead out of bullet injuries in an encounter, with the police,
 - (i) If a specific complaint is made alleging that any identified individual had caused the death of such person, an independent F.I.R. shall be registered in it, if it satisfied the law laid down by the Supreme Court in *State of Haryana and Ors. v. Bhajan Lal and Ors. : 1992CriLJ527* ,

(ii) In the absence of any complaint, the procedure prescribed under Section 176 of the Cr.P.C. shall be followed, without prejudice to any investigation that may be undertaken by the Police itself.

(iii) The judgment in *People's Union for Civil Liberties v. Union of India* : AIR1997SC1203 does not represent the correct legal position.

24. In view of the privilege claim by the State (regarding disclosure of names), the (referring) Full Bench opined that the following five (5) issues and other related questions may necessitate reconsideration of the judgment in APCLCs case : 2007(5)ALT639 . The specific issues/questions referred to the Larger Bench are:

(1) What would be the remedy available in law to a complainant who is unaware of the identity of the individual police officer whose firing had caused the death of a person due to bullet injuries?

(2) Whether the Executive is bound to disclose or can it claim privilege from disclosing the identity of the said police officer?

(3) In selectively refusing to disclose the identity of such police officer/s, is the Executive not exercising the judicial power of the State and conclusively to judge for itself whether the officer/officers concerned had acted in self-defence?

(4) If so, would such usurpation of the judicial power of the State, by an Executive act of claiming privilege, not result in deprivation of life and personal liberty otherwise than in accordance with the procedure established by law violating Article 21 of the Constitution of India?

(5) Does the Executive have the power to determine to what extent the rights conferred by Part-III should be restricted or abrogated in their application to the police force of the State when such power is conferred exclusively only on the parliament under Article 33 of the Constitution of India?

25. On 31-12-2007 while considering the draft issues presented on behalf of the petitioner, this Court granted liberty to all the parties to file their respective draft issues. After hearing the learned Counsel for the respective parties and considering the draft issues, this Bench on 07-02-2008 framed the following issues for consideration:

ISSUES :

(1) Where a police officer causes the death of a person, acting or purporting to act in discharge of official duties or in self-defence as the case may be, is there commission of a cognizable offence (including in an appropriate case the offence of culpable homicide); and whether the information relating to such circumstances requires to be registered as a First Information Report obligating investigation in accordance with the procedure prescribed by the Code of Criminal Procedure, 1973?

(2) Whether the existence of circumstances bringing a case within any of the exceptions in the Indian Penal Code, 1860 including exercise of the right of private defence be could conclusively determined during investigation; whether the final report submitted by the police officer to the Magistrate on completion of the investigation is conclusive or whether the existence of the circumstances coming within the exceptions requires to be determined only in appropriate judicial proceedings?

(3) Whether a magisterial enquiry (whether under the Code of Criminal Procedure or extant Police Standing Orders) into the cause and circumstances of death occasioned by an act of a police officer obviate the rigor of investigation and trial of such act?

(4) Whether the State, the police establishment or a police officer is immune from an obligation to disclose the identity of a Police Officer who had committed an act causing the death of a person, to enable an investigating officer or any person aggrieved by such death to effectively seek justice; and if so, in what circumstances or contexts?

26. Apart from W.P. 15419 of 2006, the other writ petitions were also tagged on to enable the parties in those writ petitions to present their points of view on the issues framed on 07-02-2008 for consideration by this Bench. We have already recorded in brief the reliefs sought in the above writ petitions.

27. Heard Sri Bojja Tarakam, the learned Senior Counsel for the petitioner in W.P. No. 15419 of 2006; Sri K. G. Kannabiran, the learned Senior Counsel for the respondent No. 9 in this writ petition and for the petitioner in W.P. No. 440 of 2003; Sri V. Raghunath, the learned Counsel for the petitioner in W.P. Nos. 7906/2000, 14475 of 2002 and 440 of 2003; Sri K. Balagopal, the learned Counsel for the petitioner in W.P. No. 26358 of 1999, the learned Advocate General for the State for the official respondents in all the writ petitions; Sri U.R. Lalit, learned senior counsel for the 10th respondent; and Sri Trideep Pais and Ms. Nitya

Ramakrishnan, learned Advocates for 11th respondent (in W.P. No. 15419 of 2006). We have also heard Sri C. Padmanabha Reddy, learned Senior Counsel as Amicus Curiae.

28. Except in W.P. No. 26358 of 1999, in the other writ petitions the common factor is the occurrence of a death or deaths of individuals consequent on police firing. In W.P. No. 26358 of 1999, the allegation is that on 15.6.1999 while the petitioner's husband and an acquaintance were consuming beverage at the local toddy shop, without any provocation plain clothed policemen pounced upon the petitioner's husband and started beating him. When her husband was running away from the shop, the police opened fire at him from behind, a bullet lodged close to the spine and he sustained a very grievous injury and had almost become paralyzed.

29. On behalf of the petitioners (in the generality of cases) it is alleged that the police firing was either wholly unjustified and without any provocation whatsoever or was an excessive and disproportionate employment of force and therefore constitutes conduct amounting to the cognizable offence of murder. The State, the Police establishment of the State and the State Police Officers Association contend per contra, that the police had to resort to firing only in response to firing in the first instance by the opposite party, in self-defense and hence the conduct is non-culpable.

The pattern/practice:

30. In all the cases the uniform feature is also that the earliest information is conveyed by police officials to the jurisdictional Police Station. The information so conveyed is generically to the effect that on reliable information received as to a meeting of extremists/Maoists/Naxalites, a posse of police officers was deputed to the location to apprehend members of the banned organization. As the police party was approaching the rendezvous the members of the assemblage fired upon the police party. In the return of fire by the police officers in self-defence the death(s) occurred.

31. On receipt of such information the officer in-charge of the police station, in purported compliance with the provisions of Section 154 of Code of Criminal Procedure, 1973 ('the Cr.P.C.') records such information and enumerates certain provisions of Indian Penal Code, 1860 (for short 'IPC')/the Arms Act, 1959 ('the Arms Act')/the Explosive Substances Act, 1908 ('the E.S. Act'). All the enumerated provisions of the substantive law implicate the alleged criminal conduct of private individuals in the

transaction. Wherever Section 100 IPC is enumerated in the First Information Report ('the FIR') it is a reflection of the plea of self-defence claimed (by the police party), in the information, which led to the registering of the FIR. In no case however is any provision of law implicating the criminal conduct of any member(s) of the police party spelt out, in the FIR.

The claim in W.P. No. 15419 of 2006:

32. Cr. No. 30 of 2006 dated 24.07.2006 of Yerragondapalem P.S. (Y. Palem PS) [relatable to the issues arising in W.P. No. 15419/06 is illustrative of the invariable pattern that is apparent in homicide consequent on firings by police officers. In W.P. No. 15419/06 the petitioner - the President of the APCLC, pleads that initially there was a news that Mr. Madhav, State Secretary of CPI (Maoist) Group was caught but the other members of the party were shot dead; subsequent telecasts had different versions - some that Madhav was injured and escaped and others that he died in a police encounter. It is further pleaded that the deaths that occurred in the Nallamalla forest area in Y.Palem Mandal on 23.07.2006 are targeted police killings not immunized by any provisions under law including the provisions of the Indian Penal Code 1860 and that the killings constitute culpable homicide amounting to murder, by Police Officers.

The response of the D.G.P.:

33. The Director General of Police of the State has filed a counter affidavit dated 07.08.2006. Pages 2 to 7 of this counter set out a peroration as to the basic tenets of the extremists' ideology, the rejection of democratic and parliamentary way of life; the general strategies of the CPI (Maoist) party which subvert the rule of law fundamentals; that the spread of extremist activities and Naxalism is a potent threat to the internal security of the country and incidents and statistics of extremist activities; and the statistics regarding deaths of civilians and police personnel. The 2nd respondent further pleads that all cases of fire resulting in death of extremists are investigated with due diligence and adherence to the guide lines issued by the NHRC and various courts; each encounter death is registered as a cognizable offence and information provided to the Executive Magistrate by sending the original FIR to the Judicial Magistrate; the investigation is entrusted to an officer of the rank of a Deputy Superintendent of Police of another District who is required to file a charge sheet within three months; and the Executive Magistrate conducts the investigation in the first instance by way of an enquiry Under Section 176 of the Criminal Procedure Code 1973 (Cr.P.C).

34. It is also the case of the 2nd respondent that police use adequate force in order to arrest Under Section 41 and 46(3) of the Cr.P.C. and that the police action is a bona fide case of use of adequate force which may in certain cases result in the casualty of the accused extremists (page 7 of the counter).

35. It is further pleaded in the counter affidavit that in addition to the investigation and inquest as above, in every case of encounter the District Collector orders a magisterial enquiry by an Executive Magistrate above the rank of Sub Divisional Magistrate, who holds an open enquiry widely published. The consequent report is sent to the District Collector & District Magistrate, who on being satisfied with the enquiry send a report to the Government and if not satisfied order a de novo enquiry. The report from the District Collector is scrutinized by the Government including by the Law Department and if not satisfied a de novo enquiry is ordered.

36. The 2nd respondent pleads (in respect of the incident in question) that on reliable information that the CPI (Maoist) are conducting a meeting in Markapur reserve forest to plan large scale violence in the forthcoming Gram Panchayat elections, on 22.07.2006 the Addl. Superintendent of Police (Operations) Markapur deputed the complainant, the S.I. of Police, Y.Palem PS with two Constables of the PS and 15 members of the District Police Special Party to the forest to arrest the Maoists. On 23.07.2006 at about 10 am while conducting combing operations near a hillock about 30 Maoists wearing Olive Green uniform armed with guns were found coming in the opposite direction and on seeing the police party opened fire. The police party warned them to surrender. The warning was not heeded and the firing continued on the police party. In self-defence the police party opened fire on the Maoists. The exchange continued for about one hour. During the firing the complainant contacted the police station. After cessation of the firing the police party found three male and five female dead bodies of Maoists including of Madhav, the Secretary of the AP State Committee. Arms and ammunition such as hand grenades, wireless sets, kit bags, cash and other material were also found at the scene of occurrence.

37. The A.S.I. of Police of Y.Palem PS, who received incomplete information about the encounter informed the same to the Inspector of Police, Markapur and was directed by the latter to make an entry in the General Diary. On receiving further details of the incident on 24.07.2006 from the complainant, Cr. No. 30/06 was registered under Sections 148, 307 r/w 149 IPC, Sections 25 and 27 of the Arms Act; Section 5 of the E.S. Act and Section 8 of the APPS Act r/w Section 100 IPC.

38. After setting out the description of the scene of occurrence and the procedure adopted for immediate investigation and conduct of the inquest, the counter narrates that four deputed Mandal Executive Magistrates who comprised the inquest party unanimously opined that the deceased and about 22 other unidentified Maoists had opened fire on the police party while they were conducting combing operations with a view to kill them; that the police party opened fire in self-defence and the Maoists died in the resultant exchange of fire. Elsewhere in the counter (page 27) it is pleaded that during the exchange of fire three police men RSI Sreeramulu, PC 2687 Pydiraju and PC 5530 Kiran Kumar, were injured. The SDPO, Gurajala of Guntur District, is appointed as the Investigating Officer and the consequent investigation would determine whether the police party opened fire in self-defence or exceeded this right. It is the specific defence of the 2nd respondent that as neither the FIR nor any information received from the SI of Police, Y.Palem, disclosed commission of any offence by the Police Officers involved, no case is made out implicating the ingredients of Sections 299 and 300 IPC and therefore there is no warrant for incorporating an offence by the Police Officers Under Section 302 IPC.

39. The 2nd respondent pleads that one of the deceased Madhav, State Secretary, is an accused in 9 offences in several Police Stations in Mahabubnagar District including offences Under Section 302 IPC. The counter is however significantly silent as to whether the other deceased in the police firing on 23.07.2006 are accused in any offence and on what charge.

A brief overview of the written submissions filed on behalf of the several parties in this batch of writ petitions:

40. (A) On behalf of the petitioner (in W.P. No. 15419/06):

It is urged

(i) On issue No. 1: That when a police officer(s) causes the death of a person while acting or purporting to act in discharge of duties or on a claim of self-defence, the officer has presumptively committed the offence of culpable homicide; the information relating to such circumstance must be registered as a FIR and thereafter investigation pursued according to the procedure ordained in the Cr.P.C; the contention on behalf of the State by the learned Advocate General (that Cr. No. 30/06 of Y.Palem PS has already been registered against the Maoists and during the course of investigation of this crime if it is revealed that the police has committed an offence that aspect would also be investigated and there is no necessity

of registering the police conduct as a separate crime for independent investigation), is extravagant and inconsistent with the provisions of the Cr.P.C; where two sets of offences - one by the extremists and the other by the police, are prima facie revealed as forming part of the same event both the crimes would have to be independently registered; in every case of extremist killing in police firing the information conveyed clearly indicates also the death of citizens, prima facie a culpable homicide; the appropriate provision of the Indian Penal Code indicating the offence(s) presumed to have been committed by the police (subject to investigation and/or trial, as the case may be) must be necessarily indicated in the FIR; in the absence of such enumeration of offences by the police, the FIR would be a mere detailed description of an event without indication that the event implicates the commission of an offence prohibited by law; invariably under the current practice in cases of extremists killing inter alia Section 307 IPC is enumerated (indicating the offence committed by the extremists), while omitting any enumeration of offences by the police including in case of a death of a citizen, Under Section 302 IPC; when the investigating officer pursues the investigation Under Section 157 Cr.P.C, the I.O. is investigating into the offence Under Section 307 IPC and not into the conduct of the police implicated as one Under Section 302 IPC.

(ii) On issue No. 2: The justification of private defence is Under Sections 99 and 100 IPC. These provisions have to be read in conjunction with Section 105 of the Indian Evidence Act 1872, which enjoins that the burden of proving the existence of circumstances bringing the case within any of the general exceptions to the IPC is upon the claimant of self-defence and the court shall presume the absence of such circumstances. The exercise of the right of private defence cannot be determined during investigation and the final report submitted by the I.O. to the Magistrate is not conclusive. Only in judicial proceedings is it legitimate to determine that the police conduct in an extremist killing event constitutes a valid self-defence justification.

(iii) On issue No. 3: A Magisterial inquiry Under Section 174 Cr.P.C. is applicable only to cases of suicide and other suspicious death; the scope of such inquiry is limited to the apparent cause of death, for noting down wounds and other marks of injury and to elucidate the manner or by what weapon or instrument the injuries on the body might have been caused. Identification of the perpetrator of the homicide is beyond the scope of Sections 174 and 176 Cr.P.C. Enquiry by the Magistrate Under Section 174 Cr.P.C. is not a substitute for either investigation Under Section 157 Cr.P.C. or the trial by a judicial proceeding.

(iv) On issue No. 4: Neither the police establishment nor the police officer is immune from an obligation to disclose the identity of the police officer(s) who caused the death of a person. When information is received by an officer in charge of a police station that a homicide has occurred at the hands of a police officer, though claimed to be in self-defense, it is the duty of such informant to reveal the names of the police officer(s) who have committed the homicide; where the informant (even a police officer) admits in an information conveyed to the police station that he and/or other police officer(s) committed a homicide, it is the duty of such informant as also the duty of the officer in the police station recording such information to record the names of the perpetrators of the homicide, since the conduct involved is *ex facie* culpable. Section 202 IPC makes an offence, the conduct of intentional omission to give any information respecting an offence. The contention on behalf of the State that since a person aggrieved by a non-investigation by the police can file a private complaint Under Section 200 Cr.P.C, is not answer to the non-derogable obligation of the informant to provide the names and descriptions of the police officer(s) involved or the statutory obligation of the officer in charge of a police station to record the information or to demand the furnishing of such information. The current procedure adopted by the State is not authorized by law and is at variance with the law. Since it is the integral constitutional obligation of the State to ensure law and order and to investigate crime and since culpable homicide is an offence against the State, the State cannot contrive a procedure, which subverts the non-negotiable and fundamental principle of governance.

41. (B) Submissions by the 9th respondent (W.P. No. 15419/06):

(i) The question is whether an encounter killing by the police is a culpable or a non-culpable homicide? In the absence of any legislatively enabled executive use of deadly force in specified circumstances, every homicide by the police is presumptively culpable homicide. The first point of inquiry is whether a person by an act has caused the death of another. If the answer is in the affirmative, the second stage of inquiry invites itself i.e., as to in which of the four clauses in Section 300 IPC, the act of the perpetrator may fall and if it does not fall within Section 300 IPC, the conduct presumptively amounts to culpable homicide not amounting to murder, hence punishable under Section 304 Parts I & II IPC. The police to succeed in a plea of self-defense justification must establish in a court that the exercise of the right to private defense was on account of reasonable apprehension of death, the apprehension occurring on the spot and at the time when the police firing was resorted to. The police must also establish that the force used was reasonable and proportionate

and that there was no ill-will or malice in the performance of the duty that led to the homicide. Since combing operations are conducted after planning; on the basis of intelligence reports; and special forces are deployed to engage in targeted killings of Maoists, there is prima facie presumption of malice and predisposition to homicide.

(ii) On issue No. 2: Once the plea of self-defense is set up or presented, an offence of murder shall be presumed, the perpetrator(s) must be charge sheeted for such offence and the accused required to establish the claim of self-defense in a Court.

(iii) On issue No. 3: A Magisterial enquiry is not a substitute for a session's trial. The police who participated in an encounter killing by a mere declaration that the killing occurred in exercise of a right to private defense, cannot endow themselves immunity from prosecution nor can the investigating officer close the investigation by accepting such declaration. The death of persons in a police encounter is indisputably a cognizable offence. An assailant's claim to self-defense must be investigated in the first instance only as a part of the investigation into the offence of culpable homicide. Neither a Magisterial enquiry nor a media presentation by the Director General of Police that the victims of encounter were killed in self-defense, are a lawful substitute for a clearly focused investigation pursuant to registration of the FIR enumerating the offence of culpable homicide and thereafter prosecution in a judicial proceedings.

(iv) On issue No. 4: Where there has been a forfeiture of life there can be no immunity from the obligation to disclose information relevant to the investigation of such act. Any claim to immunity in this behalf is in clear violation of Article 21 of the Constitution, a non-derogable constitutional value. Right to life jurisprudence even in the Indian context explicates that preemptive self-defense or an anticipatory aggression cannot lead to diminished official responsibility to the inexorable mandate of the law.

42. (C) Submissions on behalf of the petitioner (W. P. No. 26358/99):

The agent of the State who claims to have taken the life of another in the course of duty under the cover of permissible action or reaction cannot be a judge in his own cause. The State actor must submit to the process of law as applicable to any citizen in a claim to have taken life for self-preservation/defense, or under other circumstances permissible in law. While the raft of justification circumstances may be wider in the case of police officials/public authority than a private citizen, the principles of law applicable are identical.

43. Where a police officer conveys information to a police station *inter alia* admitting to the commission by himself and/or by other officer(s), of a homicide(s), a case of culpable homicide amounting to murder has to be registered against the perpetrator(s) as revealed in the information; the case so registered must be investigated fairly, impartially and professionally by an independent agency to identify the perpetrators of the offence as enumerated; and the eventual determination whether the homicide is culpable or non-culpable (on account of legitimate justification defences as would exonerate the perpetrator under criminal law), has to be determined by a competent court and not by the assailant police officer(s) or the investigating police.

44. An interactive analysis of the provisions of Section 129 Cr.P.C. r/w Section 130(3) Cr.P.C; Section 149 Cr.P.C. r/w Section 97 IPC; Section 46(3) Cr.P.C, and Sections 99 - 103 IPC, clearly discloses that since the exercise of a power and the manner and extent of its exercise is conditional upon, controlled or limited by the requirement of conformity to reasonable and objective standards, the discretion employed in the exercise of such regulatory power is subject to judicial review and no claim of unfettered executive discretion is legitimate. In case of injury or death caused by police, the perpetrator's claim to the existence of circumstances which bring the facially prohibited conduct within the justification defenses either Under Section 76, 79 or 97 r/w 100 IPC (even in the absence of a complaint by or on behalf of a victim), judicial review of the validity of claims of justification defenses is mandatory and it is the competent court which must decide whether the police had used force in the manner and to the extent permitted by law or had exceeded the parameters of justification defenses and thus committed an act that is culpable.

45. Since the death caused in a police firing is facially a cognizable offence, the offence must necessarily be registered and investigated. The substantive provisions of criminal law read with the adjectival provisions of the Cr.P.C. and the Evidence Act show that police killings are presumptively and at the first instance a cognizable offence and the justification of exceptions to substantive criminality as provided in Chapter IV IPC and elsewhere in the Code do not derogate from the conduct being initially and presumptively an offence. At the threshold when information is conveyed to the police of killing in police action, what is on record is an offence of culpable homicide and the conduct continues to an offence until the circumstance that renders the conduct as non-offence come on record in the investigation and are accepted as such by a competent court. The executive and investigatory obligation is non-derogable and requires that

the presumptive offence shall be investigated and the satisfaction that justification defenses are validly established must be conclusively declared only by a competent court and not by the investigating officer.

46. (D) Submissions on behalf of the petitioners (W.P. Nos. 7906/00,14475/02 & 440/03):

While asserting that the police in the State are indulging in extra legal and extra judicial executions, the submissions made on behalf of the petitioner and the 9th respondent (in W.P. No. 15419/06) are adopted.

47. (E) Submissions on behalf of the 11th respondent (W.P. No. 15419/06):

On issue Nos. 1 to 3: the State's obligation to punish extra-judicial homicide is a corollary of a citizen's (the victim's) right to life as well as the right to dignity of the victim's kin. Article 21 does not enjoin mere procedure but enjoins due procedure. The status of the suspected offender or of the victim is irrelevant. Chapter XVI of the IPC enumerates offences affecting the human body and lists six variations of homicide, which are considered culpable and made cognizable. (Sections 302, 303, 304, 304A, 304B and 314 IPC) Except an offence falling Under Section 304A (causing death by rash and negligent act) all other offences are non-bailable and hence exclusively triable by a Court of Session. This is a reflection of the legislative recognition of the value and inviolability of human life.

48. Chapter IV IPC lists general exceptions which must be read as exceptions to every offence. In addition some offences are subject to specific exceptions and defences e.g., Sections 300 and 499 IPC. The exceptions apply to all without any special exceptions in favour of a public servant.

49. If information is received in any form whatsoever of the commission of a cognizable offence, investigation has to follow. The first information of different transactions or offences in the same occurrence may be the same for the several offences; while the FIR may record facts showing different transactions in the same course of events, the investigation reports Under Section 173 Cr.P.C. would be diverse. Distinct investigations are obligated in counter cases. Private defense or an exception is only to be decided at trial.

50. The enumeration of the provisions of substantive law in the FIR or in the final report Under Section 173 Cr.P.C. is not conclusive and the court may always alter the charge (Section 216 Cr.P.C).

51. Only when the investigation discloses limited or no material qua a particular person, such person may be released Under Section 169 Cr.P.C. Where a nexus between the accused and the offence is established or indicated by the investigation, Section 169 Cr.P.C. has no application. A plea of private defense arises if the evidence links the suspect to the offence. In all other circumstances the accused must be forwarded to the Magistrate who is required to commit the case to Session on disclosure of offence(s) triable by the Session Court. Even in a private complaint context, the scrutiny by the court is only to ascertain whether the ingredients of a cognizable offence are made out whereupon process must be issued to the accused.

52. A final report Under Section 173 Cr.P.C. for closure of a case of homicide on an assumption that the homicide is not culpable on account of general exceptions including the right of private defense justification is beyond the authority of the police nor is it within the authority of the Magistrate who must necessarily commit the case to Session where alone the vitality and applicability of the general exceptions must be considered. Since culpable homicide is exclusively triable by a Court of Session, the Court of Session must also consider private defense justifications. Private defence justification issues are to be proved but not presumed and require leading of evidence.

53. On issue No. 4: A police killing even in a purported encounter is potentially the subject matter of a public trial in accordance with law. What is statutorily in the public domain cannot be in the realm of privilege. The right to dignity of the victim's kin entitles them to a full explanation of the occurrence and of the prosecution of the guilty and hence the concomitant information can neither be privileged nor withheld.

54. (F) Submissions by the learned Advocate General on behalf of the 1st respondent (W.P. No. 15419/06):

On issue No. 1: Under Section 154 Cr.P.C, information relating to commission of a cognizable offence is required to be registered (FIR). When the information does not disclose an offence (keeping the general exceptions in mind) no FIR can/need be registered, since no offence is disclosed. Implicating a requirement that registration of FIR is mandatory even when the information on its face discloses that the justification of self-defense is available and if applied no cognizable offence is committed, would be doing violence to the language of Section 154 Cr.P.C. If some information is received which does not clearly disclose a cognizable offence, it does not prevent the police from verifying the relevant facts and thereafter if the facts disclose commission of a cognizable offence to register FIR

and investigate the case further. Under Section 157 Cr.P.C. a police can investigate on information received or even otherwise. To contend that the FIR must be registered in all cases of information received about death caused by a police officer in discharge of his duties or in self-defense would lead to consequence not envisaged by law - to absurd results. Every Judge, child, doctor, public servant or citizen whose action results in injury or death will have to be necessarily prosecuted even when they are fairly covered by the general exceptions. If in the course of investigation by an investigating officer/enquiry by a Magistrate, it is revealed that the plea of self-defense is a facade, the provisions of Cr.P.C. enable the Police/Magistrate to prosecute the person whose conduct constitutes a cognizable offence.

55. On issue No. 2: If during investigation it is revealed, in the light of general exceptions or otherwise that no offence has been committed, a report to that effect shall be filed Under Section 173 Cr.P.C. before the Magistrate. If the investigation reveals commission of cognizable offence even so such a report must be filed. The Magistrate is required to examine the final report filed Under Section 173 and from the said report or from other information may take cognizance or refuse to do so depending on the material available before him. The investigation by the police is thus not conclusive of the matter.

56. On issue No. 3: The police Under Section 157 Cr.P.C. may undertake further investigation even after intimation to the Executive Magistrate to hold inquest Under Section 174 Cr.P.C. A Judicial Magistrate under Section 190 Cr.P.C. may take cognizance of any offence upon a complaint, upon a police report, upon information received or upon his own knowledge that an offence has been committed. A Magisterial enquiry into the facts and circumstances of death does not obviate the rigor of investigation and trial.

57. On issue No. 4: In the facts of this case the issue has arisen, in view of the observations/findings in the majority opinion of the Full Bench in *APCLC v. State* (supra). The learned Full Bench observed: 'If a specific complaint is made alleging that an 'identified individual' had caused the death of such person, an independent FIR shall be registered in it, if it satisfies the law laid down by the Supreme Court in *State of Haryana v. Bhajan Lal*.'

58. The State specifically concedes the legal position that the conclusion recorded by the Full Bench in Para 65(b)(i) [extracted above], is incorrect. The Cr.P.C. enables the filing of a complaint even against an unknown person/offender. Since the State now concedes that the petitioner can

lodge a complaint even against an unknown person, the issue does not survive. The concerned authority should be left to exercise the discretion of revealing the names of police personnel depending upon the facts and circumstances of each case. The State is not claiming any class immunity from disclosure. The petitioner (in W.P. No. 15419 of 2006) approached the authorities under the Right to Information Act, 2005 (the 2005 Act). The Designated Officer under this Act - the Station House Officer, Y.Palem, exercised his statutory discretion and rejected the petitioner's application, by an order dated 30.08.2007. Against such order the petitioner has a remedy under the same legislation. In view of the exceptions carved out qua Section 8(1)(g) & (h) of the 2005 Act, in the facts and circumstances of this case and since the lives of police personnel would be endangered if their names are revealed, no disclosure of names is required under law. The State however does not claim immunity from disclosure to the Court nor does it claim any general class immunity.

59. (G) Submissions on behalf of the 10th respondent (W.P. No. 15149/06):

On issue No. 1: It is not necessary in case of a death (occurring in the course of an exchange of fire with the police) that it should automatically lead to the registration of an offence. The Criminal Code provides for an intermediary stage, of inquest under Sections. 174 -176 Cr.P.C. Section 176 stipulates that the inquest can be in addition to or in the place of investigation. The current (executive) practice of conducting an inquest by the RDO, acting as the executive magistrate, following the guidelines envisaged by the NHRC, is an effective and adequate review of the incidents of exchange of fire.

60. A police officer has the discretion, under Section 154 Cr.P.C, to ascertain whether the information discloses the commission of a cognizable offence. Where the recording officer in his discretion is satisfied that the information received does not disclose the commission of a cognizable offence, he can decline to record the information. In that event the complainant can take recourse to the other remedies under the Cr.P.C (under Sections 153(3) and/or 190).

61. After recording the information under Section 154, the investigating officer has yet the discretion (under Section 157), of determining whether the information disclosed requires further investigation. If satisfied that no investigation is warranted, the recording officer is entitled to drop all further investigation and report the same to the Magistrate. The investigating officer is entitled to take into account the factual aspects, including the various exceptions provided under the Cr.P.C including the

provisions authorizing the use of force by the police. If no cognizable offence is disclosed, more so if no offence of any kind is disclosed the police would have no authority to undertake an investigation.

62. Sections 149 and 152 of the Cr.P.C obligate the police to interpose themselves between persons contemplating or actually committing offences and the rest of the society. Sections 129 - 132 Cr.P.C authorize the use of force by police officers to disperse mobs and unlawful assemblies. Protection is accorded under Section 132 even where the use of force in such situations results in death. Section 151 Cr.P.C authorizes any police officer to arrest any person, where he has knowledge that such a person has a design to commit a cognizable offence. Section 46(3) Cr.P.C authorizes use of force by the police officer in the course of affecting an arrest. Such use of force, which may result in injury to body or even a fatality, would not constitute an offence. The provisions of Section 6 IPC read with the general exceptions contained in Sections 76 - 106, specifically Sections 76 - 79 enjoin that where injury is caused to a human body or death occurs due to such injury on account of employment of force by police officers in the course of duty, such conduct does not constitute an offence.

63. On issues 1 and 2: Exceptions can be invoked at the stage of recording the FIR under Section 154 Cr.P.C or at the stage of the investigation itself. It is not necessary that these exceptions should be invoked only in court, at the stage of trial. Section 105 of the Evidence Act (the provisions of the Evidence Act apply to judicial proceedings in a court of law vide Section 1), does not exclude consideration of the justification defenses either during the course of investigation or even at the stage of recording information under Section 154.

64. After recording the FIR and taking up the investigation on the basis of such information, any subsequent information couched in the form of a complaint would be treated by the investigating officer as further information received under Section 161 Cr.P.C. A second FIR leading to registration of a separate offence is however impermissible.

65. The discretion inhering in the investigation officer cannot be abrogated or dictated to by the judicial branch and the process of judicial oversight operates only after the investigating officer files the final report.

66. (H) Submissions of Sri C. Padmanabha Reddy (*Amicus Curiae*):

On issue No. 1: Yes. Section 154 Cr.P.C. enjoins that every information relating to commission of a cognizable offence, whether given orally (in

which event it must be reduced into writing) or in writing to an office in charge of a police station and signed by the informant must be entered in a book to be kept by such officer in such form as the State Government may prescribe, commonly known as the First Information Report. The act of entering the information into the said form is known as the registration of a crime or case.

67. At the stage of registration of a crime the police officer cannot embark upon an enquiry as to whether the information is reliable and genuine and refuse to register a case on an assumption that the information is not reliable or credible. The officer (in charge of a police station) is statutorily enjoined to register a case and to then proceed with investigation, if he has a reason to suspect the commission of an offence, which he is empowered to investigate Under Section 156 Cr.P.C.

68. Where the information itself indicates that there was an attempt to kill the police party and that in self-defense the police fired at the extremist(s) and this resulted in the death of an extremist(s), the said information comprises an attack by Maoists which is (in practice) registered Under Section 307 IPC and other applicable provisions. The other part of the information, that the police opened fire and killed extremist(s) in self-defence must also be registered. The claim of a self-defense justification is available only when clearly justified in accordance with the provisions of the substantive law and the well-entrenched principles.

69. Where the information discloses presumptive offences by two warring groups each party claiming the other as an aggressor, it is obligatory that two crimes be registered on such information. It is impracticable for the investigating agency to record conflicting statements in the same crime. Where there are rival versions regarding the same episode, they should normally take the shape of two FIRs. The offence for which a crime has to be registered depends on the nature of the first information. If a third party to the transaction gives the information it may be registered Under Section 174 Cr.P.C, which may be altered after further information. Where however the information itself is to the effect that a person was killed in firing, it is clearly a case of homicide. The issue whether the police are protected by general or special exceptions must be investigated or (if warranted) pleaded and proved at the trial.

70. Where the police refuse to register a case Under Section 154(3) Cr.P.C. a person aggrieved by such refusal may send the substance of such information in writing and by post to the Superintendent of Police concerned who, if satisfied that such information discloses the commission

of a cognizable offence, shall either investigate the case himself or direct an investigation by any officer subordinate to him.

71. Where no action is taken by the police (either Under Section 154(1) or 154(3) Cr.P.C.) the complainant (Under Section 190 r/w 200 Cr.P.C.) can lodge the complaint before the Magistrate having jurisdiction to take cognizance of the offence. The Magistrate is required to enquire into the complaint in the manner provided in Chapter XV of the Code, but if the Magistrate finds that the complaint does not disclose any offence requiring further action, he may dismiss the complaint Under Section 203 Cr.P.C. on recording brief reasons. Where the Magistrate is satisfied that the complaint/evidence recorded *prima facie* discloses an offence, he must take cognizance of the offence and issue process to the accused.

72. The provisions of the Cr.P.C. refer only to the registration, investigation and cognizance of offence and not the offender(s). Cognizance means ‘that a Magistrate must have not only applied his mind to the contents of the petition but he must have done so for the purpose of proceeding in a particular way as indicated in subsequent provisions i.e., proceedings Under Section 200 Cr.P.C. and thereafter sending it for enquiry and report Under Section 202 Cr.P.C. Cognizance is considered to have been taken on the day when the case is taken on file and process issued to the accused.’

73. On issue No. 2: The final report Under Section 173 Cr.P.C. must contain the facts discovered by the police and the conclusions drawn therefrom. If during the investigation and from the material gathered the Investigating Officer infers that the police acted in self-defense a report may be submitted to that effect. Such report may or may not be accepted by the Magistrate. Where the Magistrate decides to accept the final report he has to give notice to the complainant, if any. Where he does not agree with the final report, the Magistrate shall take cognizance if the material warrants cognizance or he may direct the police to further investigate the matter. Section 105 of the Indian Evidence Act 1872 is applicable only during trial. Section 105 enjoins the court to presume the absence of circumstances bringing the case within any of the exceptions. The accused has an opportunity to rebut the presumption only during trial and not at any previous stage.

The generic factual context:

74. In the batch of cases presented to this Bench for consideration of the legal issues involved (except in W.P. No. 26358 of 1999, where there is no death but grave injury to a person; and in W.P. No. 14475 of 2002), the generic factual narrative is that on credible information received a

police (special police) party was deputed to a rendezvous where some extremist elements are believed to have gathered for the purpose of planning/executing extremist activities. On reaching the locality in question and despite a warning and admonition by the police party to surrender, they were fired upon by the extremists and in the return of fire by the police party (in self-defense) the death(s) occurred and in some instances the surviving members of the unlawful group had escaped. Such information is conveyed by a member of the police party to an officer in charge of a Police Station. On receipt of such information the FIR is registered, purportedly Under Section 154(3) Cr.P.C., recording the information received, enumerating offences under the substantive provisions of criminal and other applicable laws.

75. The offences enumerated in the FIR are invariably against the members of the private assemblage, often including the deceased, but never ever against a member or members of the police party involved in the engagement, which resulted in the death(s) of citizens. Whether such State procedure conforms to the law is the fundamental issue that falls for our consideration. If it does not, what is the appropriate substantive and procedural State obligation as by law enjoined is also a concomitant question. Though the State, qua the counter affidavit of the 2nd respondent the Director General & Inspector General of Police, suggests that the wide spread, often endemic and occasionally proliferating operations of the extremists groups are addressed towards seriously undermining and debilitating law and order, endeavoring to overawe and overwhelm the executive and sovereign authority of the State, by violent means and by employment of deadly force against civilian population as well as State authority including members of the police establishment, neither the 2nd respondent nor the State claim any special legislative authority other than the general law (the provisions of the IPC and the Cr.P.C.) in justification of the unique executive process pursued, to investigate the legitimacy qua the law, of the executive conduct resulting in the encounter deaths. The current State practices pursued in such cases is sought to be justified only qua the ordinary laws of the land.

ANALYSIS:

76. Issue Nos. 1 and 3 may be conveniently considered together

Issue No. 1: Where a police officer causes the death of a person, acting or purporting to act in discharge of official duties or in self-defence as the case may be, is there commission of a cognizable offence (including in an appropriate case the offence of culpable homicide); and whether the information relating to such circumstances requires to be registered as a

First Information Report obligating investigation in accordance with the procedure prescribed by the Code of Criminal Procedure, 1973?

Issue No. 3: Whether a magisterial enquiry (whether under the Code of Criminal Procedure or extant Police Standing Orders) into the cause and circumstances of death occasioned by an act of a police officer obviate the rigor of investigation and trial of such act?

77. There are several shades of competing positions on different aspects of issue No. 1, which we propose to analyze and consider.

(A) The scope of Section 154(3) Cr.P.C.

78. Sub-section (1) of Section 154(3) Cr.P.C. is relevant for the consideration of this issue. Sub-sections (2) and (3) of this provision relate to the obligation to furnish to the informant a copy of the information as recorded in Sub-section (1); and the remedy available to a complainant to represent to the Superintendent of Police concerned on the refusal of the Officer in charge of a police station to record the information referred to in Sub-section (1) and the obligation of the Superintendent of Police on receipt of such a representation from the complainant.

79. Section 154(3) reads:

154. Information in cognizable cases:- (1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.

80. That the recording of the information received relating to the commission of a cognizable offence in the prescribed form is a non-derogable obligation of the officer in charge of a police station, in view of the legislative mandate in Section 154(3) Cr.P.C., is clear and is not disputed either. The prescribed form for recording the entry of the information so received is referred to as the First Information Report and the act of entering the information in the prescribed form is known as the registration of a crime/case, - Para 30 -Bhajan Lal (7 supra).

81. Bhajan Lal clearly declares: At the stage of registration of a crime/case on the basis of the information disclosing cognizable offence in compliance

with the mandate of Section 154(3) of the Code, the concerned police officer cannot embark upon an enquiry as to whether the information, led by the informant is reliable and genuine or otherwise and refuse to register a case on the ground that the information is not reliable or credible. Bhajan Lal clearly holds: the police officer has no other option except to enter the substance thereof in the prescribed form, that is to say to register a case on the basis of such information.

82. Reiterating the interpretation in Bhajan Lal as to the scope of Section 154(1) of the Code, the Supreme Court in *Ramesh Kumari v. State* (NCT of Delhi) and Ors. : 2006CriLJ1622 (Per: H.K. Sema, J) held that the provisions of Section 154(3) of the Cr.P.C. are mandatory and the officer concerned is duty bound to register the case on the basis of an information disclosing a cognizable offence. The Court also reiterated the relevant principle spelt out in Bhajan Lal, that the genuineness or otherwise of the information can only be considered after the registration of the case; and that genuineness or credibility of the information is not a condition precedent for registration of the case. The same view was reiterated (H.K. Sema, J) in *Lallan Chaudhary v. State of Bihar* 2006 (8) SCJ 329 : (2006) 1 SCC 229, that the reliability, genuineness and credibility of the information are not the conditions precedent for registering a case under Section 154(3) of the Cr.P.C.

83. In *Prakash Singh Badal v. State of Punjab* (2007) 1 SCC (Cri) 193 (Per: Dr. Arjit Pasayat, J) the scope of the provisions of Section 154(3) Cr.P.C. was again considered. On an analysis of the phraseology employed in Section 154(3) in juxtaposition with the provisions of Section 41 Cr.P.C. (dealing with the powers of the Police to arrest without warrant), the Supreme Court held that in view of the fact that the Legislature had carefully and designedly employed the expression 'information' without qualifying the expression with accompanying words such as 'reasonable complaint' or qualifying 'information' with the requirement that such information must be 'credible', the Police officer cannot refuse to record the information relating to the commission of a cognizable offence and to register a case thereon on the ground that he is not satisfied with the reasonableness or credibility of the information. *Prakash Singh Badal* (2007) 1 SCC (Cri) 193 clearly held that reasonableness or credibility of the information is not a condition precedent for registration of the case and that the sine qua non for recording a first information report is that there must be an 'information' and that information must disclose a cognizable offence.

84. We may at this stage usefully, though briefly, consider the observations of the Supreme Court in *Shakila Abdul Gafar Khan (Smt) v. Vasant Raghunath Dhoble and Anr.* : 2003CriLJ4548 (per Arijit Pasayat, J). This was a case involving an allegation of custodial/police torture resulting in the death of the complainant's husband, one Abdul Gafar. The complaint made by PWs 1, 2 and 5 against the respondents Dhoble and others during the period 14.10.1983 to 16.10.1983 was not investigated, though their statements were recorded. A private complaint was then made in December 1984 and the case was committed to Session trial in January 1987. The trial court found the accused guilty but the judgment of conviction and sentence was set aside by the High Court in appeal and thereupon the issue was taken to the Supreme Court. Responding to the contention on behalf of the State that the statements by PWs 1, 2 and 5 were considered Under Section 174 Cr.P.C. and therefore no FIR was registered, the Supreme Court strictured this procedure and observed that the official (the recording officer of the Police Station) acted as though he were deciding the guilt or otherwise of the accused and that the permissible area of application of mind (when exercising jurisdiction Under Section 154(3) Cr.P.C.) is limited to finding out the existence of a cognizable offence and nothing beyond that. The Supreme Court further observed that the course adopted by the official makes a mockery of the law.

85. There is another aspect of the matter arising from a contention advanced on behalf of the State that may usefully be considered at this stage. Relying on the judgment in *Aleque Padamsee and Ors. v. Union of India and Ors.* : 2007CriLJ3729 (Per: Dr. Arijit Pasayat, J), it is contended by the State that this Court cannot entertain a plea nor issue a Mandamus to the police to register a case under Section 154(3) of the Cr.P.C. In *Aleque Padamsee*, the Apex Court on a consideration of the earlier judgments in *All India Institute of Medical Sciences Employees' Union (Regd.) v. Union of India* : (1996)11SCC582 ; *Gangadhar Janardan Mhatre v. State of Maharashtra* : 2004CriLJ4623 ; *Ramesh Kumari v. State (NCT of Delhi)* : 2006CriLJ1622 ; *Minu Kumari v. State of Bihar* : 2006CriLJ2468 ; *Hari Singh v. State of U.P.* : 2006CriLJ3283 and *Lallan Chaudhary v. State of Bihar* (2006) 1 SCC 229, ruled that the proper course and remedy available in the context of inaction by the police to register the First Information Report under Section 154(3) of the Cr.P.C, is to pursue the remedies under the provisions of Cr.P.C. by filing a complaint before a Magistrate. This view is reiterated in *Sakiri Vasu v. State of U.P. and Ors.* : AIR2008SC907 . Though in *Aleque Padamsee* (supra) and *Sakiri Vasu* : AIR2008SC907 the Supreme Court did not specifically hold and in express terms that no Mandamus under

Article 226 of the Constitution of India could issue to direct the State executive agency (the police) to perform the statutory obligations under Section 154(3) of the Cr.P.C., nor did the Court hold that availability of alternative and statutory remedies eclipse the constitutionally endowed jurisdiction under Article 226, the State would contend that in view of the available statutory remedies to an aggrieved, to prefer a private complaint to the Magistrate, no direction to register an FIR could be issued by the court.

86. This Bench is not constituted to adjudicate on the merits of any particular factual issue involved in any of the cases on board or to grant relief by issue of specific directions to the police. This Bench would consider the normative issues which have been framed by us including as to the obligations of the police under Section 154(3) of the Cr.P.C., when information is received as to homicide(s) at the hands of police officers in encounter cases and in the context of the informant claiming that the homicide(s) occurred in exercise, by the police of the right of private defense.

87. Pronouncing upon the contours of the legal obligations of the law enforcement agencies of the State, in such and similar circumstances qua the provisions of Section 154(3) of the Cr.P.C., in the context of our Constitution's mandate, is emphatically within the province of this Court.

88. It requires to be noticed that Bhajan Lal (7 supra) had occasion to deal inter alia with the generic issue as to the scope and obligation Under Section 154(3) Cr.P.C. In the context of the stand by the State the issue before us presents a distinct dimension; whether where the first information is by a police officer intimating death of civilian(s) in an engagement with law enforcement officers of the State (in circumstances claimed by such officers to have occurred while exercising the right of self-defense), is there yet the non-derogable obligation to register the FIR or a distinct FIR (apart from the FIR that is now being registered against the private citizens involved in the engagement), against the police officer(s) involved in the homicide, treating such homicide to be facially a culpable homicide, warranting registration and initiation of the investigatorial process?

(B) Registration of two (2) First Information Reports. If permissible:

89. In *T.T. Anthony v. State of Kerala and Ors.* : 2001CriLJ3329 Quadri, J speaking for the court (2 judges) held:

20. From the above discussion it follows that under the scheme of the provisions of Sections 154, 155, 156, 157, 162, 169, 170 and 173

Cr.PC only the earliest or the first information in regard to the commission of a cognizable offence satisfied the requirements of Section 154(3) Cr.PC. Thus there can be no second FIR and consequently there can be no fresh investigation on receipt of every subsequent information in respect of the same cognizable offence or the same occurrence or incident giving rise to one or more cognizable offences. On receipt of information about a cognizable offence or an incident giving rise to a cognizable offence or offences and on entering the FIR in the station house diary, the officer in charge of a police station has to investigate not merely the cognizable offence reported in the FIR but also other connected offences found to have been committed in the course of the same transaction or the same occurrence and file one or more reports as provided in Section 173 CrPC.

90. In 7.7. Anthony the factual scenario was that during the visit of one Mr. Raghavan, a Minister in the UDF Government to Kannur District in Kerala State, on 25.11.1994 in a police firing purportedly resorted to for the protection of the Minister and of public and private properties five persons died and six were injured and more than 100 persons suffered injuries in the lathi charge with a few police personnel also sustaining injuries, in a melee which preceded the police firing. The firing occurred at two places - at one location on the orders of the Executive Magistrate and at the other on the orders of the Superintendent of Police. In respect of both the instances Cr. Nos. 353 and 354 of 1994 were registered under several sections of the IPC and provisions of other statutes against specified and unspecified individuals belonging to the CPI (M) party. On strident public demand, on 20.01.1995 a Commission of Inquiry was appointed under the provisions of the Commission of Inquiries Act 1962, to enquire inter alia into the circumstances which led to the police firing and for assessment as to whether the firing was justified, ascertainment of the persons responsible for such firing and incidental matters. After the 1996 Assembly elections there was a change of political fortunes and the LDF Government replaced the UDF Government. In May 1997 the Commission submitted its report recorded that the police firing on 25.11.1994 was not justified and that Mr. Raghavan, a Deputy Superintendent of Police, a Deputy Collector and others were responsible for the police firing. The report of the Commission was accepted by the Government and eventually Cr. No. 268 of 1997 was registered against Mr. Raghavan, the Dy. Superintendent of Police, the Dy. Collector and other Police Officials, Under Section 302 IPC. The Investigating Officer filed an interim report implicating 19 police officers. Aggrieved thereby writ petitions were filed by some of the accused. The earlier cases registered against the members of the CPI (M) party came to be closed, after the registration of Cr. No. 268 of 1997. The accused in Cr. No. 268 of 1997

filed writ petitions seeking quashing of the FIR and alternatively for investigation by the CBI. A learned single Judge of the High Court directed reinvestigation by the CBI and disposed of the writ petitions accordingly. Separate appeals were filed by the writ petitioner as well as by the State. The Division Bench partly confirmed the order of the learned single Judge but directed a fresh investigation by the State police headed by a senior officer specified in the judgment, instead of the CBI. The writ petitioners filed appeals before the Supreme Court. The Supreme Court in *T.T. Anthony* distinguished the earlier judgments in *Ram Lal Narang v. State (Delhi Administration)* : 1979CriLJ1346 and *M. Krishna v. State of Karnataka* : 1999CriLJ2583 and held that notwithstanding the broad power of investigation including the power to make further investigation Under Section 173 Cr.P.C, there was no warrant for subjecting a citizen each time to fresh investigation by the police in respect of the same incident, giving rise to one or more cognizable offences, consequent upon filing of the successive FIRs whether before or after filing the final report Under Section 173 Cr.P.C. The Supreme Court held:

27. ... In our view a case of fresh investigation based on the second or successive FIRs, not being a counter-case, filed in connection with the same or connected cognizable offence alleged to have been committed in the course of the same transaction and in respect of which pursuant to the first FIR either investigation is under way or final report under Section 173 has been forwarded to the Magistrate, may be a fit case for exercise of power under Section 482 CrPC or under Articles 226/227 of the Constitution.

91. The Supreme Court concluded that the registration of the second FIR as Cr. No. 268/97 and the consequent investigation was invalid and quashed while preserving liberty to the investigating agency to seek the leave of the concerned court in Cr. Nos. 353 and 354 of 1997, for pursuing further investigation Under Section 173 Cr.P.C.

92. In *Upkar Singh v. Ved Prakash* (2004) 13 SCC 292 : 2005 (1) ALT 2 (DN SC) the Court (Per: Santosh Hegde, J for self, S.B. Sinha and A.K. Mathur, JJ) considered the issue whether a second complaint with respect to the same incident, filed as a counter complaint was prohibited under the provisions of the Cr.P.C. and whether on refusal by the police to register the counter complaint, the Magistrate could direct the police, at any stage, to register the complaint and investigate the same. The earlier decision in *T.T. Anthony* (21 supra) also fell for consideration. On the facts of *Upkar Singh's* case, the appellant and some others were accused of offences under Sections 452 and 307 IPC in crime No. 48 of 1995 of

Sikhera Police Station in Fahimpur Kalan village. The appellant had also lodged a complaint in respect of the same transaction against the respondents alleging offences punishable under Sections 506 and 307 IPC, committed against the appellant and his family members. The complaint having not been entertained by the police, the appellant filed a petition under Section 156 of Cr.P.C. before the Judicial Magistrate. Muzaffarnagar. The Magistrate directed the Sikhera Police Station to register a crime against the accused named in the complaint of the appellant and to investigate the same. The police thereupon registered crime No. 48-A of 1995 under Sections 147, 148, 149 and 307 IPC. The 1st respondent (before the Supreme Court) aggrieved by the registration of crime No. 48-A of 1995 preferred a criminal revision petition which was allowed and the order of the Magistrate directing registration of the criminal case was set aside. Aggrieved thereby, the appellant approached the High Court, which Court by the order dated 10-04-2001 and following an earlier judgment of that Court dismissed the appellant's revision. After the above judgment of the High Court, the judgment of the Supreme Court in T.T. Anthony (21 supra) came to be delivered. The respondents rested their defense before the Supreme Court inter alia on the judgment in T.T. Anthony. We consider it appropriate to extract the reasoning of the Supreme Court in Upkar Singh as set out in paragraph Nos. 21 to 23 of the report:

21. From the above it is clear that even in regard to a complaint arising out of a complaint on further investigation if it was found that there was a larger conspiracy than the one referred to in the previous complaint then a further investigation under the court culminating in another complaint is permissible.

22. A perusal of the judgment of this Court in Ram Lal Narang v. State (Delhi Admn.) : 1979CriLJ1346 also shows that even in cases where a prior complaint is already registered, a counter-complaint is permissible but it goes further and holds that even in cases where a first complaint is registered and investigation initiated, it is possible to file a further complaint by the same complainant based on the material gathered during the course of investigation. Of course, this larger proposition of law laid down in Ram Lal Narang case is not necessary to be relied on by us in the present case. Suffice it to say that the discussion in Ram Lal Narang case is in the same line as found in the judgments in Kari Choudhary and State of Bihar v. J.A.C. Saldanha : 1980CriLJ98 . However, it must be noticed that in 7.7. Antony case, Ram Lal Narang case was noticed but the Court did not express any opinion either way.

23. Be that as it may, if the law laid down by this Court in 7.7. Antony case is to be accepted as holding that a second complaint in regard to the same incident filed as a counter-complaint is prohibited under the Code then, in our opinion, such conclusion would lead to serious consequences. This will be clear from the hypothetical example given hereinbelow i.e., if in regard to a crime committed by the real accused he takes the first opportunity to lodge a false complaint and the same is registered by the jurisdictional police then the aggrieved victim of such crime will be precluded from lodging a complaint giving his version of the incident in question, consequently he will be deprived of his legitimated right to bring the real accused to book. This cannot be the purport of the Code.

93. The decision of the Supreme Court in *Kari Choudhary v. Sita Devi* (1992) 1 SCC 714, which was referred to with approval in *Upkar Singh* (24 supra) also affords salutary guidance on this issue. In *Kari Choudhary*, the Apex Court had inter alia considered when an investigation should be pursued in both crimes when there are two FIRs in respect of the same case. On facts, the mother-in-law was the complainant in a case of culpable homicide of her daughter-in-law. Eventually however she was transposed as one of the delinquent offenders of the murder. On the basis of the mother-in-law's complaint, FIR No. 135 was registered. During the course of investigation, the police formed an opinion that the murder had occurred in a manner totally different and that it was committed pursuant to a conspiracy hatched by the mother-in-law - Sita Devi, other daughters-in-law and others. Police sent a report dated 30-11-1998 to the Court that the allegations in the FIR 135 are false. The police continued investigation after informing the Court that they had registered another FIR No. 208 of 1998. Sita Devi lodged a protest before the Chief Judicial Magistrate asserting that the police report dated 30-11-1998 is unsustainable and reiterating that the accused in FIR No. 135 are the real culprits. The Chief Judicial Magistrate rejected the protest petition by an order dated 28-08-1999. Sita Devi thereupon challenged the said order in a revision. This was allowed on 07-02-2000 and the Chief Judicial Magistrate was directed to conduct an enquiry under Section 202 Cr.P.C. The police proceeded with the investigation on the fresh information that the murder was by some other persons and after conclusion of the investigation filed a charge sheet on 31-03-2000 wherein Sita Devi and others were arraigned for an offence under Sections 302 read with Section 34 IPC. The Chief Judicial Magistrate committed the case to the Court of Session and the Session Court framed a charge against the accused for the above offence. Sita Devi then moved the High Court for quashing the criminal proceedings. A learned single Judge accepted the challenge and quashed the criminal proceedings. As a consequence

Sita Devi and the other accused stood absolved of the charge of murder even without a trial. The observations of the Supreme Court in Kari Choudhary, which throw a light on the issue (relevant for this case), are set out in paragraph No. 11 of the judgment:

“11...Of course the legal position is that there cannot be two FIRs against the same accused in respect of the same case. But when there are rival versions in respect of the same episode, they would normally take the shape of two different FIRs and investigation can be carried on under both of them by the same investigating agency. Even that apart, the report submitted to the court styling it as FIR No. 208 of 1998 need be considered as an information submitted to the Court regarding the new discovery made by the police during investigation that persons not named in FIR No. 135 are the real culprits. To quash the said proceedings merely on the ground that final report had been laid on FIR No. 135 is, to say the least, too technical. The ultimate object of every investigation is to find out whether the offences alleged have been committed and, if so who have committed it.

(Emphasis)

94. In view of the decision of the three Judge Bench of the Supreme Court in Upkar Singh (24 supra) which approved the principle spelt out in the earlier decision in Kari Choudhary (25 supra), the legal position must be considered as established that where there are rival versions in respect of the same episode, it is not only legitimate but necessary that the information must take the shape of two different FIRs and the investigation must be pursued in respect of both the cases.

95. In the context of the rival positions adopted in this batch of cases i.e., on behalf of the petitioners and per contra on behalf of the State and the A.P. Police Officers Association, we are required to consider a related aspect. We also notice and place on record the fact that the A.P. Police Standing Orders, [S.O. 416 (8) instructs (the recording officer under Section 154(3) Cr. P.C.] to ‘Register a case even if the information is from the accused.’ The revised A.P. Police Manual was approved in G.O.Ms. No. 201, Home (Police. C) Department dated 08-09-2001.

(C) Whether a FIR must be registered against police officer(s) involved in an operation which has resulted in homicide(s). claimed to be in self-defense:

96. As we have already noticed and recorded, the first information (in cases involving an encounter between police and civilians alleged to be

Maoists/Naxalites/Extremists), to the officer in charge of a police station is normally, if not invariably, by a police officer. The information is also to the effect that when the police approached the conclave of civilians and warned them to surrender they opened fire. In the resultant firing by the police (asserted to be in self-defence) the casualty(s) occurred including death(s).

97. The learned Advocate General, on behalf of the State and Sri Lalit the learned Senior Counsel on behalf of the 10th respondent (in W.P.15419/06) contend that in view of the provisions of Section 6 read with the General Exceptions (set out in Chapter IV, in particular Sections 96 - 106 IPC), the first information conveyed to the officer in charge of the police station cannot lawfully be considered as information relating to commission of any offence let alone a cognizable offence. It is additionally the contention on behalf of the AP Police Officers Association that the provisions of Sections 129 - 132 (in Chapter X Cr.P.C. -relating to maintenance of public order and tranquillity) and the provisions of Sections 149 and 152 Cr.P.C. (Chapter XI Cr.P.C. -relating to preventive action of the police), authorize use of force by police officers to disperse mobs and unlawful assembly; to interpose themselves between persons contemplating or actually committing offences and the rest of the society; afford protection to police officers when force is exercised under the provisions of Sections 129 - 132 Cr.P.C. (Section 132 Cr.P.C); and even where the employment of force in such situation results in death(s). Section 151 Cr.P.C. authorizes a police officer to arrest any person upon knowledge of a design to commit any cognizable offence, even without an order from a Magistrate and without a warrant. Section 46(3) Cr.P.C. (Chapter IV) authorizes the use of all means necessary to affect an arrest including to the extent of causing the death of a person. The use of force, even lethal force by police officers, is thus legislatively sanctioned, contends the State.

98. We will now consider the above proposition.

Section 6 IPC (Chapter II - the General Explanations) reads:

6. Definitions in the Code to be understood subject to exceptions:
 - Throughout this Code every definition of an offence, every penal provision, and every illustration of every such definition or penal provision, shall be understood subject to the exceptions contained in the Chapter entitled 'General Exceptions', though those exceptions are not repeated in such definition, penal provision, or illustration.

99. On a true and fair construction of the provisions of Section 6 IPC, considered in the context of the legislative scheme qua the several provisions of the IPC, it is apparent that Section 6 explicates a convenient legislative formula to avoid reproduction of lengthy exceptions in the description of the each of the several offences. Consequently all offences enumerated in the Indian Penal Code must be read subject to the provisions in Chapter IV relating to General Exceptions (Sections 76 - 106 IPC). Therefore, when an act falls within any of these exceptions, by virtue of the provisions of Section 6, the accused must be accorded the benefit of the appropriate General Exception even though such exception is not specifically indicated in the description of the offence elsewhere in the IPC.

100. In *Subodh Tiwari v. State of Assam* the Gauhati High Court held that in view of the provisions of Section 6 the provisions of Section 299 and 302 IPC are also to be understood subject to the General Exceptions though the exceptions are not specifically enumerated in Sections 299 - 302 IPC. Thus the High Court held, even when the acts of an accused may amount to culpable homicide amounting to murder, the court is statutorily bound to consider the facts and circumstances to ascertain whether any of the provisions contained in the General Exceptions is attracted. On the material before the court if the court concludes that the accused had the right of private defence, it should hold that the act of the accused did not amount to an offence.

101. In *State of Manipur v. C.T. Sangam* (1978) Cri. LJ. 10 (Gauhati) the High Court held that in view of the provisions of Section 6 there is no imperative duty or obligation on an accused to take up a specific plea or set up a defence falling within any of the General Exceptions. If from the entire evidence on record, a case is seen to be covered by the provisions contained in Chapter IV IPC, the court is bound to take that into consideration.

102. In *Seriyal Udayar v. State of Tamil Nadu* : 1987CriLJ1058 (per Oza, J) the Supreme Court observed that even if on the basis of the material on record the right of private defence of the accused-appellant is not established, still the material produced in cross-examination and the circumstances discussed (by the court) do indicate that the incident might have happened in the manner in which it was suggested by the accused appellant and therefore it could not be said that the prosecution has been able to establish the offence against the appellant beyond reasonable doubt, the accused is entitled to acquittal.

103. It is therefore apparent that the provisions of the General Exceptions are implicated into the description and definition of all offences enumerated in the IPC. It is consequently the duty of all executors of the legislative obligations under the Penal Code, the recording officer in charge of a police station, the investigating officer or the appropriate Magistrate or Court of Session as the case may be, to consider every offence defined and sanctioned by the provisions of the IPC in the light and context of the General Exceptions set out in Chapter IV IPC.

104. Section 46(3) Cr.P.C. deals with how an arrest could be made and cognate aspects. Section 43 authorizes any private person to arrest or cause to be arrested any person who in his presence commits a non bailable and cognizable offence, or any proclaimed offender, so however that such private person (making the arrest) must without unnecessary delay make over or cause to be made over the person so arrested to a police officer or to take such arrested person to the nearest police station. Section 46(3) recognizes that an arrest could be made by a police officer or other person. Section 46(3) authorizes not only a police officer but other person as well, to use all means necessary to affect the arrest, if such person forcibly resists the endeavor to arrest him or attempts to evade the arrest. Section 46(3) clarifies that the provisions of Section 46(3) do not authorize the causing of death of a person who is not accused of an offence punishable with death or with imprisonment for life.

105. In *Romesh Chandra Mehta v. State of W.B.* : 1970CriLJ863 the court clarified when a person could be said to be accused of an offence. In the context of the right/immunity against testimonial compulsion under Article 22(1) of the Constitution, the court in *Romesh Chandra Mehta* observed: Normally a person stands in the character of an accused when a First Information Report is lodged against him in respect of an offence before an officer competent to investigate it, or where a complaint is made relating to the commission of an offence before a Magistrate competent to try or send to another Magistrate for trial of the offence. This passage was quoted with approval and the principle reiterated by *Krishna Iyer, J* in *Nandini Satpathy v. P.L. Dani and Anr.* : 1978CriLJ968 . We see no reason to import an artificial or an extravagant interpretation to the expression accused in Section 46(3) Cr.P.C. Thus, [subject to the substantive interpretation and analysis hereinafter in the judgment], where the person whose death is caused is not formally an accused (as pointed out in *R.C. Mehta and Nandini Satpathy*), recourse to Section 46(3) is unavailable.

106. In the scheme of the provisions of the Cr.P.C., in particular in Chapter V (wherein Section 46(3) occurs), it is apparent that the powers of arrest may in the specified circumstances be exercised not only by law enforcement officers but by civilians as well. The provisions of Section 46(3) Cr.P.C., occurring in a procedural code do not, expressly nor by any interpretive compulsion constitute a substantive Legislative authorization to police officers and civilians as well to use lethal force to the extent of causing death. The provisions of Section 46(3) must be understood as enjoining a prohibition that in making an arrest (whether by a police officer or any other person), death shall not be caused of the person who is not accused of an offence punishable with death or imprisonment for life. It is not possible to consider the provisions of Section 46(2) and (3) as authorizing the use of lethal force without such conduct being susceptible to scrutiny for conformity with the criminal prohibitions enjoined in the IPC considered together with the General Exceptions set out in Chapter IV IPC Where the person whose death is caused, is not accused of an offence punishable with death or imprisonment for life, the provisions of Section 46(3) Cr.P.C. are per se inapplicable.

107. It is significant that Section 46(3) Cr.P.C. occurs in a procedural code. It cannot (on text or legislative context) be interpreted as a substantive legislative authorization of an unlimited and uncanalised power to cause death. Sub-section (2) of Section 46(3) Cr.P.C provides that a police officer or other person may use all means necessary to affect the arrest. Clearly therefore all necessary means are available only to effect arrest. The power to employ all necessary means, the Legislature has consciously restricted to the object of affecting the arrest. If the choice in a given circumstance is thus between escape and certain causing of death, there appears no justification in law to cause death merely to prevent escape. Sub-lethal employment of force to prevent escape, in our considered view, may however be employed; as such non-lethal employment of force ensures arrest of the misdemeanant while tending to avoid his certain death. We consider this to be proper interpretation of Section 46(2) and (3) of Cr.P.C. If Section 46(3) Cr.P.C. is otherwise construed, as authorizing conscious and deliberate use of lethal force clearly intending the causing of death where that is the only means of preventing escape, on death caused that would not lead to arrest. Sub-sections (2) and (3) of Section 46(3) Cr.P.C. are both in the context of effecting arrest. Proportionality of the force employed while proceeding to arrest a misdemeanant is thus a very relevant circumstance in ascertaining the culpability or otherwise of the conduct in the circumstances of arrest.

108. There is another incongruous interpretive consequence in construing Section 46(3) Cr.P.C as an independent, comprehensive and substantive legislative authorization for use of lethal force; overarching the provisions of the IPC and excluding/eclipsing/avoiding the contouring standards for legitimate employment/applicability of self-defense justifications under Chapter IV IPC. If Section 467 Cr.P.C is a dominant and compendious legislative prescription, would a self-defense justification (under Chapter IV IPC) be available where lethal aggression is presented by a person not accused of an offence punishable with death or with imprisonment for life!

109. We therefore consider the appropriate interpretation of Section 46(3) Cr.P.C. to be, in elucidation of the contours of the provisions of Sub-section (2), as authorizing the use of lethal force only where a potential arrestee (who is accused and therefore formally arrayed as such and not merely suspected, of an offence punishable with death or imprisonment for life), conducts himself in a manner leading to a reasonable belief of an imminent apprehension of danger to the life and person of the police officer or other person proceeding to effect the arrest.

110. In any event while on behalf of the State and the AP Police Officers' Association the provisions of Section 46(3) are referred to in passing, the substantive and empirical stand of these respondents is that the conduct of the police officer(s) falls within the matrix of self-defence justification (a General Exception).

111. Section 129 Cr.P.C. authorizes inter alia a police officer to command an unlawful assembly or an assembly of 5 or more persons likely to cause a disturbance of the public peace to disperse and enjoins a corollary duty on the members of such assembly to disperse in conformity with such command. Section 129 authorizes the use of force to execute the command to disperse and to arrest and confine persons who form part of such assembly, to effectuate the dispersal of such assembly. Section 130 authorizes the Executive Magistrate to requisition assistance of the Armed Forces to disperse an unlawful assembly or an assembly of 5 or more persons likely to cause disturbance of the public peace. It must be noticed that Section 133 enjoins that every such officer of the armed forces, as requisitioned, shall use as little force, and do as little injury to the person and property, as may be consistent with dispersing the assembly and arresting and detaining such persons.

112. Section 132 Cr.P.C. mandates sanction by the appropriate Government as the condition precedent to the prosecution in a criminal court of any person for any act purporting to be done Under Sections

129 - 132 Cr.P.C. The expression nothing is an offence in Sub-section (2) of Section 132 Cr.P.C. is applicable where the conduct of an Executive Magistrate, a Police Officer, a person or an officer of the Armed Forces acting Under Sections 129 - 132 Cr.P.C. is in good faith. It is clear from the provisions of Section 132 Cr.P.C. that in exercise of the powers conferred, to disperse an unlawful assembly or an assembly of five or more persons likely to cause disturbance of the public peace, there is no blanket immunity from prosecution. If the conduct of a law enforcement officer Under Sections 129 - 132 Cr.P.C. were intended to be beyond the pale of criminality irrespective whether the force used was unreasonable or in bad faith, there is no occasion for providing for sanction as a condition precedent to the prosecution. The provision for sanction is a safeguard against frivolous prosecution. Wherever therefore there is a complaint of excessive or disproportionate use of force or unwarranted causing of injury to person and property and if such complaint constitutes information as to the commission of a cognizable offence, the complaint must be recorded and registered as FIR Under Section 154(3) Cr.P.C. However in view of the provisions of Section 132 Cr.P.C. sanction by the appropriate Government would be necessary for institution of a prosecution in a criminal court.

113. Sections 149, 151 and 152 enjoin an obligation on a police officer to interpose to prevent commission of any cognizable offence to arrest a person on knowledge of a design by such person to commit a cognizable offence; and to interpose to prevent any injury attempted to be committed in the police officer's view respecting public property or other specified public land marks, etc.

114. None of the provisions (Secs. 46, 129 - 132, 149, 151 and 152) per se authorize the use of lethal force without accountability nor do they, on a true and fair construction of these provisions, carve out an architecture of exceptions beyond, distinct or apart from the general or specific exceptions enumerated in the substantive provisions, of the IPC.

115. The substantive case of the State and the of the AP Police Officers Association rests on recourse to private defence justification. We therefore consider the generic and normative architecture of defences in criminal law. We embark on a detailed analysis of the area as the State very emphatically assumes that even investigatory scrutiny (into police conduct in cases of death(s) resulting from encounter operations) would undermine the morale of the police forces and is not warranted by law.

Anatomy of Defences in Criminal Law:

116. The substantive provisions of Criminal Law indicate a general, internal structure of offences. These are:

(a) An offence is committed where an actor satisfies all the elements contained in the definition of that offence. There are 2 defining facets to an offence:

(i) Actus reus elements or the objective criteria of an offence which may consist of the conduct of the actor, the circumstances in which the conduct takes place and the results consequent on the conduct; and

(ii) The mens rea or the culpability element such as purpose or intention, knowledge, recklessness, negligence, or lack of culpability with regard to the engaging in the conduct, causing the result, or being aware of the circumstances specified in the objective element(s). Every offence must contain at least one objective element (actus reus element) consisting of the conduct of the actor. Every actus reus element must have a corresponding mens rea element, which however may be different for each of the objective elements of the same offence. Sometimes, a culpability element may be required without a corresponding objective element - see Sir Mathew Hale - *Historia Placitorum Coronae* (London-1736).

General:

117. Defenses in Criminal Law are accommodations of complex notions of fairness and morality homogenized by demands of efficiency and utility. Defenses, in a generic sense are a set of identifiable conditions or circumstances that may prevent conviction for an offence. There appear in contemporaneous legal systems, a bewildering array of such possible bars to conviction. These include alibi; amnesia; authority to maintain law, order and safety of the community; chromosomal abnormality; consent; custodial authority; defense of habitation; defense of others; of property; de minimus infractions; diplomatic immunity; domestic or special responsibility; double jeopardy; duress; entrapment; executive immunity; extreme emotional disturbance, hypnosis; impaired consciousness; impossibility; incompetence; insanity; intoxication; involuntary act defenses; judicial authority; judicial immunity; justification; law enforcement authority; legislative immunity; medical authority; mental illness apart from insanity; military orders (lawful or otherwise); mistake (of fact and sometimes of law); necessity; plea bargained immunity; provocation; public duty authority; reflex action;

renunciation; self-defense; Statute of limitations; testimonial immunity and the like - see: Paul H. Robinson - *Criminal Law Defenses: A systematic Analysis* 82 *Columbia Law Review* (1982).

118. A defense in Criminal Law is a set of identifiable conditions or circumstances, legislatively prescribed and to an extent nuanced over time by precedential authority, which may prevent conviction for an offence.

119. Though as already noticed there are apparently a variety of defences which possibly operate as a bar to conviction, the several defences could be categorized conceptually as failure of proof, those that modify the offence, justifications, excuses, and non-exculpatory public policy defences.

120. In a large number of criminal jurisdictions as in India, no person may be convicted of an offence unless each element of the charged offence is proven beyond reasonable doubt. This is a general prosecutorial burden. Failure of proof defences mean that in view of the defense apparent or adopted, the prosecution is unable to prove all the required elements of the offence, the *actus reus*, the *mens rea*, the circumstances, the result elements and the other culpability requirements. Illustrations of defenses involved in failure of proof are mistake (Section 79 IPC); intoxication (Section 85, 86 IPC); mental illness (Section 84 IPC); consent (Section 87 - 89 IPC); diminished capacity (Section 86 IPC).

121. A modification of offence defense is more than a simple negation of an element of an offence, which applies even where all the elements of offence are satisfied; and is distinguishable from other defenses like self-defense or insanity. In offence modification defenses the accused satisfies all the elements required for culpability but is nevertheless entitled for acquittal. Instances are *De minimis* infraction (Section 95 IPC) or where a parent in a kidnapping case and against the advice of police pays a substantial ransom to the kidnapper of the child (Section 81 IPC). The principle underlying the modification of culpability is that while the person has apparently satisfied all the elements of the offence charged he has not in fact caused the harm or evil sought to be prevented by the legislation defining the offence. In a large number of cases defences under this head may not be given a format expression in the legislation but exist only as accepted rules. A common rule being that the victim of a crime may not be held as an accomplice even though his conduct has in a significant sense aided the commission of the crime. In several jurisdictions the woman involved has an offence modification defense to a charge of abetment to adultery. In India however (Section 497 IPC) the wife of the other person is not punishable as an abettor. It is therefore a public policy defense.

122. Non exculpatory public policy defences include Statute of limitation (Section 468 Cr.P.C); double jeopardy (Art. 20(2) of the Constitution r/w Section 300 Cr.P.C); diplomatic immunity; testimonial immunity [Art. 20(3) of the Constitution]; plea bargained immunity (Chpt. XXI A, Cr.P.C); Judicial, Legislative and Executive immunity (Section 77 and 78 IPC. Article 361(2) and (3) of the Constitution); incompetence defenses (Section 82 and 83 IPC).

123. Defenses of this class are not based on the lack of culpability of the actor. They are pure public policy arrangements. The immunity from conviction flows not on account of established non-culpability of the actor or the innocence of the defendant but on account of the countervailing public policy interests recognized, accommodated and provided by the legislature.

Justification Defenses:

124. In justification defenses the offence caused by the justified behavior remains a legally recognized harm. Excusing conditions as defense constitute part of justification defenses and are available so long as the condition has been caused by a disability, transient or permanent and is present at the time of the offence. Under the special justifying circumstances however that harm is outweighed by the need to avoid a greater harm or to further a larger societal interest. Self-defense or defensive force justifications are all based on a threat in response to which the defensive force is justified. They are often distinguished by one another by the nature of the interest threatened. Statutes too often make special alterations or exceptions to the basic principle of defensive force justification depending on the interests threatened. The general exceptions enumerated in Sections 96 - 106 in Chpt. IV of the IPC fall within this category of defences.

125. Public authority defences (Section 46(3) Cr.P.C.) unlike defensive force justifications need not always be triggered by a threat. Here the actor (an official or even a private individual) must be protecting or furthering a legally recognized interest. But even here the culpability for the presumptive criminal conduct/act is avoided only by recourse to established defenses.

126. All justifying defences have a similar architecture viz., triggering conditions, which permit a necessary and proportional response. Triggering conditions are the circumstances that must exist before the perpetrator will be eligible to act under a justification. The aggressor must present a threat of unjustified harm to the protected interest. The triggering

conditions of a justification defense do not however in themselves provide the privilege to act without restriction. In this category all defences for a successful claim of justification to act must satisfy two requirements (a) it must be necessary to protect and (b) must be a proportional response viz., that the action must be taken only when and to the extent necessary to protect or further, the interest at stake. The inherent proportionality requirement normatively defines the maximum limit of the harm that may be used in protection or furtherance of an interest (Section 97 r/w 99 - 106 IPC).

127. A justification defense provides exculpation for conduct that remains generally criminalized. Justified conduct causes a legally recognized harm or evil and remains generally condemned and prohibited. It is tolerated only when by infliction of the intermediate harm or evil, a greater societal harm is avoided or benefit gained.

128. While all defenses have the effect of saving the accused from some or all of the punishment he would otherwise receive, only justification defenses achieve this on the ground that the conduct in question was in fact legally permissible. Justifications, along with criminal prohibitions, set the boundary between permissible and criminally prohibited conduct.

129. There appear to be three (3) distinctive features of justification defenses that distinguish and mark them out as more than mere exceptions to criminal prohibitions:

(i) While (criminal) prohibitions are defined in terms of prohibited means, justifications appear to be set out in terms of preferred ends; criminal law identifies conduct for prohibition in terms of the means employed - killing a human being, or taking property without consent, irrespective of how venal or noble the ends might be for doing so - expressed in the principle - motive is not an essential element of a crime but evidence of motive is admissible since it is relevant as a circumstance tending to prove the commission of an offence - KENNY Outlines of Criminal Law - 19th Edition p. 36. Justifications however are invariably defined in terms of the ends but do not necessarily specify the particular means by which to accomplish those ends e.g.; a person is justified in doing whatever is necessary (within proportionality limits) for the end of defending oneself;

(ii) The other distinguishing feature between mere exceptions to offence definitions and justification defenses is their fault standard. While particular prohibitions (including exceptions built into them) are subject to a variety of different fault standards, justifications are almost always subject to the same independent fault standard, of reasonable belief; thus if the

justification of self defense were to be considered as incorporated into the definition of the offence of murder, this would significantly change the scope of criminal liability; someone with an honest though unreasonable belief that deadly force was necessary to protect his own life would be convicted of murder; but if non self-defense is considered the element of the offence (of murder), then any honest belief that deadly force was necessary and proportionate to the threat, however unreasonable, would suffice to negate mens rea and ensure an acquittal of the accused.

(iii) The third feature of justification defenses, distinguished from mere legislated exceptions to criminal prohibitions is that criminal law does not simply spell out justification defenses as permissions to do what is generally prohibited. Law recognizes that when certain individuals, with the requisite legal power, validly decide that their conduct is justified under the circumstances, that decision is legally effective, that is when an individual decides that it is justified to do something that is generally prohibited, that decision brings about a change in what the individual is legally permitted to do. It is required to notice that this principle applies where a magistrate, exercising his legal power decides to issue a warrant as part of a lawful search which otherwise would constitute trespass; a law enforcement officer decides when a citizen is justified in doing things that are generally prohibited in order to assist them in pursuing important law enforcement purposes; a private fiduciary such as a parent decides that it is justified under what circumstances to use force to discipline their children, or even when an ordinary citizen decides when it is justified to use lethal force in their own defense.

130. It is the importance of a valid decision by the appropriate individual that gives meaning to the crucial distinction between lawful activity including police activity and vigilantism. This is because the justification provisions in criminal legislation do not set out general permissions to engage in socially worthwhile conduct, however that conduct may be defined; on the other hand justification defenses recognize that some people (not others) have the legal power to take decisions. [See generally - Malcolm Thorburn - Justifications, Powers, and Authority 2008, 117 Yale Law Journal, 1070].

131. Thorburn categorizes justification defenses applicants into three generic groups:

(a) Private fiduciaries: Such as parents or those acting in loco parentis, who are required to take decisions as to parental use of discipline force; or a fiduciary relationship arising through unilateral undertaking or agreement as in the case of a doctor providing invasive emergency medical

treatment or by means of bilateral agreement for medical treatment in non-emergency situations (Section 88, 92 IPC). In such situations criminal law assumes conduct that is otherwise criminal as justified because of the exercise of legal power by the decision maker. The crucial element in the justification of such conduct is the valid decision by an authorized individual who is assumed to exercise lawful decisional power. Normally fiduciary relationships arise qua bilateral arrangements on consent. There are also a great many fiduciary relationships where the fiduciary wields decision-making power over the affairs of a beneficiary who never consented to such an arrangement. In all these cases the law entrusts decision-making power over the affairs of a beneficiary's affairs to a fiduciary since the beneficiary is incompetent to make the decisions. This is true both of fiduciary relations that arise by operation of law (e.g. as between natural parent and the child) and those that arise by unilateral undertaking (between an adoptive parent and a child, or between a doctor and an unconscious patient in need of emergent medical care) (Section 89 IPC). The validity of the decision is however measured by fiduciary standards, i.e. duty to exercise reasonable care and to act in the beneficiary's interest and not his own;

(b) Public officials: While private fiduciaries are entitled to make decisions about justified interferences with the interests of their specific charges, public officials are entitled to make decisions about when it is justified to interfere with the interests of a whole lot of other people as well. A police officer may determine that it is appropriate for him to arrest any person within his jurisdiction without a warrant under appropriate circumstances. This class of justification defenses though limited to a class of public officials who may exercise the relevant legal power i.e., specific state officials - the class of persons whose interests are subject to that decision making power is considerably broader, usually including anyone within the decision maker's jurisdiction.

132. Without available justification defenses public Law enforcement officials would be unable to deliver upon their function. Markus Dirk Drubber (A political Theory of Criminal Law: Anatomy and the Legitimacy of State Punishment) An unpublished manuscript available at <http://ssrn.com/abstract>, perceptively observes that a list of police functions looks like list of serious criminal offenses: Drubber points out that The statutory threat of punishment looks suspiciously like 'menacing', wiretapping like 'eavesdropping', entrapment like 'solicitation' (or even conspiracy), searching a suspect's house like 'trespass', searching or frisking the suspect herself like 'assault', arresting her like 'battery', seizing her property like larceny', a drug bust like 'possession of narcotics' (with or

without intent to distribute), indicting or convicting like ‘false imprisonment’, and executing her like ‘homicide’ (murder to be precise).

133. Law also recognizes that public (police) officials are entitled to effect arrests, i.e. are justified in doing what would otherwise constitute an assault.

134. Law assumes that there is a quasi-fiduciary nature of relationship between public officials and the citizenry. [Robert Flannigan, *The Fiduciary Obligation* 9 Oxford Legal Studies, 285 (1989); Evan J. Criddle, *Fiduciary Foundations of Administrative Law* 54 UCLA L. Rev. 117(2006)]; and

(c) Ordinary citizens with Public Powers: Situations occur when ordinary/private citizens exercise decision making when caught in extraordinary situations, such as self-defense (broadly including not only defense of self but also defense of property and property of others), citizen’s arrest, and (where the defense exists) lesser evils. Normally exercise of public powers by citizens caught in extraordinary situations arises because other, better qualified (i.e. the relevant class of public officials), are temporarily unavailable. Private citizens do not normatively have a standing power to make decisions regarding arrest without a warrant, lesser evils and the like. It is a juridically recognized and a generally accepted matter of criminal law doctrine that private citizens do not have standing power to make these classes of decisions; rather, they are entitled to decide when it is appropriate to use force in self-defense, to prevent a greater evil or to effect an arrest only where recourse to State officials is impracticable. The authority of private individuals to exercise public power is however recognized in the matrix of the larger enterprise of criminal law as intrinsic to a temporal imminence of society requirement coupled with the absence of a lawful alternative course of action, i.e. recourse to the authorized public authority. Thus the decision making authority of ordinary citizens is derived entirely from their role as stand-ins for public officials who are unable to make those decisions themselves.

135. The source of ordinary citizen’s legal power to decide when it is permissible to violate criminal prohibitions in order to defend oneself, to effect an arrest, or to prevent a breach of peace, or to prevent a greater evil is clearly seen to be the derivative of the power of frontline State officials such as police officers to make such decisions.

136. Law subjects private fiduciaries, public officials and private citizens who exercise decision making powers affecting for instance the life and liberties of others in circumstances such as citizen’s arrest or private defense

justifications to substantially similar standards of scrutiny. A police officer could claim immunity from investigatory process or in appropriate cases prosecution only on legislatively authorized/mandated immunity and not on specious grounds of vague public interest. All claims of self-defense justifications whether by private individuals or by members of law enforcement must in law be investigated and tried according to similar, well-defined principles and on vigorous patterns of established reasoning.

137. When required to determine whether a police officer was justified in carrying out a search, an arrest or in killing an individual on the claim of self defense, the State (the investigating officer) and at the appropriate stage the courts are required to pursue the same sort of reasoning as they do when asked to determine whether a private actor was justified in carrying out conduct that a private fiduciary had deemed to be justified and not a distinct or special standard.

138. A theoretical assumption of a neat divide and clearly apparent classification between public officials and private citizens does not hold up in contemporaneous practice either. At an accelerating pace governments are privatizing services that were once considered the non-derogable core of governmental activity. Even where governments are not privatizing such services, they are often retreating from the provision of these services, leaving the private sector to provide them. This phenomenon is emphatically illustrated in the steady growth of the private security industry across the developed and developing world. In all such cases putatively private citizens - whether they be private security guards, private prison employees, or mercenaries -engage in conduct that is generally prohibited, claiming criminal justifications in their defense.

139. The functional paradigm of law enforcement officials: Police officials are endowed with a mantle of sovereign authority by the State to enforce the laws and protect people. They possess awesome powers. They perform their duties under hazardous conditions and ever with the vigilant public and now the media eye upon their performance. Police officers are permitted only a margin of error in judgment under conditions that impose high degrees of physical and mental stress. They function as field soldiers who enforce the laws and preliminarily determine the guilt of those who are perceived to have transgressed the law. They inherit a lawful grant of power to arrest and detain individuals until the court, at the appropriate level in the judicial branch (another organ of the State) passes a final judgment of guilt for each alleged offender. Police officers also have the authority to use deadly/lethal force in special circumstances legislatively conditioned and authorized that warrant employment of

such level/degree of force. The laws structuring a constitutional government clearly, and police policies too presumptively, limit an officer's ability to use unrestricted force.

140. Under general principles of criminal law, although an officer having the right to arrest a misdemeanant may use such force as is necessary to effect his or her purpose, provided it is not excessive, an officer has no right, except in self-defense to shoot or kill a misdemeanant in attempting to arrest him/her 40 American Jurisprudence, Second Edition -Homicide, Section 135.

141. Pragmatic, philosophical and moral dilemmas encompass the use of lethal force by law enforcement officials while attempting to arrest/apprehend suspected criminals. The problematic and the conundrum lies in determining whether peace officers, entrusted to secure persons for judicial proceedings may hand down the unappealable judgment of death on the street even before guilt is determined at trial.

142. As Sir Robert Mark, the Commissioner of Metropolitan Police, London pointed out Policing a perplexed society - George Allen and Unwin publication, 1977, the police discharge the communal will, not that of any government minister, mayor or other public official, or that of any political party, whilst remaining fully accountable to the community for what they do or fail to do - We are taught at the outset of our police careers that obedience to orders affords no defense for wrongdoing or misuse of authority.

Elsewhere in the work (page 81), Sir Mark writes: Attempts to achieve political objectives by coercion or violence are, of course, unlawful and in a sophisticated society ought to be unnecessary but to counter them by excessive violence may in practice go far to help militants to achieve their aims or allow them a degree of public sympathy or support which they would not otherwise receive. The police therefore, both as a matter of law and strategy, adhere strictly to the doctrine of minimum force, notwithstanding that this may involve acceptance of minor casualties and harassment. This does not, of course, imply willingness to allow militant demonstrators their way, but to deny them success by the least violent means.

Contours of the right of private defense under the IPC:

143. Defensive force/self-defence justifications and the contours of this general exception to criminality are spelt out in Sections 96 - 106 of the IPC. In particular, Section 99 IPC explicates the non-derogable principle

that the right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence. This doctrine of proportionality thus overarches the entire spectrum of the right of private defence. The provisions of Section 100 IPC contour the right of private defence of the body extending to causing of death; the provisions of Section 101 to causing any harm other than death; the provisions of Section 103 the right of private defence of property extending to the causing of death; and the provisions of Section 104 contour the right of private defence extending to the causing of any harm other than death where the offence, the committing of which, or the attempting to commit which, be theft, mischief or criminal trespass, other than of the nature described in Section 103. Sections 96 and 97 are preambular in scope; Section 98 enumerates the right of private defence against the conduct of a person of unsound mind and other disabilities that would otherwise constitute the conduct of such person as a non-offence. Section 102 defines the point of commencement and continuance of the right of private defence of the body, while Section 105 defines the point of commencement and continuance of the right of private defence of the property. Section 106 spells out the right of private defence against deadly assault which reasonably causes the apprehension of death extending to causing harm to an innocent person if the person exercising the right of private defence be so situated that he cannot effectively exercise that right without risk of harm to an innocent person.

144. Our Courts (in complementarity with the jurisprudence of other civilized legal systems), have consistently taken the view that the doctrine of private defence inheres the necessary corollary that the violence, which a person defending himself or his property is entitled to use, must not be unduly disproportionate to the injury which is to be averted or which is reasonably apprehended and should not exceed its legitimate purpose. The Courts have further held that the exercise of right of private defence must never be vindictive or malicious -Jai Dev and Anr. v. State of Punjab : [1963]3SCR489 .

145. Again in State of U.P. v. Ram Swarup and Anr. : 1974CriLJ1035 (Per: Chandrachud, J), the Apex Court reiterated the principle thus (paragraph 14 of the report):

The right of private defence is a right of defence, not of retribution. It is available in face of imminent peril to those who act in good faith and in no case can the right be conceded to a person who stage-manages a situation wherein the right can be used as a shield to justify an act of aggression. If a person goes with a gun to kill another, the intended

victim is entitled to act in self-defence and if he so acts, there is no right in the former to kill him in order to prevent him from acting in self-defence. While providing for the right of private defence, the Penal Code has surely not devised a mechanism whereby an attack may be provoked as a pretence for killing.

The Court reiterated that the extent of harm that may be lawfully inflicted in self-defence is limited. It is a necessary incident of the right of private defence that the force used must bear a reasonable proportion to the injury to be averted, that is, the injury inflicted on the assailant must not be greater than is necessary for the protection of the person assaulted.

146. Enumerating the contours of the burden of proof enjoined by Section 105 of the Evidence Act in the context of the general exceptions in Sections 96 - 106 IPC, the Apex Court in *Ram Swarup* (40 supra) and after referring with approval to earlier decisions in *K.M. Nanavati v. State of Maharashtra* : AIR1962SC605 ; *Dahyabhai Chhaganbhai Thakker v. State of Gujarat* : 1964CriLJ472 ; *Munshi Ram v. Delhi Administration* AIR 1968 SC 702; and the judgment of the Allahabad High Court in *Rishikesh Singh v. State* : AIR1970All51 , held that the burden which rests on the accused to prove that any of the general exceptions are attracted does not absolve the prosecution from discharging its initial burden and the primary burden never shifts except in cases where a statute displaces the presumption of innocence. The evidence on record though insufficient to establish the exception, may be sufficient to negate one or more of the ingredients of the offence i.e., the accused may fail to establish affirmatively the existence of circumstances which would bring the case within a general exception and yet the facts and circumstances proved by him while discharging the burden under Section 105 of the Evidence Act may be enough to cast a reasonable doubt on the case of the prosecution, in which event he would be entitled to an acquittal. The Court also clarified that the burden on the accused to prove the exception is not of the same rigor as the burden of the prosecution to prove the charge beyond a reasonable doubt. It is enough for the accused to show, as in a civil case, that the preponderance of probabilities is in favour of his plea.

147. The above principles were reiterated in *Yogendra Morarji v. State of Gujarat* : 1980CriLJ459 .

148. In *Kulwant Singh v. State of Punjab* : (2004)9SCC257 (Per: S.B. Sinha, J), the Apex Court reiterated the principle that the right of private defense is preventive and not retributive in nature and that the right is available to a person who is suddenly confronted with immediate necessity

of averting an impending danger which is not of his own creation and that whenever a right of private defense is claimed, it must be judged from the nature of occurrence, the circumstances in which it had occurred and whether the person claiming such right has acted legitimately. Attending circumstances would be relevant for judging the same.

149. In *State of M.P. v. Ramesh* : 2005CriLJ652 (Per: Arijit Pasayat, J), the Apex Court while reiterating the established principles pointed out that in order to find whether the right of private defense is available to an accused, the entire incident must be examined with care and viewed in its proper setting. To claim a right of private defense, extending to voluntary causing of death, the accused must show that there were circumstances giving rise to reasonable grounds for apprehending that either death or grievous hurt would be caused to him. The Court also held that in order to find out whether the right of private defense is available, the injuries received by the accused, the imminent threat to his safety, the injuries caused by the accused and the circumstances whether the accused had time to have recourse to public authorities are all relevant factors to be considered. The Court reiterated the important ingredient of the doctrine of defence justification viz., that it is essentially a defensive right and is available only when the circumstances clearly justify it. It should not be allowed to be pleaded or availed as a pretext for a vindictive, aggressive or retributive purpose of offence. It is a right of defence, not of a retribution, expected to repel unlawful aggression and not as retaliatory measure. It is not a plea or a device whereby an attack may be a pretence for killing. The right to defend does not include a right to launch an offensive, particularly when the need to defend no longer survived, ruled the Court in *Ramesh* (47 supra).

150. In *V. Subramani and Anr. v. State of T.N.* : 2005CriLJ1727 (Per: Arijit Pasayat, J), the Court pointed out that whether in a particular set of circumstances a person legitimately acted in exercise of right of private defense is a question of fact to be determined on the facts and circumstances of each case. No test in the abstract for determining such question can be laid down. All the surrounding circumstances must be considered. The Court also pointed out that the right (private defense) commences as soon as a reasonable apprehension of danger to the body arises from an attempt, or threat, to commit the offence, although the offence may not have been committed, but not until there is that reasonable apprehension. The right lasts so long as the reasonable apprehension of danger to the body continues. The Court reiterated that in order to determine whether the right of private defence is available or not, the injury received by the accused, the imminence of threat to his safety, the injuries caused by the

accused and the circumstances whether the accused had time to have recourse to public authorities are all relevant factors to be considered.

151. In *Bishna v. State of W.B.* 2006 (1) ALT (Crl.) 180 (SC) : 2006 (1) SCJ 124 : (2005) 12 SC 657 (Per: S.B. Sinha, J) the doctrine of the right of private defense was revisited. The Court reiterated the principle that a right of private defence cannot be claimed when the accused are aggressors, when they go to the complainant's house well-prepared for a fight and provoke the complainant party resulting in quarrel and taking undue advantage that the deceased was unarmed causing his death; and also that where the right of private defence is pleaded, the defence must be a reasonable and probable version satisfying the Court that the harm caused by the accused was necessary for either warding off the attack or forestalling the reasonable apprehension of grave injury from the side of the accused.

152. These principles were reiterated in *Laxman Singh v. Poonam Singh and Ors.* (2005) 10 SCC 94 : 2004(1) ALT 10.3 (DNSC); and in *Triloki Nath v. State of U.P.* : AIR2006SC321 .

153. The decisions considered above are all in the context of the applicable principles which should govern decision making by the Courts in cases where an accused pleads a self-defense justification or where circumstances involving application of the General Exceptions in Chapter-IV IPC are implicated, in the facts and circumstances of the case.

154. Nevertheless, the principles enunciated in the precedents with regard to the circumstances, the restrictions and the limitations on the legitimate exercise of the right of private defense apply to the stage of recording of information (conveying information as to an act of homicide, by the perpetrator of such homicide while asserting that the homicide was in consequence of the exercise of right of private defense). These principles equally apply and shall inform the investigatorial process into cognizable offences, under the provisions of the Cr.P.C, as they do to the trial on a charge of culpable homicide where the accused pleads a self-defense justification for the act.

155. The right of self-defense is based on necessity and without such necessity the right to resort thereto does not exist *Corpus Juris Secundum* Vol. 57, P.107. In *Munney Khan v. State of M.P.* : [1971]1SCR943 , the Supreme Court explained the right of private defense as being essentially a defensive right circumscribed by the statute available only when the circumstances clearly justify it. It should not be allowed to be pleaded or availed of as a pretext for a vindictive, aggressive or retributive purpose.

This right is available against an offence and, therefore, where an act is done in the exercise of right of private defense, such an act cannot give rise to any private defense in favour of the aggressor in return. This would be so even if the person exercising the right of private defense has the better of his aggressor provided he does not exceed his right, because the moment he exceeds it, he commits an offence. If there is no initial right of private defense then there can hardly be any question of exceeding that right. An aggressor cannot claim this right nor can the right be used as a shield to justify an act of aggression. The quantum, nature and duration of the force that is legitimate in the exercise of the right of private defense depends upon the peculiar circumstances of each case and that is a matter for investigation and ascertainment of the surrounding facts and relevant circumstances, explained the Court in *Munney Khan*.

156. To reinforce the contention [that on the first information conveyed (by a Police Officer) in cases involving the death of civilian(s) in a police encounter, no crime need be registered], the learned Advocate General places reliance on the judgment in *Costao Fernandes v. State* at the instance of D.S.P., CBI, Bombay : 1996CriLJ1723 . Hansaria, J (G.N. Ray, J concurring) quashed the prosecution against the appellant. The appellant - a Preventive Officer of the Customs Department, while on duty to apprehend smuggling activities saw the deceased speeding away with smuggled gold worth rupees 8 crores in a car. The appellant chased the deceased on a motorcycle and attempted to stop the vehicle. The deceased resisted and in the ensuing scuffle the deceased inflicted as many as 22 injuries including abrasions and incised wounds at various parts of the appellant's body. There was evidence on record that the appellant was trying to remove the ignition key of the vehicle being driven by the deceased. The appellant was prosecuted for the offence Under Section 302 IPC for having caused the death in the process of exercising his right of private defense. Before the Supreme Court it was contended on behalf of the respondent-State that if a Customs Officer attempting to stop a vehicle involved in smuggling activities had faced resistance from the driver or occupant of the vehicle which had necessitated taking recourse to right of private defense and in the process, the driver or the occupant had suffered injuries which caused death, the officer concerned cannot claim protection (at the threshold) for interdicting the criminal trial, by recourse to the provisions of Section 155 of the Customs Act, 1962 (the Act). According to the State the officer must face the criminal trial where the question of right of private defence, if raised, is to be considered in the light of the evidence adduced in the case. Section 106 of the Act empowers the appropriate officer, if he has a reason to believe that any aircraft, vehicle or animal ... is being, or is about to be used in the

smuggling of any goods or in the carriage of any goods which have been smuggled, to stop any such vehicle, animal or vessel or in the case of an aircraft, compel it to land; to search the air craft, vehicle or vessel; to break open the lock of any door or package, if the keys are withheld; and generally to order - compel a vessel to stop or the aircraft to land; if it fails to do so to give a chase and give a signal for the vessel or air craft to stop or land, as the case may be; and if it fails to do so, to fire upon. Section 106(2)(b) also empowers the appropriate officer to use all lawful means for stopping any vehicle or animal and where such means fail to fire open such vehicle or animal. Section 155 of the Act enjoins, inter alia, that no prosecution shall lie against any officer of the Government for anything done or intended to be done in good faith, in pursuance of the Act, the Rules or the Regulations. On behalf of the State it was contended that the appellant's injuries were self-inflicted, a contention which was rejected by the Supreme Court on an analysis of the material on record including the wounds certificate. While quashing the prosecution, the apex court held that the very purpose of Section 106 of the Act would be frustrated, if a Customs Officer in exercise of his powers and duties is not permitted to take all consequent action necessary for stopping the conveyance and conducting its search. If in the course of such action it becomes necessary to immobilize the driver or the occupant of a vehicle, then the officer has ample authority Under Section 106. In view of the provisions of Sections 106 and 155 of the Act and the peculiar facts and circumstances of the case, the court held that the facts, prima facie, support the appellant's claim for protection Under Section 155 of the Act and it would not be proper to disallow such protection at the threshold and subject the appellant to a full-fledged trial on the charge of murder.

157. It requires to be noticed that in *Costao Femandes* (54 supra) while quashing the criminal proceedings against the appellant the court (per the concurring opinion of Ray, J) delineated the caution that must be exercised (para-4 of the report):

4. It is, however, necessary to indicate a note of caution in the matter of consideration of protection against criminal liability if sought for under Section 155 of the Customs Act at the threshold of the Criminal trial. Since such immunity is claimed at the threshold, the Court should carefully scrutinize the relevant facts and materials placed before it for the purpose of finding (a) that the concerned Officer was authorised to act for prevention of smuggling activity and in fact had bona fide acted in exercise o his duties and functions in preventing the smuggling activities

being carried or about to be carried (b) there are prima facie materials to indicate that such officer had honestly attempted to stop the conveyance for effecting search of the same (c) that such an attempt to stop the vehicle was sought to be frustrated either by not stopping the vehicle or by attempting to forcibly taking away the vehicle despite attempt by the concerned officer to stop the vehicle and (d)w that recourse to use of force on the driver or occupant of the vehicle was apparently necessary to immobilize the vehicle or to save himself from imminent danger of personal risk. If on consideration of the materials placed before the Court, a possible view can be objectively taken that in discharge of the duties and functions under Section 106 of the Customs Act that a competent Officer had bonafide used force and such use of force is not just a ruse for high handed action on his part which was not at all necessary in the facts of the case but prima facie there is justification for the course of action pleaded by the officer, the Court would give effect to the protection under Section 155 of the Customs Act by dropping the criminal case initiated against the concerned Officer. The facts already on record, some of which have been indicated in the judgment of my learned brother, indicate that the appellant was on official duty as Preventive Officer to look out for smuggling activities at the relevant time and in discharge of his official duties he had chased a speeding Contessa car driven by the deceased in an attempt to stop the car for searching the same. As a matter of fact, he overtook the car and having disclosed his identity asked the deceased to stop the car but when the driver had attempted to flee with the car, he jumped into the same and tried to take out the ignition key in order to stop the vehicle. It has not been revealed that appellant had received various injuries including incised wounds which on the basis of medical report are likely to have been caused at the time when attempt to stop car was made. Such facts prima facie support the appellant's claim for the protection under Section 155 of the Customs of Act to the appellant but subject him to a full fledged trial on a charge of murder by pointing out that it would be open to the appellant to plead for right to private defence in such trial, like any other accused.

158. In an earlier decision in *Bhappa Singh v. Ram Pal Singh and Ors.* : 1982CriLJ627 the officials of the Customs & Excise Department raided a jewellery shop of the appellant. On being attacked, the raiding party fired shots. The appellant lodged a complaint that the members of the raiding party had come to commit dacoity in the jewellery shop. The

High Court quashed the complaint. The Supreme Court (three Judges Bench) found from the facts on record that the Customs Department had not gone out to commit dacoity nor had it trespassed but had conducted the raid to find out if any illegal activity was being carried out in the premises. Section 108 of the Gold (Control) Act 1968 [which is in pari materia, Section 155 of the Customs Act 1962) was relied upon by the High Court for quashing the complaint. The Supreme Court concurred with this view. While upholding the judgment of the High Court, the Supreme Court however recorded a note of caution (in para 7 of the report), which we consider appropriate to reproduce:

“7. Even though what we have just stated is a general prima facie impression that we have formed at this stage on the materials available to us at present, it may not be possible to come to a conclusive finding about the falsity or otherwise of the complaint. But then we think that it would amount to giving a go-by to Section 108 of the Gold (Control) act, if cases of this type are allowed to be pursued to their logical conclusion, i.e., to that of conviction or acquittal. In this view of the matter we do not feel inclined to upset the impugned order, even though perhaps the matter may have required further evidence before quashing of the complaint could be held to be fully justified. The appeal is accordingly dismissed.”

159. Whether an act (of firing) by Police Officer(s) had caused the death and if so had been caused in circumstances falling within the General Exceptions in Chapter IV IPC, is a mixed question of law and fact. The recording/registering officer under Section 154(3) Cr.P.C. cannot be presumed the authority or omniscience to divine the complex law/fact matrix from the information received and at that stage.

160. The Andhra Pradesh Police Officers' Association would urge that Section 154(3) Cr.P.C, on text and principle accommodates a discretion in the recording officer, to consider whether a complaint conveying information as to the commission of a cognizable offence together with the factual narrative indicating a claim to one or more of the general exceptions (in Chapter-IV IPC) requires to be registered as FIR. In view of the provisions of Section 6 IPC the offences enumerated in the Code must be read subject to the provisions of Chapter-IV IPC and therefore contends Sri Uday Lalit (the learned senior counsel, for the 10th respondent), the recording officer acts within his inherent discretion under Section 154(3) Cr.P.C. in declining to record the information and registering the FIR when the complaint conveys information that facially

indicates commission of a cognizable offence but taken together with the general exceptions in Chapter-IV IPC (since the information also claims the benefit of one or more of these exceptions), the information does not convey facts disclosing commission of a cognizable offence and hence does not warrant registering the FIR. It is further contended that to interpret the provisions in Section 154(3) Cr.P.C. otherwise would lead to disastrous consequences. The elaboration in this regard is that wherever a complaint is made, for instance as to deprivation of life or liberty by judicial authority or pursuant to a judgment or order of a Court; by a child under seven (7) years of age or by a child above seven (7) and under twelve (12) but of immature understanding; by a person of unsound mind; or by a medical authority, it would be obligatory for the recording officer to register a FIR and set the investigatorial process into motion. Such a result would destabilize equilibrium and would be productive of immense and avoidable public mischief, is the contention.

161. In our considered view these apprehensions are misplaced. Sections 77 and 78 IPC carve out a general exception from culpability in favour of judicial authority or acts done pursuant to a judgment or an order of a Court. Where the information conveyed is that the conduct complained of is by a judicial authority or pursuant to a judgment or an order of the Court, the information is inherently not as to the commission of any offence (in view of Section 6 r/w Section 77 & 78 IPC); further convictions and sentences are by the court, the officer performing the functions of office. Where however the information is to the effect that a person masquerading as judge or not acting in such capacity had committed a cognizable offence, then and in such circumstance the recording officer must record the information and register the same as a First information Report. We perceive no serious or grave public mischief ensuing as a consequence of interpreting Section 154(3) Cr.P.C. on its normal textual terms.

162. It requires to be noticed that Article 261 of the Constitution enjoins that Full faith and credit shall be given throughout the territory of India to public acts, records and judicial proceedings of the Union and of every State. The appointment of a judge is a public act and the particulars and designation of appointment as a judge are matters of public record. Even if a mischievous complaint is made that a named individual masquerading as a judge had passed an order; whether the named individual is a judge is an easily discoverable public act and a matter of public record. Even the provisions of Section 81 of the Evidence Act enjoin that a Court shall presume the genuineness of any official gazette

or government gazette. Judicial appointments of every hue and hierarchy throughout the territory of India are gazetted appointments.

162-A. For reasons alike, as discussed in the preceding paragraphs, complaints against persons entitled to incompetence defenses such as infants (Sections 82 and 83 IPC) or against medical authority (Sections 88, 89 and 92 IPC) may either require to be recorded and registered as FIR or not, depending upon the idiosyncratic facts, context and circumstances of the information. In any event, the failure to record the information or register the FIR wherever warranted by law, is productive of far greater public mischief than the inconvenience occasioned by recording and registering the FIR.

163. It must also be recognized that the exceptions in favour of judicial authority or the immunity vouchsafed to acts done pursuant to an order or judgment of a Court comprise public policy class of defenses. The language of Sections 77 and 78 IPC shows that the exculpation is absolute and not hedged in by limitations as in the case of private/self-defense justifications. As we have earlier herein considered on analyses of the textual, juridical and precedential exposition of defense justifications, private defense is a right available as only a preventive and not a retributive measure and proportionality of the defensive force employed to an initial aggression, is an integral component that defines the contours of justifiable claims to a defensive force justification. The general exceptions enumerated in favour of judicial authority or in respect of acts done pursuant to a judgment or order of the Court are thus qualitatively dissimilar and provide an absolute exculpation. We perceive no substance in this contention except sophistry.

164. Empirical analysis, textual and curial authority with respect to self defense justifications considered supra indicates that the need of self-preservation is rooted in the doctrine of necessity. It is the rule of necessity to which a party may have a recourse under certain situations to prevent greater personal injury or injury to others which he may apprehend. Self-preservation is more an instinctive than a cognitive condition of a majority of the living species and in particular human beings. This instinct is recognized a lawful defense in the laws of civilized Nations and finds legislative expression in Sections 96 - 106 IPC. These statutory provisions per se and as expounded in decisions are clearly to the effect that the Exceptions are hedged in and circumscribed by conditions and limitations including the imminence and gravity (standard) of the threat and conditions as to the requirement of proportionality of the response/defense.

165. The basic elements of self-defense by employment of deadly/lethal force include (1) the perpetrator must have reasonable grounds to believe that he was in imminent danger of death or serious body harm; heated words, vague threats or the possibility of future harm does not suffice; the harm must be serious and imminent; (2) the perpetrator actually believed that he or any other person was in such imminent danger; establishing this subjective belief may normally require the perpetrator to make a statement or testify as the case may be; (3) the danger was such that the perpetrator could only save himself by employment of deadly force; (4) the perpetrator had employed no more force than was necessary in all the circumstances of the case; and (5) the perpetrator was not the initial aggressor.

166. Self-defense justification is normally an all or nothing strategy. In order to establish it, the perpetrator has to admit being at the scene of offence with a weapon, which he used intentionally to harm the aggressor. He has to admit that he injured/killed the aggressor. The facts gathered must establish and in a given situation the perpetrator may have to establish that a reasonable person in his place would have acted similarly. Self-defense justifications normally imply a rational response to a very dangerous situation, and normally eschew claims of mental illness, insanity, defenses based on intoxication or drug use, or other defenses enumerated as General exceptions to criminality.

Conclusion on Issue No. 1:

167. On a careful consideration of the relevant statutory provisions; the binding and persuasive precedents; the normative architecture of private defense justifications generally and in the context of the provisions of the IPC; and the constitutional values that inform and structure our governance processes, we hold that the information conveyed to the officer in charge of a Police Station intimating the death of any person as a consequence of firing by law enforcement officials of the State (notwithstanding a claim as to the death occurring while exercising the right of private defence) must invariably and without exception be registered as FIR Under Section 154(3) Cr.P.C.; and investigation Under Sections 156/157 must follow.

168. Sri Kannabiran, the learned senior counsel (for the 9th respondent in W.P. No. 15419 of 2006) cited the Privy Council decision in *Palmer v. The Queen* (1971) A.C. 814 and the House of Lords' decision in *Ft. v. Clegg* (1995) 1 A.C. 482 to support the contention that if the plea of self-defense fails in a case resulting in death in an encounter between civilians and police, the conviction for murder under Section 302 IPC

must necessarily follow. We refrain from pronouncing on this aspect of the matter as this aspect does not fall for consideration before this Bench per se or as integral to any of the issues formulated for our consideration.

169. The question whether on the failure of a plea of self-defense, in cases of death resulting from a police encounter, the accused police officer(s) must invariably be convicted for murder or may be convicted for culpable homicide not amounting to murder, is an aspect that is more appropriately determined by the appropriate Court of Session when trying the charge.

170. There is an ancillary contention, which we consider. Sri Tarakam, the learned Senior Counsel for the petitioners (W.P. No. 15419/06) has urged that the first information conveyed by a police officer in case of encounter death(s) constitutes an admission of commission of the culpable homicide of murder and therefore registration Under Section 154(3) Cr.P.C. is inevitable. We have already concluded that on information conveyed of death(s) in a police encounter recording and registering of such information is a non-derogable executive obligation Under Section 154(3) Cr.P.C.

171. In *Faddi v. State of M.P.* : 1964CriLJ744 the court held:

Where the person who lodged the first information report regarding the occurrence of a murder is himself subsequently accused of the offence and tried and the report lodged by him is not a confessional first information report but is an admission by him of certain facts which have a bearing on the question to be determined by the Court, viz., how and by whom the murder was committed or whether the statement of the accused in the court denying the correctness of certain statements of the prosecution witnesses is correct or not, the first information report is admissible to prove against him, his admissions which are relevant under Section 21 (Evidence Act).

172. Again in *Aghnoo Nagesia v. State of Bihar*: 1966CriLJ100 the court held that the information conveyed to the police Under Section 154(3) Cr.P.C. is per se not substantive evidence but may be used to corroborate the informant Under Section 157 of the Indian Evidence Act or to contradict him Under Section 145 of the said Act, and if the informant is called as a witness. If the first information is given by the accused himself, the fact of his giving the information is admissible against him as evidence of his conduct Under Section 8 of the Evidence Act. The court clarified that a confession is an admission of the offence by a person charged with the offence. A statement which contains self-exculpatory matter cannot amount to a confession, if the exculpatory statement is of

some fact which, if true, would negate the offence alleged to be confessed. The court held:

If the first information report is given by the accused to a police officer and amounts to a confessional statement, proof of the confession is prohibited by Section 25. The confession includes not only the admission of the offence but also other admissions of incriminating facts related to the offence contained in the confessional statement. No part of the confessional statement is receivable in evidence except to the extent that the ban of Section 25 is lifted by Section 27 (Evidence Act).

173. In any view of the matter, the information conveyed in cases of encounter deaths cannot be construed as a confession of the offence of culpable homicide since the information asserts the exercise of the right of private defense in justification of the conduct.

Issue No. 3 - Analysis:

174. While the petitioners and the others supporting the petitioners' contention urge that even where the first information is conveyed by a police officer to the officer in-charge of a police station (intimating the death of private individual(s) in an exchange of fire while claiming that the police had to resort to firing in self-defense and consequent on the other party firing in the first instance), a FIR must be registered assuming the conduct of the police officer(s) to be culpable homicide; the State and the 10th respondent (W.P. No. 15419/06) contest this submission and submit that an inquest enquiry is adequate.

175. The learned Advocate General and Sri Lalit chorus that there is neither substantial prejudice occasioned to the rule of law concerns nor is there violation of the provisions of Cr.P.C. since in all cases of death of civilian(s) in exchange of fire with the law enforcement agency, an inquest is invariably conducted, the Cr.P.C. itself provides for a intermediary process of inquest under Sections 174 -176 Cr.P.C. and under Section 176 the inquest could be in addition to or in place of an investigation.

176. The State assumes and the A.P. Police Officers' Association (R-10 in W.P. No. 15149/06) echoes this assumption, that an inquest or an investigation by an officer in charge of a police station Under Section 174 Cr.P.C. is an effective alternate if not a substitute to the recording of first information Under Section 154(3) Cr.P.C. and investigation Under Section 157 Cr.P.C.

177. It requires to be noticed that it is now the settled legal position that the object of the proceedings Under Section 174 is merely to ascertain

whether a person has died under suspicious circumstance or an unnatural death and if so what is the apparent cause of the death. The question regarding the details as to how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted, is foreign to the ambit and scope of the proceedings Under Section 174 Cr.P.C. - vide *Pedda Narayana v. State of A.P.* : AIR1975SC1252 .

178. In *Smt. Shakeela Abdul Gafar Khan* (supra) (a case of death on account of injuries received during police custody), the Supreme Court observed (at Para 21 of the report) that the stand of the State for not registering the FIR and in treating the information as a statement recorded Under Section 174 Cr.P.C., is fallacious. The Supreme Court stated that if it were brought to the notice of the police that somebody has beaten the deceased, the FIR ought to be registered. The following observations of the Supreme Court are apposite:

21. ... An interesting explanation has been given by CW 1. He has stated that the statements were recorded in terms of Section 174 of the Code and in order to report to the coroner as regards the circumstances of the death. At that point of time sentiments were high. The allegations were looked into and the matter was reported to the higher authorities to order an independent Crime Branch inquiry. This witness also stated that he had also made enquiries from the accused and other police officials and tried to obtain their version. The witness stated that he had personally questioned the accused and two other PSIS, and he perused the papers, medical certificate and station diary etc., and submitted his report through ACP Irani. The official acted as if he was deciding the guilt or otherwise of an accused. The permissible area of application of mind is limited to finding out existence of a cognizable offence and nothing beyond that.

22. It is a fairly well settled position in law that even at the time of taking cognizance the court is not required to find out which particular person is the offender, and the cognizance is taken of the offence. The course adopted by the official certainly tends to make a mockery of law. The official stated that he had requested the higher authorities to conduct a Crime Branch enquiry. It has not been shown as to what was the outcome of such enquiry, if any. We will revert back to this aspect after dealing with the question whether the accused is guilty.

179. Again in *Radha Mohan Singh and Ors. v. State of U.P.* : 2006CriLJ1121 , the Supreme Court referred to and quoted with approval

the principle spelt out in *Pedda Narayana* (60 *supra*) and reiterated that an investigation Under Section 174 Cr.P.C is limited in scope and confined to the ascertainment of the apparent cause of death. It is concerned with discovering whether in a given case the death was accidental, suicidal or homicidal or caused by animal and in what manner or by what weapon or instrument the injury on the body appear to have been inflicted. It is for this limited purpose that persons acquainted with the facts of the case are summoned and examined Under Section 175 Cr.P.C. The details of the overt acts are not necessary to be recorded in the inquest report. The question regarding the details as to how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted or who are the witnesses of the assault is foreign to the ambit or scope of the proceedings Under Section 174 Cr.P.C, reiterated the Supreme Court. The Court further held that neither in practice nor in law is it necessary for the person holding the inquest to mention all these details. As observed in *Radha Mohan Singh*, the decision in *Pedda Narayana* was approved by a three Judge Bench in *Khujji v. State of Madhya Pradesh* : 1991CriLJ2653 ; and the nature and purpose of an inquest held Under Section 174 Cr.P.C was also explained in *Amar Singh v. Balwinder Singh* 0065/2003 : 2003CriLJ1282 .

180. It is therefore the clear and established legal position, statutorily explicit and precedentially affirmed that an inquest and the concomitant investigation Under Sections 174 -176 Cr.P.C is neither a substitute for nor inheres the rigor of an investigation Under Section 157 Cr.P.C which must follow on the registration of a FIR as regards a cognizable offence, Under Section 154(3) Cr.P.C. Whether to pursue an investigation (Under Section 157 Cr.P.C) is not within the realm of an absolute and uncanalised discretion or the prerogative of the officer in charge of a police station. The discretion is a statutory discretion mandated by legislation and must be neutrally and professionally exercised. The purpose of the investigation Under Section 157 Cr.P.C. is to investigate the facts and circumstances of the case and if necessary to take measures for the discovery and arrest of an offender.

181. The scheme of the Cr.P.C. clearly envisages symbiotic and reinforcing powers and authority conferred on the police (representing the Executive); and the Magistrate (representing the Judicial branch), in the raft of procedural prescriptions. There is clearly discernable consecration of oversight functions to the Magistracy and the courts of Criminal jurisdiction. To illustrate, Section 37 obligates every person to assist a police officer and a Magistrate as well, in the areas specified in the said provision. Section 39 enjoins that every person aware of the commission

of, or the intention of any other person to commit, any offence punishable under any of the Sections of the IPC (enumerated in Section 39 Cr.P.C, including Section 302 IPC), shall forthwith give information to the nearest Magistrate or police officer, of such commission or intention. Section 40 Cr.P.C enjoins officers employed in connection with the affairs of a village and every person residing in the village to communicate to the nearest Magistrate or to the officer in charge of the nearest Police Station, any information in his possession respecting the matters enumerated in Section 40. The provisions of Chapter V (relating to arrest of a person), reinforce the principle that in the scheme of the Code the judiciary represented by the Magistracy is intimately associated with control and oversight of the processes of arrest, apart from exercising himself the power of arrest (Section 44).

182. Coming to Chapter XII Cr.P.C., when information is received by the officer in charge of the Police Station relating to the commission of a cognizable offence, the officer shall record and register the same [Section 154(3)] and must forthwith send a report of the same to the Magistrate empowered to take cognizance of such offence upon a police report. The Magistrate is thus kept informed and at the earliest point of time, as to the registration of the FIR. This provision ensures effective oversight and control of the process of investigation, subject however to the investigatorial autonomy of the police. The provisions of Section 159 Cr.P.C. also are to ensure effective control and oversight by the Magistrate on the process of investigation. The reporting obligation by the police (to the Magistrate) and the power conferred on the Magistrate to authorize the detention of the accused Under Section 167 Cr.P.C. reinforces the control and oversight functions of the Magistrate. We have earlier in this analysis, considered the scope of Section 173 Cr.P.C. including the obligation of the police to forward the police report (to the Magistrate), on completion of the investigation.

183. When it comes to inquest proceedings however, the process as spelt out in Sections 174 and 175 Cr.P.C. does not associate the Magistrate (except the District Magistrate or the Sub-Divisional Magistrate, who are executive agencies of the State as distinct from a judicial Magistrate) with the process. Section 176 Cr.P.C. also consecrates the power to inquire into the cause of death, to a District Magistrate, Sub-Divisional Magistrate or any other Executive Magistrate empowered in this behalf by the State Government or the District Magistrate.

184. Section 176 Cr.P.C. however carves out an exception. In cases of custodial death, disappearance or rape, in addition to the inquiry or

investigation held by the police (inquest inquiry), it is mandated that a Judicial Magistrate or the Metropolitan Magistrate shall hold an inquiry. In a case of inquest therefore (except in cases of custodial death, disappearance or rape), neither is the judicial Magistrate associated with the inquest process nor do the statutory provisions enjoin a reporting obligation by the police to the Magistrate.

185. Cases of civilian death(s) in police encounter do not fall within the rubric of custodial death, disappearance or rape. The inquest inquiry is thus outside the oversight locus of the judicial branch as represented by the Magistrate. Such oversight is however statutorily entrenched whenever information as to the commission of a cognizable offence is recorded and registered Under Section 154(3) Cr.P.C.

186. Krishna Iyer, J in *Nandini Satpathy* (30 *supra*), quoted with approval the observations of Brandies, J in the dissenting opinion in *Olmstead v. United States* (72) L.Ed. 944:

Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizens. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a law-breaker, it breeds contempt of law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justified the means ... would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

187. Life and liberty are basic human rights ensured to every person in every civilized society. Article 21 of the Constitution mandates that No person shall be deprived of life or personal liberty except according to procedure established by law. This constitutional injunction is to all persons including the State. In the absence of legislated exceptions, a person accused of even a heinous or the gravest offence must under the law be charged and convicted by a judicial authority after a due process and infliction of the sanction of deprivation of liberty or extinction of life (as the case may be) must be administered only on the basis of a judicial order.

188. As the State does not claim nor suggest any special or extraordinary legislative authority, for employment of lethal force against a Maoist/

extremist/Naxalite and adopts the position that the deaths in the police encounters are invariably as a consequence of the exercise of the right of private defense by police officers, it is mandatory that the governance process, including the recording, investigatorial and where warranted the charge and trial processes must conform to the injunctions of Article 21.

189. In the initial years of our constitutional discourse the scope of Article 21 was narrowly construed as only a guarantee against executive action unsupported by law - *Gopalan A.K. v. State of Madras* : 1950CriLJ1383 , until in the decision in *Maneka Gandhi v. Union of India* : [1978]2SCR621 , the court pronounced that a procedure prescribed for depriving of a person of his life or personal liberty must be reasonable, fair and just and must conform to the requirements of Articles 14 and 19 as well (See also *Francis Coralie Mullin v. Union Territory Delhi, Administrator* : 1981CriLJ306 .

190. In interpreting the obligation of the State, its law enforcement officers, the officer in charge of a police station and the investigating officer cannot be oblivious to the jurisprudential verity that the provisions of either the substantive Penal Code or the Cr.P.C., cannot be construed as disparate or disjointed legislative injunctions, infinitely flexible according to considerations of practicality and subjective predilections of the officials of the executive branch enjoined the duty to administer the law. The provisions of the Cr.P.C. must be understood and executed in conformity with the contemporaneous contours of Article 21 as by curial opinions expounded.

191. Article 21 encompasses a prohibition against the deprivation of life or personal liberty by a law enjoining a procedure that is not reasonable, fair or just; or which is arbitrary, whimsical or fanciful -*Francis Coralie Mullin* (67 supra).

192. The right to life includes a raft of obligations upon the State; to preserve the life of every person by offering immediate medical aid to every patient, regardless of whether he is an innocent or a guilty person - *Parmanand Katara v. Union of India* : 1990CriLJ671 ; the liberty against domiciliary visit by the police without authority of law - *Kharak Singh v. State of U.P.* : 1963CriLJ329 ; the right against solitary confinement - *Sunil Batra v. Delhi Admn.* : 1978CriLJ1741 ; the right against confinement in bar fetters - *Charles Sobhraj v. Supdt, Central Jail, New Delhi* : 1978CriLJ1534 ; the right to speedy trial -*Hussainara Khatoon v. Home Secy, State of Bihar* : 1979CriLJ1036 , *Kadra Pahadiya v. State of Bihar* : AIR1981SC939 ; the right to legal aid - *Madhav Hayawadanrao*

Hoskot v. State of Maharashtra : 1978CriLJ1678 ; the right against handcuffing - Prem Shankar Shukla v. Delhi Admn. : 1980CriLJ930 ; the right against delayed execution -T.V. Vatheeswaran v. State of T.N. : 1983CriLJ481 ; the right against custodial violence - Sheela Barse v. State of Maharashtra : 1983CriLJ642]; and the right against public hanging - Attorney General of India v. Lachma Devi : 1986CriLJ364 .

193. In Prabhu Dayal Deorah v. District Magistrate : 1974CriLJ286 (Per: K.K. Mathew, for majority), it was observed: We say and we think it is necessary to repeat, that the gravity of the evil to the community resulting from anti-social activities can never furnish an adequate reason for invading the personal liberty of a citizen, except in accordance with the procedure established by the Constitution and the laws. The history of personal liberty is largely the history of insistence on observance of procedure. And observance of procedure has been the bastion against wanton assaults on personal liberty over the years. Under our Constitution, the only guarantee of personal liberty for a person is that he shall not be deprived of it except in accordance with the procedure established by law. The need today is for maintenance of supplies and services essential to the community. But social security is not the only goal of a good society. There are other values in a society. Our country is taking singular pride in the democratic ideals enshrined in its constitution and the most cherished of these ideals is personal liberty. It would indeed be ironic if, in the name of social security we would sanction the subversion of this liberty. We do not pause to consider whether social security is more precious than personal liberty in the scale of values, for, any judgment as regards that would be but a value judgment on which opinions might differ. But whatever be of impact on the maintenance of supplies and services essential to the community when a certain procedure is prescribed by the Constitution or the laws for depriving a citizen of his personal liberty, we think it our duty to see that the procedure is rigorously observed, however strange this might sound to some ears.

194. In the counter affidavit of the D.G.P. for the State and in the oral arguments on behalf of the State, it is suggested that having regard to the entrenched and violent activities and tactics adopted by extremist groups, which have resulted over the years in large scale casualties not only to law enforcement officers but civilians as well, it is the obligation of the State to restore the equilibrium of the civil society, to restore law and order and to that end to pursue and apprehend members of the extremist groups. In the course of performance of such sovereign obligation when the police party proceeds, on reliable information to the location where there is an

assemblage of extremist groups, the exchange of fire occurs on account of the initial aggression by the other party and casualties, on occasion result.

195. According to the State, despite the claim of self-defense justification by officers of the law enforcement party, if it were interpreted that Section 154(1) Cr.P.C. obligates the recording and registration of a culpable offence against the involved police officers, the police force would be demoralized and subjected to the avoidable jeopardy and the trauma of investigation or trial. This is broadly the justification presented by the State for its deeply entrenched and unique practice.

196. We do not consider that the morale of our law enforcement officials, who perform under difficult, taxing and stressful situations, is so fragile as to be shattered by the due observance of the legal process. In any event, the inexorable mandate of law cannot be sacrificed at the altar of expediency or to placate executive phobia of the legal processes.

197. Brandeis, J made a pregnant observation in *Olmstead v. United States* 277 U.S. 438 (1928) - Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

198. As Robert Jackson, J eloquently observed in *United States v. Spector* 343 U.S. 169, 180 (1952) -We can afford no liberties with liberty itself.

199. When the claim is of a self-defense justification, the law is very clear that an ordinary civilian may claim such justification as well. A private defense claim by a member of the police force stands on no different or special footing. Explanations 1 and 2 to Section 99 IPC clearly exemplify that an individual has a right of private defense even against a public servant or against an act done, or attempted to be done, by the direction of a public servant.

200. The National Human Rights Commission (NHRC) under the Chairmanship of Hon'ble Justice Sri M.N. Venkatachalaiah, addressed a letter dated 20.03.1997 to all the Chief Ministers recommending the procedure to be followed by the States in cases of encounter deaths. Six years later the NHRC after noticing that its experience in the matters of encounter deaths has not been encouraging and most of the States are not following the guidelines issued in true spirit, with a view to ensure transparency and accountability of public servants, issued modified

guidelines. The NHRC noted with distress that though under the existing guidelines the States were required to send intimation to the Commission of all cases of death arising out of police encounter, some States do not send intimation on the pretext that there is no specific direction. The Commission expressed the view that the statistics are necessary for effective protection of human rights in exercise of NHRC functions. Justice A.S. Anand, Chairperson, NHRC, accordingly addressed a letter-dated 2.12.2003 to all the Chief Ministers of States and to Union Territories intimating the modified procedure to be followed in cases of death in the course of police action. The modified procedure recommended is:

A. When the police officer in charge of a Police Station receives information about the deaths in an encounter between the Police party and Ors. he shall enter that information in the appropriate register.

B. Where the police officers belonging to the same Police Station are members of the encounter party, whose action resulted in deaths, it is desirable that such cases are made over for investigation to some other independent investigating agency, such as State CBCID.

C. Whenever a specific complaint is made against the police alleging commission of a criminal act on their part, which makes out a cognizable case of culpable homicide, an FIR to this effect must be registered under appropriate sections of the I.P.C. Such case shall invariably be investigated by State CBCID.

D. A Magisterial inquiry must invariably be held in all cases of death, which occur in the course of police action. The next of kin of the deceased must invariably be associated in such inquiry.

E. Prompt prosecution and disciplinary action must be initiated against all delinquent officers found guilty in the magisterial enquiry/police investigation.

F. Question of granting of compensation to the dependents of the deceased would depend upon the facts and circumstances of each case.

G. 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.

H. A six monthly statement of all cases of deaths in police action in the State shall be sent by the Director General of Police to the Commission, so as to reach its office by the 15th day of January and July respectively. The statement may be sent in the following format along with post mortem reports and inquest reports, wherever available and also the inquiry reports:

1. Date and place of occurrence
2. Police Station, District
3. Circumstances leading to deaths:
 - i. Self defence in encounter
 - ii. In the course of dispersal of unlawful assembly
 - iii. In the course of effecting arrest.
4. Brief facts of the incident
5. Criminal Case No.
6. Investigating Agency.
7. Findings of the magisterial inquiry/enquiry/by Senior Officers:
 - a. disclosing in particular names and designation of police officials, if found responsible for the death, and
 - b. whether use of force was justified and action taken was lawful.

201. The Hon'ble Chairperson, NHRC, Justice A.S. Anand in the letter dated 2.12.2003 referred to above, while intimating the modified procedure prefaced the directives with the following observations:

Dear Chief Minister,

Death during the course of a police action is always a cause of concern to a civil society. It attracts criticism from all quarters like Media, the general public and the NGO sector. The police does not have a right to take away the life of a person. If, by his act, the policeman kills a person, he commits an offence of culpable homicide or not amounting to murder, unless it is established that such killing was not an offence under the law. Under the scheme of criminal law prevailing in India, it would not be an offence if the death is caused in exercise of right of private defence. Another provision under which the police officer can justify causing the death of a person, is Section 46(3) of the Criminal Procedure Code. This provision authorizes the police to use reasonable force, even extending up to the causing of death, if

found necessary to arrest the person accused of an offence punishable with death or imprisonment for life. Thus, it is evident that death caused in an encounter if not justified would amount to an offence of culpable homicide.

202. In the revised A.P. Police Manual, S.O. 546 deals with investigation of terrorist crime. Para-6 of S.O. 546 sets out the NHRC guidelines for investigating death(s) in police encounter. These are:

A. When the police officer in charge of a Police Station receives information about the deaths in an encounter between the Police party and Ors. he shall enter that information in the appropriate register.

B. The information as received shall be regarded as sufficient to suspect the commission of a cognizable offence and immediate steps should be taken to investigate the facts and circumstances leading to the death to ascertain what, if any, offence was committed and by whom.(emphasis)

C. As the police officers belonging to the same Police Station are the members of the encounter party, it is appropriate that the cases are made over for investigation to some other independent investigation agency, such as State CID. Alternatively such cases may be investigated by an officer of the rank of Dy. Supdt. of Police/SDPO of some other district. (emphasis)

D. Question of granting of compensation to the dependents of the deceased may be considered in cases ending in conviction, if police officers are prosecuted on the basis of the results of the investigation.

203. S.O. 546(6)A clearly enjoins that the information received about deaths in encounter between police party and others should be entered in the appropriate register and Para-B clearly enjoins that such information shall be regarded as sufficient to suspect the commission of a cognizable offence. Surely, the intendment of SO 546(6)B is not that the investigation (not inquest, be it noted) into the facts and circumstances must be of the offence, presumably committed by the deceased or the civilian party to the transaction. The language of Para-B excludes any such extravagant assumption. The S.O. is clear that the non-derogable obligation is to register FIR treating such information as conveying information as to commission of a cognizable offence by the police officer(s) and thereafter to set in motion the process of investigation to

ascertain what offence was committed and by whom. This is not a process falling under Section 174 Cr.P.C. The above analysis is compelling also from the provisions of S.O. 546(6)C which enjoin that the cases be entrusted for investigation to an independent investigation agency such as the State CID or alternatively by an officer of the rank of the Deputy Superintendent of Police/SDPO of some other District.

204. The current practice is to register the death Under Section 174 Cr.P.C. i.e., for the purpose of inquest. We have already recorded the conclusion that an inquest is not for the purpose of ascertaining the perpetrator of an offence. There appears no logical purpose served in enjoining (S.O. 546(6) C) that the case registered Under Section 174 Cr.P.C. should be made over for investigation to an independent agency. It is the FIR registered against officer(s) treating the information received as one conveying the commission of a cognizable offence that requires to be investigated by an independent agency or the Dy.S.P/SDPO of another district (since the officer(s) of the concerned police station are normally the perpetrator(s) of the homicide which is prima facie to be treated as culpable).

205. The practice now followed in the State is not only in clear deviance of the NHRC guidelines and the provisions of S.O. 546(6) in the A.P. Police Manual, an extravagant subversion of the rule of law, but also in defiance of the Legislative mandate qua the provisions of the Cr.P.C.

206. The analysis in the preceding paragraphs compels the conclusion that a self-defense justification cannot be assumed to be legitimate or established on the mere assertion by or on behalf of the perpetrator, without the rigor of a focused investigation for the purpose of collecting relevant evidence after registration of the FIR incorporating the name of the perpetrator(s), if and as disclosed in the information conveyed and duly enumerating the appropriate provisions of substantive law.

207. In our considered view the failure to record and register the primary offence (of the death of civilian(s) in a transaction involving exchange of fire with officers of the police establishment of the State) is a grave and wholly unwarranted transgression of constitutional and sovereign responsibility. The State is legislatively mandated to record and register a cognizable offence and thereafter set the criminal law in motion including the immediately following process of investigating into the offence.

208. A person (whether a civilian or a public servant) accused of a cognizable offence including of culpable homicide is exculpated of the prohibited conduct only on the ascertainment and establishment of the

necessary facts, which rationally support the claim of private defense. It inexorably follows that when the information is conveyed to an officer in charge of the police station (even if be by a police officer), that the death(s) occurred as a consequence of firing by the police in self-defense, such information must be recorded under Section 154(1) Cr.P.C. treating the information as one relating to commission of the cognizable offence of culpable homicide amounting to murder. An investigation mandated by Section 157 Cr.P.C., must follow. The investigation could be avoided only by (the officer in charge of the police station) recording in a report, clear reasons for failing to pursue investigation. Recording of such reasons is mandatory and a non-derogable obligation qua the provisions of Section 157 Cr.P.C.

Conclusion on Issue No. 3 :

209. We therefore consider and hold that the registration of civilian death(s) in police encounters exclusively Under Section 174 Cr.P.C. is wholly inappropriate and unauthorized. We further hold that such information shall be recorded and registered Under Section 154(1) Cr.P.C., a process that structurally ensures judicial oversight, control and supervision, of the integrity of the investigatorial process. We reject the contention that an obligation to record the first information Under Section 154(1) Cr.P.C and to investigate into the facts and circumstances of the case so recorded Under Section 157 Cr.P.C is avoided by the stratagem of an inquest Under Section 174 Cr.P.C. The stand by the State that there is nevertheless an investigation on registering the case under Section 174 Cr.P.C. or incidentally after registering a case against the offences by the civilian party, is an extravagant argument, incongruous with the provisions of the Cr.P.C. We find no justification on text, principle or authority for this deviant process that has been entrenched as an inveterate and regnant practice in the State.

Issue No. 2: Whether the existence of circumstances bringing a case within any of the exceptions in the Indian Penal Code, 1860 including exercise of the right of private defense could be conclusively determined during investigation; whether the final report submitted by the police officer to the Magistrate on completion of the investigation is conclusive or whether the existence of the circumstances coming within the exceptions requires to be determined only in appropriate judicial proceedings?

210. Chapter-XII of Cr.P.C sets out the procedure regarding Information to the police and their powers to investigate. As we have seen, Section 154(1) Cr.P.C relates to the obligation to record and register every information relating to the commission of a cognizable offence. We have

held (while recording our conclusion on issue No. 1) that every information intimating to an officer in charge of the police station of death(s) in a transaction involving exchange of fire between police officer(s) and civilian(s) must and invariably be recorded and registered as FIR and if in such transaction there be death(s) of member(s) of law enforcement as well, separate FIRs must be registered -one in respect of death(s) of police personnel and the other relating to the death(s) of civilian(s). We have further held that on registration of FIR, the investigation enjoined by Section 157 Cr.P.C. must follow.

211. Section 156 Cr.P.C. confers power on the officer in charge of a police station to investigate any cognizable offence (which the Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter-XIII), without an order of the Magistrate.

212. Section 157 Cr.P.C enjoins that from the information received or otherwise, if an officer in charge of a police station has reason to suspect the commission of an offence, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report and shall proceed in person or depute a subordinate (as authorized by a general or special order of the State in this behalf) to investigate the facts and circumstances of the case and if necessary to take measures for the discovery and arrest of the offender(s). (emphasis)

213. Section 159 Cr.P.C. sets out the power of the Magistrate (on receiving a report under Section 157 Cr.P.C) to direct an investigation, or, if he thinks fit, to at once proceed, or depute any Magistrate subordinate to him to proceed, to hold a preliminary inquiry into, or otherwise to dispose of, the case in the manner provided in the Code.

214. Section 173 Cr.P.C. deals with the forwarding of the report of investigation to the Magistrate empowered to take cognizance of the offence on a police report. Sub-section (2) of Section 173 Cr.P.C. enumerates the matters that must be stated in the report of the investigation, to be forwarded to the Magistrate (in the form prescribed by the State Government). These are: the names of the parties; the nature of the information; the names of the persons who appear to be acquainted with the facts and circumstances of the case; whether any offence appears to have been committed and, if so, by whom; whether the accused has been arrested; whether he has been released on his bond and, if so, whether with or without sureties; and whether he has been forwarded in custody under Section 170. Clause (ii) of Section 173 enjoins the obligation to communicate the action taken by the police officer to the person, if any,

who had first given the information relating to the commission of the offence. Sub-section 173 clarifies that nothing in Section 173 shall be deemed to preclude further investigation in respect of an offence after a report under Sub-section (2) is forwarded to the Magistrate and that if upon such investigation, further evidence, oral or documentary, is revealed, the police officer shall forward to the Magistrate a further report or reports regarding such evidence and that the provisions of Sub-sections (2 to 6) shall apply in relation to such report or reports, as they apply in relation to the initial report forwarded under Sub-section (2).

215. As is apparent from the text of Section 173 Cr.P.C., on completion of investigation the investigating officer is enjoined to forward to the Magistrate, a report in the form prescribed by the State Government. The report, which is variously, called in practice a final report or a completion report shall contain the particulars referred to in Sub-clauses (a) to (g) of Clause (i). The final report must incorporate an opinion; (d) whether any offence appears to have been committed and, if so, by whom? Investigation thus involves not only collection of evidence but also formation of opinion. It is such opinion that is enjoined by Section 173 Cr.P.C. to be included in the police report that must be forwarded to the Magistrate. Sub-clause (c) enjoins that the police report should incorporate the names of the persons who appear to be acquainted with the circumstances of the case. Therefore the names of all persons either acquainted with the circumstances of the case or who in the opinion of the investigating officer appear to have committed any offence shall be incorporated in the police report Under Section 173 Cr.P.C.

216. While Section 154(1) Cr.P.C. mandates the recording and registration of the information relating to the commission of a cognizable offence (whether or not the name(s) of the accused are mentioned in such information) Section 157 Cr.P.C. mandates the investigation of the facts and circumstances of the case and if necessary thereupon to take measures for the discovery and arrest of the offender(s). In complementarity with the concomitants of investigation Under Section 157(1) Cr.P.C., the police report to be forwarded to the Magistrate (Under Section 173 Cr.P.C.) shall incorporate the names of person(s) by whom the offence appears to have been committed (in the opinion of the Investigating Officer).

The extent and contours of Judicial oversight of the powers of Investigation:

217. The Judicial Committee of the Privy Council in *King Emperor v. Nazir Ahmed* (per Lord Porter) observed that the judiciary should not

interfere with the police in matters that are within their province and into which the law imposes on them a duty of enquiry. The Privy Council held: the functions of the judiciary and the police are complementary, not overlapping and the combination of individual liberty with due observance of law and order is only to be obtained by leaving each to exercise its own functions, always of course, subject to the right of the court to intervene in an appropriate case ... the court's function begins when a charge is preferred before it and not until then.

218. The scope of investigation was again explained in *H.N. Rishbud and Anr. v. State of Delhi* : 1955CriLJ526 as consisting generally of: (1) Proceeding to the spot, (2) Ascertainment of the facts and circumstances of the case, (3) Discovery and arrest of the suspected offender, (4) Collection of evidence relating to the commission of the offence which may consist of (a) the examination of various persons (including the accused) and the reduction of their statements into writing, if the officer thinks fit, (b) the search of places or seizure of things considered necessary for the investigation and to be produced at the trial, and (5) Formation of the opinion as to whether on the material collected there is a case to place the accused before a Magistrate for trial and if so taking the necessary steps for the same by the filing of a charge-sheet under Section 173.

219. In *Vadilal Panchal v. Dattatraya Dulaji Ghadigaonkar and Anr.* : [1961]1SCR1 (per SK Das, J) the issue that fell for consideration was whether a Magistrate on receiving a report (pursuant to a direction for an enquiry Under Section 202 Cr.P.C., for ascertaining the truth or falsehood of a complaint), could accept the report supporting the plea of self-defence presented by the person complained against, on the basis of the report and statement of the witnesses recorded by the enquiring officer. On facts the Magistrate had dismissed the complaint Under Section 203 Cr.P.C. Thereagainst the respondent-complainant moved the High Court, which set aside the order of dismissal and directed the Magistrate to issue process against the appellant. The High Court held that since indisputably the death occurred on account of the shot fired by the respondent, the accused would have to establish the necessary ingredients of the right of private defence as laid down in Section 96 onwards of the IPC. The High Court opined that General Exceptions cannot be held to be established from the mere report of the police as that would be contrary to the provisions of Section 105 of the Evidence Act; that the provisions of Section 202 and 203 Cr.P.C. do not abrogate the rule of presumption explicated by Section 105 of the Evidence Act nor the mode of proof of exception laid down in imperative language in Section 105. On appeal, the Supreme Court ruled that the High Court erred in concluding that it

was not open to the Magistrate to come to the conclusion that on the material before him no offence had been made out and there was no sufficient ground for proceeding further on the complaint. The scope of the authority and discretion of the Magistrate Under Sections 202 and 203 Cr.P.C. was spelt out by the Supreme Court in *Vadilal Panchal* as under (paragraph 10 of the report):

(10)... What is contended on behalf of the respondent complainant is that as a matter of law it was not open to the learned Magistrate to accept the plea of right of self-defence at a stage when all that he had to determine was whether a process should issue or not against the appellant. We are unable to accept this contention as correct. It is manifestly clear from the provisions of Section 203 that the judgment which the Magistrate has to form must be based on the statements of the complainant and his witnesses and the result of the investigation or inquiry. The section itself makes that clear, and it is not necessary to refer to authorities in support thereof. But the judgment which the Magistrate has to form is whether or not there is sufficient ground for proceeding. This does not mean that the Magistrate is bound to accept the result of the inquiry or investigation or that he must accept any plea that is set up on behalf of the person complained against. The Magistrate must apply his judicial mind to the materials on which he has to form his judgment. In arriving at his judgment he is not fettered in any way except by judicial considerations; he is not bound to accept what the inquiring officer says, nor is he precluded from accepting a plea based on an exception, provided always there are satisfactory and reliable materials on which he can base his judgment as to whether there is sufficient ground for proceeding on the complaint or not. If the Magistrate has not misdirected himself as to the scope of an enquiry under Section 202 and has applied his mind judicially to the materials before him, we think that it would be erroneous in law to hold that a plea based on an exception can never be accepted by him in arriving at his judgment. What bearing such a plea has on the case of the complainant and his witnesses, to what extent they are falsified by the evidence of other witnesses - all these are questions which must be answered with reference to the facts of each case. No universal rule can be laid in respect of such questions.

(emphasis).

220. In *Abhinandan Jha v. Dinesh Mishra* : 1968CriLJ97 (per Vaidialingam. J) the court emphasized that the formation of an opinion as to whether or not there is a case to place the accused on trial, has been left to the officer in charge of a police station. The court further held that when the police submits a report that no case has been made out for sending up the accused for trial, it is not open to the Magistrate to direct the police to file a charge-sheet. The court however clarified that the Magistrate is not powerless in the circumstances. After the completion report is drawn up and forwarded to the Magistrate Under Section 173 Cr.P.C. the Magistrate is required to consider such police report Under Section 190 Cr.P.C. (in Chapter XIV, relating to Conditions Requisite for Initiation of Proceedings). As laid down in *Abhinandan Jha*:

(14) ... The use of the words ‘may take cognizance of any offence’, in Sub-section (1) of Section 190, in our opinion, imports the exercise of a ‘judicial discretion’, and the Magistrate, who receives the report, under Section 173, will have to consider the said report and judicially take a decision, whether or not to take cognizance of the offence. From this it follows, that it is not as if, that the Magistrate is bound to accept the opinion of the police that there is a case for placing the accused, on trial. It is open to the Magistrate to take the view that the facts, disclosed in the report do not make out an offence for taking cognizance or he may take the view that there is no sufficient evidence to justify an accused being put on trial. On either of these grounds, the Magistrate will be perfectly justified in declining to take cognizance of an offence, irrespective of the opinion of the police. On the other hand, if the Magistrate agrees with the report, which is a charge-sheet submitted by the police, no difficulty whatsoever is caused, because he will have full jurisdiction to take cognizance of the offence, under Section 190 of the Code. This will be the position, when the report, under Section 173, is a charge-sheet.

(15) Then the question is, what is the position, when the Magistrate is dealing with a report submitted by the police, under Section 173, that no case is made out for sending up an accused for trial, which report as we have already indicated, is called, in the area in question, as a ‘final report’. Even in those cases, if the Magistrate agrees with the said report, he may accept the final report and close the proceedings. But there may be instances when the Magistrate may take the view, on a consideration of the final report, that the opinion formed by the police is not based on a full and complete investigation, in which case, in our opinion,

the Magistrate will have ample jurisdiction to give directions to the police, under Section 156, to make a further investigation. That is, the Magistrate feels, after considering the final report, that the investigation is unsatisfactory, or incomplete, or that there is scope for further investigation, it will be open to the Magistrate to decline to accept the final report and direct the police to make further investigation, under Section 156. The police, after such further investigation, may submit a charge-sheet, or, again submit a final report, depending upon the further investigation made by them. If ultimately, the Magistrate forms the opinion that the facts, set out in the final report, constitute an offence, he can take cognizance of the offence, under Section 190, notwithstanding the contrary opinion of the police, expressed in the final report.

(17)... There is certainly no obligation, on the Magistrate, to accept the report, if he does not agree with the opinion formed by the police. Under those circumstances, if he still suspects that an offence has been committed, he is entitled, notwithstanding the opinion of the police, to take cognizance, under Section 190 of the Code. That provision in our opinion, is obviously intended to secure that offences may not go unpunished and justice may be invoked even where persons individually aggrieved are unwilling or unable to prosecute, or the police, either wantonly or through bona fide error, fail to submit a report, setting out the facts constituting the offence. Therefore, a very wide power is conferred on the Magistrate to take cognizance of an offence, not only when he receives information about the commission of an offence from a third person, but also where he has knowledge or even suspicion that the offence has been committed. It is open to the Magistrate to take cognizance of the offence, under Section 190, on the ground that, after having due regard to the final report and the police records placed before him, he has reason to suspect that an offence has been committed.

221. In *H.S. Bains, Director, Small Saving-cum-Deputy Secretary Finance, Punjab, Chandigarh v. State (Union Territory of Chandigarh)* : 1980CriLJ1308 (per O. Chinnappa Reddy, J), the Supreme Court having considered and affirmed the principles set out in the earlier decisions in *Abhinandan Jha* (supra) and in *Tula Ram v. Kishore Singh* : [1989]1SCR718, clarified the scope of the power of the Magistrate (on receipt of a complaint) as under:

(6) It is seen from the provisions to which we have referred in the preceding paragraphs that on receipt of a complaint a magistrate has several courses open to him. He may take cognizance of the offence and proceed to record the statements of the complainant and the witnesses present under Section 200. Thereafter, if in his opinion there is no sufficient ground for proceeding he may dismiss the complaint under Section 203. If in his opinion there is sufficient ground for proceeding he may issue process under Section 204. However, if he thinks fit, he may postpone the issue of process and either enquire into the case himself or direct an investigation to be made by a police officer or such other person as he thinks fit for the purpose of deciding whether or not there is sufficient ground for proceeding. He may then issue process if in his opinion there is sufficient ground for proceeding or dismiss the complaint if there is no sufficient ground for proceeding. On the other hand, in the first instance, on receipt of a complaint, the Magistrate may, instead of taking cognizance of the offence, order an investigation under Section 156(3). The police will then investigate and submit a report under Section 173. On receiving the police report the magistrate may take cognizance of the offence under Section 190 and straight away issue process. This he may do irrespective of the view expressed by the police in their report whether an offence has been made out or not. The police report under Section 173 will contain the facts discovered or unearthed by the police and the conclusions drawn by the police therefrom. The magistrate is not bound by the conclusions drawn by the police and he may decide to issue process even if the police recommend that there is no sufficient ground for proceeding further. The magistrate after receiving the police report, may, without issuing process or dropping the proceeding decide to take cognizance of the offence on the basis of the complaint originally submitted to him and proceed to record the statements upon oath of the complainant and the witnesses present under Section 200, Criminal Procedure Code and thereafter decide whether to dismiss the complaint or issue process. The mere fact that he had earlier ordered an investigation under Section 156(3) and received a report under Section 173 will not have the effect of total effacement of the complaint and therefore the magistrate will not be barred from proceeding under Section 200, 203 and 204. Thus, a magistrate who on receipt of a complaint, orders an investigation under Section 156(3) and receives a police report under Section 173,

may, thereafter, do one of three things; (1) he may decide that there is no sufficient ground for proceeding further and drop action; (2) he may take cognizance of the offence under Section 190 on the basis of the police report and issue process; this he may do without being bound in any manner by the conclusion arrived at by the police in their report; (3) he may take cognizance of the offence under Section 190 on the basis of the original complaint, and proceed to examine upon oath the complainant and his witnesses under Section 200. If he adopts the third alternative, he may hold or direct an inquiry under Section 202 if he thinks fit. Thereafter he may dismiss the complaint or issue process, as the case may be.

222. In *India Carat Pvt. Ltd. v. State of Karnataka and Anr.* : 1978CriLJ8 (per Natarajan, J) the scope of the power, authority and discretion of the Magistrate on receiving the police report Under Section 173 Cr.P.C. again fell for consideration by the Supreme Court. The appellant complained to the police alleging cheating and criminal breach of trust by the 2nd respondent. After investigation the police submitted a report to the court to the effect that further investigation was not required as the matter was civil in nature. The appellant approached the Magistrate for quashing the report and grant of permission to him to prove the commission of offence by the 2nd respondent. The Magistrate on perusing the investigation records was satisfied that a prima facie case was made out against the 2nd respondent. He passed an order for registering a Calendar Case against the said respondent Under Sections 408 and 420 IPC and for issuing summons to him Under Section 204 Cr.P.C. The 2nd respondent thereupon approached the High Court Under Section 482 Cr.P.C. for quashing the order of the Magistrate. The High Court allowed this petition holding that the Magistrate failed to follow the procedure laid down in the Cr.P.C. for taking cognizance of the case and issuing processes to the accused after the police forwarded the report. The High Court held that after receipt of the police report the Magistrate should have issued a notice to the appellant to ascertain whether he was disputing the correctness of the police report and if so calling upon the appellant to comply with the requirement of Section 200 Cr.P.C. The High Court further held that only after examining the appellant on oath and his witnesses, the Magistrate ought to have decided whether a case should be registered and process issued to the accused. Aggrieved thereupon the appellant appealed to the Supreme Court.

223. After quoting with approval its earlier decisions in Abhinandan Jha, Tula Ram and H.S. Bains (85, 88 & 86 supra) the Supreme Court in India Court held:

(16) The position is, therefore, now well settled that upon receipt of a police report under Section 173 a Magistrate is entitled to take cognizance of an offence under Section 190(1)(b) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the offence complained of and order the issue of process to the accused. Section 190(1)(b) does not lay down that a Magistrate can take cognizance of an offence only if the investigating officer gives an opinion that the investigation has made out a case against the accused. The Magistrate can ignore the conclusion arrived at by the investigating officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, in exercise of his powers under Section 190(1)(b) and direct the issue of process to the accused. The Magistrate is not bound in such a situation to follow the procedure laid down in Sections 200 and 202 of the Code for taking cognizance of a case under Section 190(1)(a) though it is open to him to act under Section 200 or Section 202 also. The High Court was therefore, wrong in taking the view that the Second Additional Chief Metropolitan Magistrate was not entitled to direct the registration of a case against the second respondent and order the issue of summons to him.

(17) The fact that in this case the investigation had not originated from a complaint preferred to the Magistrate but had been made pursuant to a report given to the police would not alter the situation in any manner. Even if the appellant had preferred a complaint before the learned Magistrate and the Magistrate had ordered investigation under Section 156(3), the police would have had to submit a report under Section 173. It has been held in *Tula Ram v. Kishore Singh* : 1978CriLJ8 that if the police, after making an investigation, send a report that no case was made out against the accused, the Magistrate could ignore the conclusion drawn by the police and take cognizance of a case under Section 190(1)(b) and issue process or in the alternative he can take cognizance of the original complaint and examine the complainant

and his witnesses and thereafter issue process to the accused, if he is of opinion that the case should be proceeded with.

224. These principles were reiterated in *Minu Kumar and Anr. v. State of Bihar and Ors.* : 2006CriLJ2468 .

225. On analyses of the several provisions in Chapters XII and XIV to XVI Cr.P.C. and in the light of the binding interpretation of the several provisions, the following principles emerge:

(A) On registration of FIR, on the basis of information received relating to commission of a cognizable offence, the officer in charge of a Police Station shall investigate such cognizable case even without an order of the Magistrate and shall also investigate when so ordered by a Magistrate Under Section 190 Cr.P.C.

(B) The obligation to investigate is {apart from following upon the registration of the offence Under Section 154(1)} also on information otherwise received. The procedure for investigation includes sending forthwith a report to the Magistrate of the information received; to proceed to the spot of occurrence to investigate the facts and circumstances of the case and if necessary to take measures for the discovery and arrest of an offender. Wide and adequate powers are conferred Under Sections 160 - 168 Cr.P.C. to enable a rigorous investigation.

(C) Upon completion of the investigation the officer in charge of the Police Station is required to forward to the Magistrate the police report in the prescribed form setting out the matters and information enumerated in Section 173, apart from the obligation to communicate to the person lodging the first information, the action taken on such information.

(D) Provisions of Chapter XIV Cr.P.C. set out the conditions requisite for initiation of proceedings.

226. Section 190 empowers (subject to the provisions of Chapter-XIV) a Magistrate to take cognizance of any offence - upon receiving a complaint of facts, which constitute such offence; upon a police report of such facts; upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed. The provision is clear that cognizance is taken of the offence and not of or merely of the offender. The Magistrate is required to exercise sound and critical judicial discretion, to apply his mind to the facts, the material and the evidence before him. When considering taking cognizance upon a police report of such facts (the police report under Section 173 Cr.P.C), the report must be subjected to rigorous judicial scrutiny. The Magistrate

exercises judicial functions and therefore at this stage of the matter, the Magistrate must bring to bear on the police report a judicious and not a routine or a casual approach.

227. The word cognizance has no esoteric or an arcane significance in criminal law or procedure. It merely connotes - becoming aware of. When used with reference to a Court/Judge/Magistrate cognizance means to take notice of judicially.

228. As pointed out in *Chief Enforcement Officer v. Videocon International Ltd.* : 2008CriLJ1636 (Per: C.K. Thakker, J), taking cognizance does not involve any formal action of any kind. It occurs as soon as a Magistrate applies his mind to the suspected commission of an offence. Cognizance is taken prior to commencement of criminal proceedings. Taking of cognizance is thus a sine qua non or a condition precedent for holding a valid trial.

229. In *Videocon International* : 2008CriLJ1636 after referring to its earlier decisions in *R.R. Chari v. State of U.P.* : 1951CriLJ775 ; *Narayanda Bhagwandas Madhavdas v. State of W.B.* : 1959CriLJ1368 ; *Ajit Kumar Palit v. State of W.B.* : AIR1963SC765 ; *Hareram Satpathy v. Tikaram Agarwala* : 1978CriLJ1687 ; *Gopal Das Sindhi v. State of Assam* AIR 1961 SC 986; *Nirmaljit Singh Hoon v. State of W.B.* : [1973]2SCR66 and *Darshan Singh Ram Kishan v. State of Maharashtra* : 1971CriLJ1697 , the apex court concluded:... Broadly speaking, when on receiving a complaint, the Magistrate applies his mind for the purposes of proceeding under Section 200 and the succeeding sections in Chapter XV of the Code of 1973, he is said to have taken cognizance of the offence within the meaning of Section 190(1)(a). If, instead of proceeding under Chapter XV, he has, in the judicial exercise of his discretion, taken action of some other kind, such as issuing a search warrant for the purpose of investigation, or ordering investigation by the police under Section 156(3), he cannot be said to have taken cognizance of any offence.

230. On text and precedential authority therefore, the Magistrate is not bound by the police report forwarded under Section 173 Cr.P.C. nor by the opinion or conclusion expressed therein that the case is false, for taking cognizance of the offence. If satisfied on the basis of the material before him, including the material disclosed during the course of investigation; and in a case involving a self-defense justification assertion, if satisfied that such material on record does not clearly establish the legitimate application of self-defense justification, the Magistrate must take cognizance of the offence disregarding the contrary opinion set out in the Police report, forwarded under Section 173. The statutory intent

is clear (Section 173 Cr.P.C) and the precedents explicit, that the police report incorporates only the opinion on the product of the investigation, an opinion that must be subjected to critical evaluation by the Magistrate.

231. In cases of homicide consequent on an encounter (between the police and civilians, in particular where there is a claim of defense justification asserted), the death is often the outcome of a complex series of causal relations, with a blurred exchange of moral identities between the participants in the transaction. Homicide in such context is not an object with an intrinsic nature and meaning. It is rather better understood as a situationally embedded product of legal processes.

232. Investigation of homicide in general and in encounter cases (with a claim of self defense) in particular, invites the need to consider the processes by which actions, reactions and interactions, which are constitutive of the incident, are interpreted and defined in a manner that the incident can be identified as constituting a (culpable or non-culpable) homicide, and the perpetrator recognized and labelled as a misdemeanant or otherwise.

233. The officer tasked to investigate the event, must produce a definitive account of who did what to whom, why and in what sequence and circumstance. The opinion in the police report, which is not substrated by such definitive account, is not an opinion that a Magistrate may lawfully accept, without abdicating the critical judicial function legislatively consecrated to his care (Under Section 190 Cr.P.C.) - (see Article The Process Structures of Police Homicide Investigations) 42. British Journal of Criminology, 669-Autumn, 2002.

234. (E) Chapter XV Cr.P.C. sets out the procedure to be followed with respect to complaints made to a Magistrate. Sections 200 to 203 set out the procedure, which a Magistrate empowered to take cognizance of an offence should follow when a complaint is made to him vide Section 190(1)(a). Section 200 enjoins an obligation (subject to specified exceptions), that the Magistrate shall examine the complainant and the witnesses, if any, upon oath, to record the substance of such examination to writing and to be signed by the complainant, the witnesses and by the Magistrate.

235. The enquiry envisaged under Sections 200 - 203 is for ascertaining the truth or falsehood of the complaint i.e., for ascertaining whether there is material in respect of the complaint so as to justify the issuance of process. The enquiry and the procedure in this Chapter is not for arriving at a satisfaction by the Magistrate whether there is sufficient ground for

conviction -Vadilal Panchal (84 supra). If a prima facie case is made out on examination of the complainant and his witnesses, the Magistrate shall issue process.

236. Section 202 empowers the Magistrate to postpone the issue of process for compelling the attendance of the person complained against and to direct (subject to exceptions) a local investigation to be made by police officer (or by such other person as he thinks fit), for the purpose of deciding whether there is sufficient ground for proceeding. The scope of enquiry Under Section 202 is confined to ascertainment of the truth or otherwise of the allegations made in the complaint, in order to determine whether process should be issued Under Section 204 or whether the complaint should be dismissed by resorting to Section 203 on the satisfaction that there is no sufficient material or reason for proceeding on the basis of the statements of the complainant and his witnesses, if any. The enquiry under this provision does not partake the character of a full dress trial which can only occur after the process is issued Under Section 204 calling upon the proposed accused to answer the accusations made against him for adjudicating the guilt or otherwise - Vadilal Panchal (84 supra); Pramatha Nath Talukdar v. Saroj Ranjan Sarkar : AIR1962SC876 ; Mohinder Singh v. Gulwant Singh : 1992CriLJ3161; Badgadi Narasinga Rao v. Kinjarapu Vara Prasad . It is not within the province of the Magistrate to enter into a detailed discussion on the merits or otherwise of the case. The scope of the enquiry Under Section 202 is limited to the ascertainment of the truth or otherwise of the allegations (i) on the material placed by the complainant before the court; (ii) for the limited purpose of finding out whether a prima facie case for issuance of process has been made out; and (iii) for deciding the question purely from the point of view of the complainant without at all advert to any defense that the accused may have. In a proceeding under Section 202 the accused has no locus nor is entitled to be heard on the question whether process should be issued against him. It is not open to the Magistrate to go into the realm of appreciation of evidence or to the question of sufficiency of the evidence for conviction of the accused - Ponnal v. Rajamanickan . The satisfaction as to the prima facie case and issue of process is a judicial function and the issue of process itself is a judicial determination - Rajendranath v. Dy. Supdt. of Police, Purulia : 1972CriLJ268 .

237. Ms. Nitya Ramakrishnan (for the 11th respondent in W.P. No. 15419/06) contended that in a case triable by the Court of Session (culpable homicide is triable exclusively by the Court of Session), the Magistrate has no authority to decline to take cognizance and commit

the case to sessions. All General Exceptions must be established only at the trial in the Court of Session, is the contention. Reliance is placed on Balraj Khanna and Ors. v. Moti Ram : 1971CriLJ1110 . Moti Ram filed a complaint before a Magistrate under Section 500 IPC asserting that the allegations by the appellants were defamatory in character. Before the Magistrate the respondent (complainant) and other witnesses were examined Under Section 202 Cr.P.C. The Magistrate dismissed the complaint Under Section 203 holding that there was no evidence on record as to which of the appellants made which allegation against the respondent and therefore no prima facie case against any of the appellants can be said to have been made out; and that the resolution passed by the Standing Committee (of the Municipal Corporation, Delhi where the respondent was serving as Liaison Officer); the discussion preceding it are covered by the Exceptions to Section 499 IPC; and hence the appellants were within their right in passing a resolution recommending the respondent's suspension. A revision there against was dismissed by the Addl. Sessions Judge, Delhi. The High Court reversed, set aside the order of the Magistrate dismissing the complaint Under Section 203 Cr.P.C. and directed further inquiry to be made into the complaint. The appellant thereupon moved the Supreme Court. The Supreme Court held that the question of application of Exceptions to Section 499 IPC does not arise at the stage of consideration of the complaint (under Chapter XV). Rejection of the complaint by the Magistrate cannot therefore be sustained.

238. Another decision relied on is Sewakram Sobhani v. R.K. Karanjia and Ors. : 1981CriLJ894 . The appellant lodged a criminal complaint for defamation against the respondents. The Magistrate issued process to the respondent directing him and others to appear for explaining the substance of the accusation to them and for recording their plea. The respondents thereupon preferred revision to the High Court under Section 397 and alternatively Under Section 482 Cr.P.C. The High Court quashed the proceedings holding that the respondents' plea clearly falls within the ambit of Exception 9 of Section 499 IPC and that it would be an abuse of the process of the court if the trial were allowed to proceed which ultimately would turn out to be a vexatious proceedings. The complainant appealed to the Supreme Court. A.P. Sen, J and O. Chinnappa Reddy, J (delivered separate concurring opinions) allowing the appeal and setting aside the order passed by the High Court, directed the Magistrate to record the plea of the accused Under Section 251 Cr.P.C. and thereafter to proceed with the trial according to law. Baharul Islam, J recorded a dissent. The majority held, referring to the decisions in Dr. N.B. Khare v. M.R. Masani AIR 1942 Nag. 117; Harbhajan Singh v. State of Punjab: 1966CriLJ82; Chaman Lal v. State of Punjab :

1970CriLJ1266 and Sukra Mahto v. Basdeo Kumar Mahto : 1971CriLJ1177 ; that even the truth of an allegation does not permit a justification under the First Exception unless it is proved to be in the public good. The question whether or not it was for the public good is a question of fact like any other relevant fact in issue. If a journalist makes assertion of fact as opposed comments on them, he must justify his assertion or in the limited cases specified in the Ninth Exception, show that the attack on the character of another was for the public good, or that it was made in good faith. The majority opinion reiterated that proof of the truth of the statement is not an element of the Ninth Exception as of the First Exception to Section 499 IPC. In the Ninth Exception the person making the imputations has to substantiate that his inquiry was with due care and attention and he was thus satisfied that the imputation was true. The majority further held:

In order to attract the Ninth Exception to Section 499 IPC, the imputations must be shown to have been made (1) in good faith and (2) for the protection of the interest of the person making it or of any other person or for the public good. The insistence is upon the exercise of due care and attention; recklessness and negligence are ruled out by the very nature of the definition. The standard of care and attention must depend on the circumstances of the individual case, the nature of the imputation, the need and the opportunity for verification, the situation and context in which the imputation was made, the position of the person making imputation and a variety of other factors. Good faith is therefore a matter of evidence. It is a question of fact to be decided from the facts and circumstances of each case. So too the question whether an imputation was made for the public good. In fact the First Exception of Section 499 IPC, expressly states ‘Whether or not it is for the public good, is a question of fact.

The court held that ‘Public good’ like ‘good faith’ is a matter for evidence and not conjecture.

239. At this stage of the analysis we may usefully refer to another judgment of the apex court that, in our view, lends clarity to this aspect of the matter. In *State of Orissa v. Debendra Nath Padhi* : AIR2005SC359 , the issue before the court was whether the trial court at the time of framing of a charge could consider material filed by the accused. In *Satish Mehra v. Delhi Administration*: (1996)9SCC766 , a two Judge Bench of the Supreme Court had observed that if the accused succeeds in producing any reliable material at the time of cognizance or framing of a charge, which might fatally affect the very sustainability of the case, it is

unjust to suggest that such material should not be looked into by the court at that stage. The Satish Mehra court held that the object of providing an opportunity to the accused of making submissions as envisaged in Section 227 Cr.P.C. is to enable the court to decide whether it is necessary to proceed to conduct the trial. The court further held that if the material produced by the accused even at that early stage could clinch the issue the court could not shut out such material holding that they should be produced only at the trial. Earlier decisions including by three Judge Benches in Superintendent and Remembrancer of Legal Affairs, West Bengal v. Anil Kumar Bhunja : 1979CriLJ1390 and State of Bihar v. Ramesh Singh : 1977CriLJ1606 , held that the trial court could consider only the material placed before it by the investigating agency, there being no requirement in law for the court to grant at that stage, either an opportunity to the accused to produce evidence in defense or consider such evidence as the defense might produce at that stage. In view of the conflict, the matter was referred to a three Judge Bench, which determined the issue in Debendra Nath Padhi. The three Judge Bench in Debendra Nath Padhi (per Y.K. Sabarwal, J), after referring to earlier decisions in Ramesh Singh: 1977CriLJ1606 , Anil Kumar Bhunja (supra), State of Delhi v. Gyan Devi : 2001CriLJ124 ; State of M.P. v. S.B. Johari : 2000CriLJ944 ; and State of Maharashtra v. Priya Sharan Maharaj : 1997CriLJ2248 ; held that at the stage of framing of the charges the defense of the accused cannot be put forth. The court rejected the contention based on reliance on Articles 14 and 21 of the Constitution that non-consideration of the material filed by the accused would render the provision (Section 227 Cr.P.C.) invalid. The court held that the requirement of hearing the submissions of the accused (in Section 227 Cr.P.C.) or even Under Sections 228, 238 and 239 Cr.P.C., was confined to hearing the submissions of the accused on the record of the case filed by the prosecution and the documents submitted therewith and nothing more. The court emphatically ruled that the expression hearing the submissions of the accused couldn't mean an opportunity to the accused to file material and thereby alter the settled law. The court concluded that at the stage of framing of the charges, hearing the submissions of the accused must be confined to the material produced by the police. The court over-ruled the decision in Satish Mehra. The ratio in Debendra Nath Padhi reinforces the appropriate construction of the provisions of Sections 190 and 203 Cr.P.C. as well; that the decision to take cognizance or dismiss the complaint must be taken without consideration of the plea or any material that an accused desires to present at these stages.

240. The decision in *Vadilal Panchal* (84 *supra*), however negates the position that a Magistrate cannot ever decline to take cognizance of an offence that is exclusively triable by the Court of Session.

241. In cases of death occurring on account of police firing, the record, i.e. the first information that shall be registered Under Section 154(1) (as we have held on issue No. 1), or in the case of a private complaint as to such event, clearly narrates the occurrence of homicide(s). Such homicide is presumptively culpable, a private defense justification asserted in the first information notwithstanding. Where an investigation is pursued (Under Section 157(1)) following upon the FIR, the investigation must necessarily bring forth the facts and circumstances of the case. The identity of the perpetrator(s); the identification of the bullets, the identity of the weapons from which particular bullets (recovered from the body) were fired, the officer to whom a particular weapon was issued, are all matters invariably of official record (see para 624(1) and (2) of the A.P. Police Manual relating to the 'Care and Custody of Arms and Ammunition') and could be correlated by forensic and ballistic analysis that must accompany the investigation, including the result of an autopsy, which must inevitably be held.

242. There may occur rare circumstances where the investigation and the final report fail to make out even a *prima facie* case for either (a) taking cognizance of the offence or (b) on exercising sound judicial discretion, warrant the dismissal of a complaint. It is in those rare cases/circumstances, but nevertheless that the judicial discretion Under Sections 190 and 203 Cr.P.C. enures.

243. We have already noticed that the precedential authority on the scope of the power of the Magistrate, under Chapter XV Cr.P.C. does not invite any discretion for considering or adverting to any defense that an accused may have; and the accused has no *locus standi* in a proceedings Under Section 202 Cr.P.C., to be heard on the question whether process should be issued against him. The Magistrate in an enquiry Under Section 202 must only ascertain the truth or otherwise of the allegations on the material placed by the complainant before the court. The decisions in *Balaraj Khanna* and *Sewakram Sobhani* (104 & 105 *supra*) entrench this position.

244. It must however be noticed that the Magistrate while considering the police report forwarded to him Under Section 173, on an information recorded and registered Under Section 154(1) and pursuant to an investigation Under Sections 156(3) and 157(1) Cr.P.C.; or while considering a police report forwarded Under Section 173, on a direction by a Magistrate Under Section 156(3) pursuant to a complaint received

by such Magistrate Under Section 190(1)(a)/200 [while directing investigation before taking cognizance of the complaint as explained in *Devarapalli Lakshminarayana Reddy and Ors. v. V. Narayana Reddy and Ors.* : 1976CriLJ1361] (analysed *infra*), still inheres the discretion (a judicial discretion and subject to the parameters discussed above) either to take cognizance Under Section 190(1)(b) or to dismiss the complaint Under Section 203 Cr.P.C. This is so since in principle the Police report must disclose that there is a *prima facie* case for proceeding further by and on taking cognizance. Once cognizance is taken however and in a case triable exclusively by the Court of Session, the Magistrate shall have to commit the case to Sessions under Section 209 Cr.P.C. Thereafter it is the Court of Session that is in seize of the case.

245. Proviso (a) to Section 202 forbids the Magistrate to direct an investigation (to be made by a police officer or by such other person as he thinks fit), where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session. Sub-section (2) of Section 202 stipulates that the Magistrate may, in an inquiry Under Sub-section (1) if he thinks fit, take evidence of witnesses on oath. The proviso to Sub-section (2) states that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

246. The issue whether in view of Clause (a) of the First proviso to Section 202 Cr.P.C., a Magistrate who receives a complaint disclosing an offence exclusively triable by the Court of Session is debarred from sending the same to the police for investigation Under Section 156(3), directly fell for consideration in *Devarapalli Lakshminarayana Reddy* (117 *supra*). On facts, the first respondent preferred a complaint before a Judicial Magistrate against the appellant alleging offences, some of which are exclusively triable by the Court of Session. The Magistrate on receiving the complaint forwarded it to the police Under Section 156(3) Cr.P.C. for investigation and report by a specified date. On behalf of the appellant it was contended that in view of the provisions of Section 202 there is a peremptory prohibition on the Magistrate to direct investigation of such a complaint by the police or any other person. The respondents contended that the power Under Section 156(3) Cr.P.C. can be invoked at a stage when the Magistrate has not taken cognizance of the case; that the power of the Magistrate Under Section 156(3) is independent of his power to send the case for investigation Under Section 202; and that the provisions of Section 202 come into operation after the Magistrate starts dealing with the complaint in accordance with the provisions of Chapter XV.

Since the Magistrate had sent the complaint for police investigation without taking cognizance, the power Under Section 202 was not attracted.

247. The apex court explained the position thus: The power to order police investigation under Section 156(3) is different from the power to direct investigation conferred by Section 202. The two operate in distinct spheres at different stages. The first is exercisable at the pre-cognizance stage, the second at the post-cognizance stage when the magistrate is in seize of the case. That is to say in the case of a complaint regarding the commission of a cognizable offence, the power under Section 156(3) can be invoked by the magistrate before he takes cognizance of the offence under Section 190(1)(a) But if he once takes such cognizance and embarks upon the procedure embodied in Chapter XV, he is not competent to switch back to the pre-cognizance stage and avail of Section 156(3). It may be noted further that an order made under Sub-section (3) of Section 156(3), is in the nature of a peremptory reminder or intimation to the police to exercise their plenary powers of investigation under Section 156(3). Such an investigation embraces the entire continuous process which begins with the collection of evidence under Section 156(3) and ends with a report or charge-sheet under Section 173. On the other hand, Section 202 comes in at a stage when some evidence has been collected by the magistrate in proceedings under Chapter XV, but the same is deemed insufficient to take a decision as to the next step in the prescribed procedure. In such a situation, the magistrate is empowered under Section 202 to direct, within the limits circumscribed by that section an investigation 'for the purpose of deciding whether or not there is sufficient ground for proceeding'. Thus the object of an investigation under Section 202 is not to initiate a fresh case on police report but to assist the magistrate in completing proceedings already instituted upon a complaint before him.

248. Applying the analysis to the facts of the case, the Supreme Court in Lakshminarayana Reddy (117 supra) held that as the Magistrate did not apply his mind to the complaint for deciding whether or not there is sufficient ground for proceeding; but only ordered an investigation Under Section 156(3) he did not bring into motion the machinery of Chapter XV. He did not examine the complainant or his witnesses Under Section 200, which the first step in the procedure prescribed under that Chapter and therefore the question of taking next step of that procedure envisaged in Section 202 did not arise. The Magistrate, instead of taking cognizance of the offence, had in exercise of his discretion, sent the complaint for investigation by the police Under Section 156(3). Thus, the first proviso

to Section 202 was not attracted, held the court in Lakshminarayana Reddy.

249. Section 202 serves the purpose of a preliminary enquiry as regards a private complaint triable exclusively by a Court of Session. In such an event the Magistrate has to comply with the provisions of Section 208 Cr.P.C. (Chapter XVI) by furnishing copies of documents mentioned in the said Section. As pointed out in *Rosy v. State of Kerala*: 2000CriLJ930 and *Birendra K. Singh v. State of Bihar*: (2000)8SCC498, the provisions of Section 202 are mandatory. As explained in *Dharmvir v. State of U.P.* in a complaint case relating to a matter exclusively triable by the Court of Session, the Magistrate is required to himself conduct the enquiry and may not direct an investigation by a police officer. The prohibition enjoined on the Magistrate Under Section 202 [to direct an investigation to be made by a police officer or by such other person as he thinks fit, whether it appears that the offence complained of is triable exclusively by the Court of Session], is subject to the clarification of the legal position in *Lakshminarayana Reddy* (117 supra). The functional integrity of the Magistrate in such cases is thus more onerous and of an exacting standard.

250. Section 203 enables the Magistrate, on considering the statements on oath (if any) of the complainant and of the witnesses and the result of the enquiry or investigation (if any) Under Section 202, if of the opinion that there is no sufficient ground for proceeding, to dismiss the complaint on recording reasons for such dismissal. The expression sufficient ground in Section 203 as also later in Section 209 (Chapter XVI) connotes satisfaction that a *prima facie* case is made out against the accused from the evidence of the witnesses entitled to a reasonable degree of credit and not that there is sufficient ground for the purpose of convicting. The consideration of the merits of the case at this stage is only to determine whether there are sufficient grounds for proceeding further. The mere existence of some ground which would be material in deciding whether the accused should be convicted or acquitted does not generally indicate that the case must necessarily fail. Such ground may indicate however the need of proceeding further in order to discover the truth upon a full and proper investigation - *D.N. Bhattacharjee v. State of W.B.*: 1972CriLJ1037.

251. In *Charan Singh v. Shanti Devi* it was held; that if (in a case triable by the Court of Session), the Magistrate after enquiry of the complaint comes to the conclusion that the complainant's case cannot be believed and it is not proper to issue process to the accused, can dismiss the complaint.

252. While the Magistrate is competent to enquire into the prima facie case for the purpose of committal and, is required to examine the material on record to be satisfied that the offence is one which is prima facie exclusively triable by the Court of Session, he cannot embark upon a detailed enquiry. In a case exclusively triable by the Court of Session, the Magistrate in his preliminary enquiry under Sections 203/204 has only to see whether there is prima facie evidence. He would be exceeding his jurisdiction if he undertakes to weigh the evidence meticulously; he is not required to balance and weigh the evidence, as though in a trial, for the purpose of committal. His opinion must be formulated not upon the sufficiency or otherwise of the material - *Kewal Krishan v. Suraj Bhan* : 1980CriLJ1271; *Saleha Khatoon v. State of Bihar*; *State of Karnataka v. Shakti Velu*; *Kannan v. R.A. Varadarajan*; *Kavita v. State* : 81(1999)DLT941.

253. On an interactive analysis of Sections 200 - 203 Cr.P.C. it is thus clear that a Magistrate may dismiss a complaint Under Section 203, (a) if he upon the statement made by the complainant reduced to writing Under Section 200, is satisfied that no offence has been committed; (b) if he clearly distrusts the complainant's statement; and (c) if he distrusts the complainant's statement but not sufficiently so, to warrant him to act upon it, in which event he may direct a further enquiry as provided Under Section 200 and may either conduct the enquiry himself or depute a subordinate officer to conduct it.

254. It is however mandatory that the Magistrate should record reasons for dismissing a complaint - *Chandra Deo v. Prokash Chandra*: [1963]1SCR55; *K. Prabhakar Rao v. State of A.P.*

255. The decisions in *Balraj Khanna*, *Lakshminarayana Reddy*, *Sewakram Sobhani* and *Debendra Nath Padhi* (104,117, 105 &110 supra) delineate the scope of Sections 190, 202 and 203 Cr.P.C., that at the stage of taking cognizance by the Magistrate; at the stage of directing investigation by the police Under Section 156(3) even on receiving a complaint or in exercising judicial discretion to dismiss a complaint (Under Section 203), it is only the material on record as forwarded along with the police report Under Section 173 or the material discerned from the complaint made to the Magistrate or from the statements of the complainant and the witnesses (if any) that could be considered either for taking cognizance (Under Section 190); for dismissal of the complaint (Under Section 203); or even for committal Under Section 209 Cr.P.C. At none of these stages is the accused entitled to assert or establish defense or to produce any document or material in support of any such defense, either for the

purpose of forestalling the taking cognizance of the offence; for dismissal of the complaint; or for avoiding committal of the case (where the offence is exclusively triable by Court of Session).

256. It however requires to be noticed that even where the first information contains a narrative asserting a self-defence justification, though such justification/defense cannot be asserted by the accused either at the stage of taking cognizance, dismissal of the complaint or committal; the general criminal law principle as to the initial investigatorial or prosecutorial burden is not eclipsed.

257. We therefore hold that in exercising judicial discretion whether to take cognizance (Section 190) or whether the complaint should be dismissed (Section 203); the Magistrate is required to consider whether the offence, either recorded in the FIR Under Section 154(1) or in the complaint discloses a prima facie case for proceeding further. The only relevant material at that stage, which should guide the discretion of the Magistrate is the FIR, the Police report Under Section 173, the complaint and the statements of the witnesses (if any) (examined on oath Under Section 200), and the product of the inquiry (Under Section 202), as the case may be. This is the narrow locus of judicial consideration.

258. (F) Chapter XVI sets out the procedure relating to the commencement of proceedings before a Magistrate. Section 204 deals with the procedure relating to issue of process; Section 205 with the discretion of the Magistrate to dispense with the personal appearance of the accused; Section 206 the procedure for special summons in case of a petty offence; Section 207 with the requirement of supplying to the accused a copy of the police report and other documents where proceedings are instituted on a police report; and Section 208 with the requirement of supply of copies of statements and documents to the accused in other cases, triable by Court of Session.

259. Section 209 enjoins that in cases instituted on a police report or otherwise and the accused appears or brought before the Magistrate and it appears to the Magistrate that the offence is triable exclusively by the Court of Session, he shall (a) commit, after complying with the provisions of Sections 207 or 208 as the case may be, the case to the Court of Session; (c) send to that Court (of Session) the records of the case and the documents and articles, if any, which are to be produced in evidence; and (d) notify the Public Prosecutor of the commitment of the case to the Court of Session.

260. On the Magistrate committing the case Under Section 209 to the Court of Session, the bar under Section 193 Cr.P.C. is inapplicable and the Court of Session is invested the complete and unfettered jurisdiction of the court of original jurisdiction, to take cognizance of the offence including the authority to summon the person or persons whose complicity in the commission of crime can prima facie be gathered from the material available on record - *Kishun Singh v. State of Punjab* : 1993CriLJ1700 .

261. If the case is exclusively triable by the Court of Session, the Magistrate cannot discharge the accused. In fact Chapter XV Cr.P.C. which sets out the procedure respecting complaints to Magistrates does not envisage nor confer power to discharge the accused. The Magistrate is merely enabled to dismiss a complaint if he is of the opinion that there is no sufficient ground for proceeding and after recording in brief the reasons for so dismissing. In a case triable exclusively by the Court of Session it is that court (Chapter XVIII - Section 227 Cr.P.C.) which may discharge the accused while recording reasons for so doing.

Conclusions on Issue No. 2:

262. On a consideration and analyses of the relevant provisions in Chapters XII and XIV to XVI of Cr.P.C., and in the light of the curial explication of the principles governing the scope of investigation and the role, jurisdiction and authority of the Magistrate in the matter of taking cognizance of the offence on a final report of the police forwarded to him; the jurisdiction and the contours of the judicial discretion of the Magistrate to dismiss a complaint or to record a committal as the case may be, we hold that the opinion recorded by the Investigating Officer in the final report (drawn up and forwarded Under Section 173 Cr.P.C. on whether any offence appears to have been committed and, if so, by whom), is but an opinion, of the Investigating Officer and does not bind the Magistrate in the exercise of the discretion to take cognizance Under Section 190 Cr.P.C. The Magistrate [notwithstanding the opinion of the Investigating Officer (that no cognizable offence appears to have been committed; or that one or more or all of the accused are not culpable; or even the opinion that the investigation discloses that the homicide [of civilian(s) in a police encounter] is non-culpable on account of a legitimate exercise by the police of the right of private defence)], shall critically examine the entirety of the evidence collected during the investigation while exercising judicial discretion to ascertain whether the opinion in the final report commends acceptance; or that there is no sufficient evidence or prima facie case to justify the accused being put on trial; or even that the facts set out in the

final report disclose commission an offence and the product of the police investigation does not justify the plea of private defence -in which event the Magistrate may take cognizance of the offence. In short, we hold that the opinion recorded in the police report forwarded Under Section 173 Cr.P.C. is not conclusive but is subject to the exercise of judicial discretion by the Magistrate. We hold on issue No. 2 accordingly.

Issue No. 4: Whether the State, the police establishment or a police officer is immune from an obligation to disclose the identity of a Police Officer who had committed an act causing the death of a person, to enable an investigating officer or any person aggrieved by such death to effectively seek justice; and if so, in what circumstances or contexts?

263. This issue in its fullness does not now survive for resolution. As earlier indicated in this judgment, a Full Bench of this Court by the order dated 4.12.2007 referred W.P. No. 15419 of 2006 along with the interlocutory applications therein (WPMP Nos. 29843 & 31250 of 2007) to be heard and decided by a Larger Bench of 5 Judges on certain issues including:

(A) What is the remedy in law available to a complainant who is unaware of the identity of the individual police officer(s) whose firing has caused death of a person due to bullet injury?

(B) Whether the Executive is bound to disclose or can claim privilege from disclosing the identity of the said police officer(s)?

(C) In selectively refusing to disclose the identity of such police officer(s), is the Executive not exercising the judicial power of the State and conclusively to judge for itself whether the officer(s) concerned had acted in self-defense? and

(D) Whether such usurpation of the judicial power of the State by an executive act by claiming privilege, results in deprivation of life and personal liberty otherwise than in accordance with the procedure established by law, violating Article 21 of the Constitution?

264. The above issues arose in the context of the majority judgment of a Full Bench of this Court in APCLC case (6 supra). At para-59 (of the report) the Full Bench majority recorded:

(59) The death of an individual, who is found dead in an incident of exchange of fire, between himself or a group of which he is a member, on the one hand, and the police party on the other hand, can certainly result in registration of an FIR, if any complaint is made, attributing specific

acts to any individual, be it police or outsider as causes of death. The fact that a person was found dead, without there being a specific complaint, cannot, by itself, result in registration of a case, against any individual. (emphasis)

265. Again (at para 60 of the report) the majority held that ... it is too difficult to accept the proposition, that as soon as the death of an individual is noticed, it must invariably result in registration of a crime under Section 302, particularly when no complaint is made attributing any specific act against any person. (emphasis)

266. In conclusion the majority held if a specific complaint is made, alleging that any identified individual had caused a death of such person, an independent FIR shall be registered in it, if it satisfies the law laid down by the Supreme Court in *State of Haryana v. Bhajan Lal*. (emphasis)

267. In W.P. No. 15419/06 the petitioner filed an application (WPMP No. 10579/07) for a direction to the respondents 3, 5 and 8 therein, to reveal the names of members of the District Police Special Party who participated in the offensive launched against the Maoists and killed 8 of them in the encounter on 23.7.2006. A Division Bench of this Court which had initially heard this writ petition, by the order dated 30.7.2007 rejected this application since the petitioner did not lodge such a request under the Right to Information Act, 2005 ('RTI Act'). In this order this Court observed that if the petitioner's application is not attended to or replied by the concerned authority within a reasonable time, the petitioner could seek the intervention of this Court.

268. The General Secretary of the petitioner addressed a letter dated 1.8.2007 to the Public Information Officer, the A.P. Information Commission ('APIC') seeking the names, designations and other particulars of the police officers involved in the encounter on 23.7.2006. The APIC in turn, by its letter dated 4.8.2007 transferred the application dated 1.8.2007 to the 5th respondent (in W.P. No. 15419/07) Under Section 6(3) of the RTI Act. On 15.8.2007 the petitioner addressed, inter alia the Deputy Superintendent of Police (I.O. in Cr. No. 30/06 of PS Y.Palem) seeking the names, designations and other particulars, in reiteration of the earlier letter dated 1.8.2007 addressed to the APIC. The 5th respondent by a letter dated 30.8.2007 (addressed the petitioner) declined disclosure of the information sought. To the extent relevant and material the 5th respondent's rejection reads as under:

It is hereby informed that the Cr. No. 30/06 of Y.Palem Police Station is being investigated by the Sub-Divisional Police Officer, Gurajala. The

crime is under investigation and the entire CD file is with him. If any information is furnished in connection with the matter under the investigation it would impede the process of investigation, apprehension and prosecution of offenders. Therefore the information requested by you could not be furnished by me, as I am not the investigating officer.

Against this order, an appeal will lay Under Section 19 of Right to Information Act, 2005 before the Inspector of Police, Yerragondapalem circle within 30 days of receipt of this order.

269. The petitioner filed an application (WPMP No. 29843/07) on 26.10.2007. This application proceeded on the assumption that the request of the petitioner for the information and particulars of the involved police officers has not yet been responded to despite an application under the RTI Act. A direction was sought in this application (to the respondents 3,5 and 8), to reveal the names of the 15 members of the District Police Special Party who participated and killed 8 members in the encounter on 23.7.2006 and further to array those police officers as respondents 9 to 23; the Sub-Inspector of Police and PC Nos. 430 and 1843 of Y.Palem PS and the Addl. Superintendent of Police (Operations) Markapur, Prakasam District, as respondents 24 to 27 (in W.P. No. 15419/06).

270. The 5th respondent, the S.H.O., Y.Palem Police Station. Filed a counter affidavit to WPMP No. 29843/07, on 31.10.2007. Para-3 of this counter asserts that the application was rejected by the 5th respondent on 30.08.2007 (a copy of the rejection was enclosed to the counter). In the light of the rejection, the 5th respondent sought rejection of the WPMP.

271. Interestingly, the 1st respondent -the Principal Secretary to Government, Home Department, filed WPMP No. 31250/07 claiming privilege (Under Section 123 of the Indian Evidence Act), to withhold the information sought by the petitioner, as to the disclosure of the names, which do not form part of any published record as that would adversely affect the affairs of the State (security and law and order). In para-6 of the affidavit accompanying WPMP No. 31250/07, the 1st respondent claimed: that the Petitioner has been trying to get the list of the Police personnel who participated in the exchange of fire with a view to file false criminal complaints against them with the main objective of intimidating them and in order to demoralize/harass and to deter them from discharging their lawful duty of preventing/curbing the unlawful activities of C.P.I. Maoists.

272. In view of the claim of privilege by the State when the writ petition (15419/07) came up for further hearing, a Division Bench of this Court by the order dated 30.11.2007 referred the issue to be heard by a Full Bench, in particular having regard to the claim of privilege by the State. The Full Bench, as already recorded, made the reference on 4.12.2007 to this Bench.

273. All the learned Counsel appearing in the matter, whether for the several petitioners or the respondents including the learned Advocate General for the State and Sri Lalit for the AP Police Officers Association are in agreement that the majority opinion of the learned Full Bench in APCLC (6 supra) to the extent the Bench held that if any complaint is made, attributing specific acts to any individual, be it police or outsider as causes of death can certainly result in registration of a FIR, is a view that is patently erroneous and wholly inconsistent with the relevant provisions of the Cr.P.C. Sri Padmanabha Reddy, the learned Amicus Curiae, has comprehensively supported this view. It is the clear and unambiguous submission of all the learned Counsel that Under Section 154(1) Cr.P.C. what all is needed to be conveyed to the officer in charge of a Police Station is information relating to the commission of a cognizable offence; it is not necessary that such information should contain the names of any accused. Similarly, in respect of a private complaint Under Section 200 Cr.P.C., the Magistrate is bound to entertain a complaint even though the complaint does not enumerate the names of any of the perpetrators. The learned Counsel are agreed on the legal position that even Under Section 190 Cr.P.C. the Magistrate takes cognizance of an offence and not of any offender. The contrary view spelt out in the majority opinion in APCLC (6 supra) is patently erroneous and inconsistent with the relevant provisions of the Cr.P.C., is the conjoint submission.

274. We are in accord with the submission of the learned Counsel for the respective parties on this interpretation of the provisions of Sections 154(1), 190(1)(b) and 200 Cr.P.C. We hold that for making a complaint under Chapter XV Cr.P.C. a complainant need not mention the names of any person who the complainant believes are involved in the commission of the offence complained of. On receiving such complaint and before proceeding to consider taking cognizance thereof, the Magistrate may refer the complaint to the jurisdictional police for investigation Under Section 156(3) Cr.P.C.- vide *Mohd. Yousuf v. Smt. Afaq Jahan and Anr.* 2006 (2) ALT (Cri.) 40 (SC) : 2006 (3) SCJ 73 : 2006 AIR SCW 95; On such referral the police shall register the information received from the Magistrate as FIR Under Section 154(1) and shall investigate Under Sections 156(3)/157 Cr.P.C. The procedure of investigation Under

Section 157(1) Cr.P.C. inheres due and wholesome authority to investigate the facts and circumstances of the case and if necessary to take measures for the discovery and arrest of the offender. (S. 157(1) Cr.P.C).

275. We accordingly hold that the decision of the Full Bench majority in APCLC (6 supra) (that a complaint attributing a specific overt act to an identified person(s) alleging that such identified individual(s) had caused the death of such a person(s), is the condition precedent for registration of a FIR), does not represent the correct legal position. This conclusion of the APCLC majority is overruled.

276. The court declares that for the recording and registration of FIR Under Section 154 Cr.P.C. the information conveyed must relate to the commission of a cognizable offence. Even though such complaint does not enumerate the names(s) of any individual(s) as the perpetrator(s) of the offence nor does attribute any specific act against any person(s), the obligation to record the complaint and register FIR subsists and is non-derogable. We further declare that for entertainment of a complaint by the Magistrate u/Chpt. XV Cr.P.C. a complaint need neither enumerate the name of the perpetrator nor attribute any specific act to any person.

277. We have held (on issue No. 1) that the officer in charge of a Police Station is bound to register the information received as to the death of a civilian consequent on a transaction involving exchange of fire with officers of the law enforcement, as FIR Under Section 154(1) Cr.P.C. and is further obligated to pursue investigation Under Sections 156/157(1) Cr.P.C.

278. In the analysis hereinbefore on issue No. 4 we have concluded that a Magistrate shall entertain a complaint notwithstanding that the complaint does not attribute any specific act against any person and even if the complaint does not allege that any identified individual had caused a death (in the circumstances of the issues before us, of a civilian in a police firing). Neither Section 154(1) nor Section 200 r/w 190 Cr.P.C. require the information or the complaint as the case may be, to attribute any overt act to any individual including a police officer as a condition precedent for recording and registration of FIR Under Section 154(1) Cr.P.C. or for a Magistrate entertaining a complaint u/Chpt. XV Cr.P.C.

279. Where a complaint is made to a Magistrate u/Chpt. XV as already analysed supra (in relation to issue No. 2) the Magistrate may take cognizance of the complaint Under Section 190 Cr.P.C. or before doing so may refer the complaint to the police for investigation (Under Section 156(3) Cr.P.C).

280. Issue No. 4 comprises two aspects: One facet of the issue is as regards the obligation of the State/police establishment/police officer to disclose the identity of police officer(s) who had caused the death of a person(s) in what is claimed to be an exchange of firing in an encounter, to enable any person aggrieved by such death to effectively seek justice. In view of our analyses and conclusion (on issue No. 2) any person aggrieved by the death of a civilian in a police encounter could effectively seek remedy under the provisions of Cr.P.C. even without having to spell out in the information conveyed to the Police Station or in a complaint to the Magistrate (Under Section 154(1) or 200 Cr.P.C. as the case may be), the names of the perpetrators and without the need to attribute any specific overt act to any individual.

281. In the light of such declaration of the legal principle, the issue whether the State/police establishment/police officer enjoys any immunity from the obligation to disclose the identity does not really survive for consideration. It is an established principle of curial discipline that the court refrains from deciding an issue, in particular an issue involving broad normative principles, unless strictly necessary for resolution. We adhere to this venerable principle and decline to pronounce on this facet of issue No. 4.

282. Sri Tarakam, Sri Kannabiran, learned Senior Counsel, the other counsel for the several petitioners and the learned Counsel for the Common Wealth Human Rights Initiative (R-11 in W.P. No. 15419/06) have urged that the claim of privilege by the State (Under Section 123 of the Indian Evidence Act), is extravagant and misconceived. Reliance is placed on several authorities including the decisions in *Henry Greer Robinson v. State of South Australia* AIR 1931 PC 254; *The State of U.P. v. Raj Narain and Ors.* : [1975]3SCR333; and *S.P. Gupta v. Union of India and Anr.* : [1982]2SCR365, for commending rejection of the claim of privilege by the State.

283. It is not necessary to pronounce on the State's claim of privilege in the facts and circumstances. In view of our decision on issues Nos. 1 to 3, we do not propose to analyze the authorities cited and determine whether the claim of privilege asserted by the State is well founded or misconceived.

284. The second facet of issue No. 4 is; whether the State or any of its agents inhere immunity from the obligation to disclose the identity (of a police officer who had committed an act causing death of a person), to an Investigating Officer. While considering issue Nos. 1 to 3 we have considered the provisions of Chapters XII and XIV to XVI Cr.P.C. and

declared - (i) that the information conveyed to the officer in charge of a Police Station as to the occurrence of the death of a person in an exchange of fire with the police (even where such information is conveyed by a police officer while claiming that the death was consequent on the exercise of right of private defence by the police), must be recorded and registered as FIR; and (ii) that an investigation Under Section 157(1) Cr.P.C. shall be pursued.

285. In the course of the above analysis we have held, in fidelity to the legislative mandate of Section 157(1) Cr.P.C. that the procedure for investigation includes investigation into the facts and circumstances of the case and if necessary to take measures for the discovery and arrest of the offender. Section 2(h) Cr.P.C. defines investigation to include all the proceedings under the Code for the collection of evidence conducted inter alia by a police officer.

286. Section 39 Cr.P.C. mandates that every person aware of the commission of any offence punishable under any of the sections of the IPC (specified in Section 39 Cr.P.C, including an offence punishable Under Sections 302 and 304 IPC), shall forthwith give information to the police officer of such commission.

287. Section 52A IPC defines the expression ‘Harbour’ as including assisting a person by any means, whether of the same kind as enumerated in Section 52A or otherwise, to evade apprehension. Sections 191 - 193 IPC define the giving of false evidence, fabricating false evidence and specify the punishment for giving or fabricating false evidence. Section 201 IPC spells out that whoever knowing or having reason to believe that an offence has been committed, causes the evidence of the commission of that offence to disappear, with the intention of screening the offender from legal punishment, or with that intention gives any information respecting the offence which he knows or believes to be false; shall be punishable for varying terms (specified in Section 201), dependent upon the nature of the substantive offence in respect of which the causing of disappearance of evidence or giving of false information to screen the offender, has occurred.

288. Section 202 makes an intentional omission to give information of offence by a person bound to inform, culpable and spells out the punishment therefore. Section 203 declares to be an offence and makes punishable the giving of false information respecting an offence committed. Section 204 renders culpable the destruction of a document or electronic record to prevent its production as evidence. Section 216 IPC specifies inter alia that whenever a public servant, in exercise of the lawful powers

of such public servant, orders a certain person to be apprehended for an offence, whoever harbours or conceals that person with the intention of preventing him from being apprehended, shall be punished as specified. Different terms of imprisonment are specified in Section 216 IPC, in proportion to the gravity of the offence for which the person is ordered to be apprehended. Section 217 IPC spells out as culpable the conduct of a public servant disobeying the direction of law with intent to save a person from punishment. Section 221 IPC enjoins to be an offence, the intentional omission by a public servant to apprehend or keep in confinement any person charged with or liable to be apprehended for an offence or the aiding of such person in escaping or attempting to escape from such confinement.

289. The learned Advocate General while fairly conceding the legal position that the State may claim no privilege for disclosure of the name(s) of the police officer(s) to the Magistrate, did not clearly spell out the stand of the State with regard to the obligation to disclose to the Investigating Officer (pursuing investigation Under Section 157 Cr.P.C.) the names of police officer(s) who are involved in or had participated in the transaction of firing, which resulted in the death(s). However, the statutory obligation of the Investigating Officer qua Section 157 Cr.P.C. to investigate the facts and circumstances of the case postulates a corollary obligation of any person (reinforced by the provisions of Section 39 Cr.P.C.) to furnish information to effectuate in full measure the process of investigation Under Section 157(1) Cr.P.C. The several provisions of the IPC, some of which have been illustratively referred to hereinabove, also place the matter beyond any disputation; that the State, its agents, instrumentalities or the officer(s) of the State are bound to extend unstinted cooperation and to provide all information and unhindered access to the official records, to the Investigating Officer. Withholding of any relevant information by any public servant, from an Investigating Officer, which has the impact of impeding or hindering the investigation of an offence registered Under Section 154(1) Cr.P.C, would be culpable conduct under several provisions of the IPC, some of which have been referred to supra.

290. On the above analysis the conclusion is compelling that the State/the police establishment/a police officer or any public servant has no manner of immunity whatsoever from the obligation to disclose to the Investigating Officer the identity of a police officer who had caused the death of a person (in a firing by the officers of the law enforcement). This aspect of issue No. 4 is answered accordingly.

291. The Full Bench in APCLC (6 supra), per majority, declared that viewed from any angle, registration of a case, Under Section 302, straight away against the police officials in such cases, does not accord with the procedure prescribed under the Cr.P.C. (para-71). To support this declaration the majority recorded several reasons: (A) that there is a discretion Under Section 154(1) Cr.P.C., conferred on the officer in charge of the Police Station whether to register a complaint; (B) that in the absence of a complaint attributing specific acts to any individual as to the cause of death, no FIR need be registered; (C) that in view of the availability of an inquest procedure Under Section 176 Cr.P.C., that procedure could be gainfully adopted; (D) that the police being an agency of the State and the administration of criminal justice being almost entirely dependent upon the participation and assistance by the police, the police official may not be treated on par with the ordinary citizens, in the context of testing their acts and omissions, in the course of discharge of their duties; and (E) that the earlier decisions (of Division Benches) of this Court, in *P. Narayanaswami v. S.I. of Police* : 1996(4)ALT241 , *K.G. Kannabiran v. Chief Secretary* : 1997(4)ALT541 , *A. Anasuya v. Station House Officer, Tadicherla* : 2001(2)ALD87 , do not represent the correct legal position, as the attention of the court does not appear to have been drawn to the provisions of Section 176 Cr.P.C.

292. The Full Bench majority in APCLC (6 supra) conceived illustrations from the attack on Parliament; an extremist killing in some village in the State; and an act of arson on a passenger train by persons claiming to belong to an extremist organization where about 50 persons died. The majority reasoned that in these instances if the intervention of the police and the killing of the extremists while exercising legitimate law enforcement duty were to be registered as FIR setting the criminal law and the investigation into motion, the consequences would be disastrous.

293. The APCLC (6 supra) majority concluded that- (i) an independent FIR shall be registered only on a specific complaint made alleging that any identified individual had caused death on account of bullet injuries in an encounter with the police, if the complaint satisfies the law laid down in *Bhajan Lal* (7 supra); (ii) in the absence of any such complaint the procedure Under Section 176 Cr.P.C. shall be followed without prejudice to any investigation that may be undertaken by the police; and (iii) that the judgment (of the Supreme Court) in *People's Union for Civil Liberties v. Union of India* (PUCL) (8 supra) does not represent the correct legal position.

294. In view of our analyses and conclusions on issues Nos. 1 to 3 we hold and declare that the conclusions of the Full Bench majority in APCLC (6 supra) do not represent the correct legal position; that the earlier decisions of the Division Benches in Narayanaswamy, Kannabiran and Anasuya (135, 136 & 137 supra) and the dissenting opinion in APLC are in conformity with the law as declared in this judgment; and that it is not within the province of this Court to declare the judgment of the Supreme Court in PUCL (8 supra) as not representing the correct legal position.

295. The illustrations referred to in the Full Bench majority and the assumptions drawn therefrom are also with respect, erroneous. Providing security and protection to the Parliament, the Council of Ministers, the Members of Parliament and others participating in the session in the Parliament is a legitimate function of the police and if the police resorted to firing at terrorists in order to save lives and property, that would surely constitute a legitimate exercise of the right of private defense, if the imminence, gravity and proportionality standards are satisfied. The APCLC Full Bench majority's conclusion that since the terrorists did not intend to attack the police who fired on them, if a case were registered against police personnel for having caused the death of terrorists in the Parliament attack, they would be exposed to an almost certain conviction for the offence Under Section 302 IPC, is an assumption that is at clear variance with the law. Illustrations by the Full Bench majority of an extremists killing in a village in the State or of arson of a passenger train by extremists' organization, are also non-sequitor, for reason alike.

296. In PUCL (8 supra) in Manipur, a disturbed area with a considerable component of terrorists activity affecting public order and even the security of the State, two persons along with some others were seized by the police from a hut, taken a long distance away in a truck, and shot there. The Apex Court (per B.P. Jeevan Reddy, J) observed: If the police had information that terrorists were gathering at a particular place and if they had surprised them and arrested them, the proper course for them was to deal with them according to law. 'Administrative liquidation' was certainly not a course open to them. (emphasis)

297. The PUCL observation above, represents the binding standard and with respect, wholly accords with the balancing standards (between liberty and authority), propounded by Robert Jackson, J in American Communications Association (5 supra).

298. In Prakash Singh and Ors. v. Union of India and Ors. : (2006)8SCC1 the Supreme Court issued directions to the Central and State Governments

to comply with a set of seven directives that delineate practical measures to kick-start police reform. The 6th directive was to set up an independent Police Complaints Authority at the State and District level to look into the public complaints against police officer(s) in cases of serious misconduct including custodial death, grievous hurt or rape in police custody. It is not known as to what is the State's response to this directive nor the extent of State's compliance with it.

299. When human life is extinguished as a consequence of Executive action, review and accountability of the State action we consider, is a constitutional necessity.

300. The Report of the Independent Commission on Policing for Northern Ireland spells out the several aspects to accountability in policing. According to this report: there is democratic accountability, by which the elected representatives of the community tell the police what sort of service they want from the police, and hold the police accountable for delivering it. There is transparency, by which the community is kept informed, and can ask questions, about what the police are doing and why. There is legal accountability, by which the police are held to account if they misuse their powers. There is financial accountability, by which the police service is audited and held to account for its delivery of value for public money. And there is internal accountability, by which officers are accountable within a police organization. All of these aspects must be addressed if full accountability is to be achieved, and if policing is to be effective, efficient, fair and impartial Chapter-5, The Report of the Independent Commission on Policing for Northern Ireland, 1999.

301. Independent over-sight bodies to augment Government and internal accountability systems with external or non-police oversight mechanisms have been set up in several jurisdictions across Europe, Africa and Canada. Such systems are to complement existing mechanisms and together to create a web of accountability from which it could be increasingly difficult for police misconduct to escape without consequences. Example of such bodies are the Independent Police Complaints Commission and the Police Integrity Commission, New South Wales; The Independent Complaints Directorate, South Africa; The Police Ombudsman in Northern Ireland; the Independent Police Complaints Commission established pursuant to the report of the inquiry by Lord Scarman and Stephen Laurence Inquiry, 1999.

302. Among the non-binding but international standards may be mentioned the United Nations 1979 Code of Conduct for Law Enforcement Officials; and the United Nations Basic Principles on the

Use of Force and Fire Arms by Law Enforcement Officials adopted by the 8th United Nations Congress on the Prevention of Crime and Treatment of Offenders (at Havana, Cuba, during 27th August to 7th September 1999). The United Nations principles on the Effective Prevention and Investigation of extra-legal, arbitrary and summary executions, adopted on 24.05.1989 by the Economic and Social Council Resolution 1989/65 enumerate potent (though non-binding) standards that list out the regime of investigative procedures to be followed. In 1997 pursuant to the Vienna Declaration and Programme of Action, a set of Principles were drafted by the United Nations Commission on Human Rights to serve as guidelines to assist States in developing effective measures to combat impunity -The United Nations Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity. The Principles were refined in 2005 to reflect contemporaneous developments in International law and practices. The principal goal of the raft of these principles is to provide for effective and enforceable remedies for the victim; and to uphold the public interest by deterring future violation.

303. We have referred to the evolution, organizational correctives and establishment of independent over-sight bodies in certain other jurisdictions by way of illustrating the trajectory and the dynamics of vibrant Human Rights Jurisprudence. The International conventions, best practices standards and principles are also referred to in the same context.

304. As pointed out by the Supreme Court in PUCL (8 supra) a Statute is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with the established rules of International law. Our analyses of the provisions of IPC and Cr.P.C. leads us to the inference that accountability for executive conduct resulting in death of civilian(s) is ensured by a rigorous investigation, the neutrality and professionalism of such investigation reinforced by statutorily embedded judicial oversight. The relevant provisions of the IPC and Cr.P.C., the substantive and the procedural prescriptions of our criminal laws thus accord with the International Principles that mandate entrenchment of mechanisms for accountability of State actions that result in lethal consequences for civilians.

305. Before we proceed to record the summary of our conclusions, on the issues framed, and analysed, we deal with an abstract submission urged on behalf of the State. The learned Advocate General contended that the recurrent and regnant violence, the subversion of law and order

and the challenge to the equilibrium of our civil society presented by Maoist/Naxalite activities constitute a grave crisis and challenge the sovereign authority of the State, legitimizing firm and resolute executive action. Interpretation of our laws must therefore accommodate the pragmatic demand of appropriate executive response to this crisis.

306. We recognize that the limitations of human foresight guarantee the eventual failure of any constitutional or legislative arrangement as an ordering principle of political experience. And insofar as emergencies expose those limits, they demonstrate the eventual contingency of all constitutional and legislated arrangements. Senator John Potter Stockton remarked (we recall this observation as it is appropriate in the context): Constitutions are chains with which men bind themselves in their sane moments that they may not die by a suicidal hand in the day of their frenzy. Debate over the Ku Klux Klan Act of 1871 -reported in *The Congressional Globe* - April 11, 1871 It is worth reflecting that when temptation does appear, typically in the guise of an emergency; we must ask whether our commitment to constitutional maintenance demands that we honour the self-command expressed as limitations on governmental power in the constitutional and legal text, or surrender to the wish to be free of it.

307. An apparent assumption in the State's argument, that our Constitution and the laws should accommodate all powers necessary to cope with the crises is that crises have beginnings and endings - that most crises are capable of resolution and that, upon their termination, the conditions and forms of constitutional government more or less return to normal.

308. John E. Finn perceptively observes: Few would be so foolhardy as to suggest that the workings of crisis government, particularly the flow of power to the executive, do not effect some permanent change in the ordinary patterns of constitutional government John E. Finn: *Constitutions in Crisis - Political Violence and the Rule of Law*- Oxford, 1991. Edward S. Corwin explained that post-crisis government may so little resemble pre-crisis government that the difference might, as in the case of United States following World War II, or after the New Deal amount to a constitutional revolution. Corwin - *Total War and the Constitution*, p.172 - Alfred A. Knopf, 1947

309. The rule of law culture is a wonderfully complex and rich theory of political organization. Lord Bolingbroke made a classic statement on the meaning of constitutionalism. He observed that constitutionalism is a

form of government conducted by fixed principles of reason directed to certain fixed objects of public good. Lord Bolingbroke, *Historical Writings*- University of Chicago Press, 1972 The fixed principles of reason bind since, Lord Bolingbroke, formulated - the community hath agreed to be bound by them.

310. In a constitutional government there are substantive objectives (the fixed objects of public good), structural limitations, and procedural guarantees that limit the exercise of State power. Indeed, the concept of limited power, of restraints upon not only the exercise but also the proper object of power, is central to any understanding of constitutionalism and of a rule of law regime within it. Charles H. McIlwain-*Constitutionalism: Ancient and Modern* - Cornell University Press 1947

311. We have considered it appropriate to resonate to the abstract State claims to crisis management; with observations on the normative principles of constitutionalism and rule of law fundamentals. We say that core and critical social policy and governance choices, particularly involving rights to life and liberties must be expressed in legislative instruments. We need say no more.

312. The learned Advocate General, Sri K.G.Kannabiran, Sri Uday Lalit, and Sri Bojja Tarakam - learned Senior Counsel; and the other learned Counsel for the several parties in the batch of cases before us, have presented the respective positions on the several critical issues that we have considered in this judgment, in considerable forensic detail and with commendable and painstaking effort. We record our gratitude to the learned Counsel for the assistance rendered. We particularly place on record our gratitude to Sri C. Padmanabha Reddy, the learned Senior Counsel who assisted this Court with clinical analyses and his usual fairness on the several inter-meshing substantive and procedural provisions and the relevant precedents.

Summation:

313. To conclude, we hold:

(A) On issue No. 1: That where a police officer causes death of a person, acting or purporting to act in discharge of official duties or in self-defense as the case may be, the first information relating to such circumstance (even when by a Police/Public Official; whether an alleged perpetrator is named or not) shall be recorded and registered as FIR, enumerating the relevant provisions of Law, (Under Section 154(1) Cr.P.C.) and shall be investigated (Under Section 156/157 Cr.P.C).

(B) On issue No. 2: That the existence of circumstances bringing a case within any of the Exceptions in the Indian Penal Code including the exercise of the right of private defense (a General Exception in Chapter IV IPC), cannot be conclusively determined during investigation. The opinion recorded by the Investigating Officer in the final report forwarded to the Magistrate (Under Section 173 Cr.P.C), is only an opinion. Such opinion shall be considered by the Magistrate in the context of the record of investigation together with the material and evidence collected during the course of investigation. The Magistrate (notwithstanding an opinion of the Investigating officer, that no cognizable offence appears to have been committed; that one or more or all of the accused are not culpable; or that the investigation discloses that the death of civilian(s) in a police encounter is not culpable in view of legitimate exercise by the police of the right of private defense), shall critically examine the entirety of the evidence collected during investigation to ascertain whether the opinion of the Investigating Officer is borne out by the record of investigation. The Magistrate has the discretion to disregard the opinion and take cognizance of the offence Under Section 190 Cr.P.C.

(C) On issue No. 3: That a magisterial enquiry (inquest) (Under Sections 174 -176 Cr.P.C.) is neither a substitute nor an alternative to the obligation to record the information as FIR and to conduct investigation into the facts and circumstances of the case and if necessary to take measures for the discovery and arrest of the offender (s) (Under Sections 154(1), 156 and 157 Cr.P.C) and

(D) On issue No. 4: In view of the conclusions on issues Nos. 1 to 3 and in view of our declaration [that the information conveyed to the officer in charge of a Police Station (Under Section 154(1) Cr.P.C.) or a complaint made to the Magistrate (u/Chpt. XV Section 200 Cr.P.C.), need not mention the name of the Police Officer(s) who the complainant believes is the perpetrator of the offence complained of], it is not necessary to pronounce on whether the State, the Police Establishment or a Police Officer has immunity from the obligation to disclose the identity (of a police officer who had committed an act causing the death of a person), to a person aggrieved by such death to effectively seek justice. Whether the investigating officer is required to disclose the names of the police officers who are involved in an operation resulting in civilian casualty when a request for such information is lodged by an individual, is an issue not within the spectrum of the issues falling for our determination herein. This aspect is left open. The obligation to disclose to the Investigating Officer the identity of the police officer(s) so involved, is however absolute and there is no immunity whatsoever from this

obligation. Withholding of any information or material that impedes effective or expeditious investigation violates several provisions of the Indian Penal Code and the Criminal Procedure Code (pointed out in our analyses on this issue). The reference is answered as above. No order as to costs.

11.3 Supreme Court judgment in Prakash Kadam & Etc. vs Ramprasad Vishwanath Gupta & Anr on 13.5. 2011

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NOS.1174-1178_OF 2011

[Arising out of SLP((Criminal) Nos. 3865-69 of 2011)]

Prakash Kadam & etc. etc. Appellants

-versus-

Ramprasad Vishwanath Gupta & Anr. Respondents

J U D G M E N T

Markandey Katju, J.

A curse shall light upon the limbs of men;

Domestic fury and fierce civil strife Shall cumber all the parts of Italy;

Blood and destruction shall be so in use And dreadful objects so familiar
That mothers shall but smile when they behold Their infants quarter'd
with the hands of war;

All pity choked with custom of fell deeds:

And Caesar's spirit, ranging for revenge, With Ate by his side come hot
from hell, Shall in these confines with a monarch's voice Cry "Havoc!"
and let slip the dogs of war;

That this foul deed shall smell above the earth With carrion mean,
groaning for burial.

— (Shakespeare: Julius Caesar Act 3 Scene 1)

1. Leave granted. Heard learned counsel for the appellants and perused the record.

2. This case reveals to what grisly depths our society has descended.

3. This appeal has been filed against the impugned judgment and order dated 21.1.2011 passed by the High Court of Judicature at Bombay in

Criminal Application Nos. 5283-5285 and 5303-5304 of 2010 by which the High Court has cancelled the bail granted to the appellants by the Sessions Court.

4. The appellants are policemen accused of a contract killing in Sessions Case No. 317/2010 which is pending before the Sessions Judge, Greater Bombay. The appellants have been charge-sheeted for offences punishable under Sections 302/34, 120-B, 364/34 IPC and other minor offences. The victim of the offence is deceased Ramnarayan Gupta @ Lakhanbhaiyya. The prosecution case is that the appellants were engaged as contract killers by a private person to eliminate the deceased.

5. The case of the prosecution in brief is that the deceased Ramnarayan Gupta and the accused No. 14, Janardan Bhange were, once upon a time, very close to each other. Both of them had been working as estate agents and, mainly their business was to purchase land from the farmers whose land has been acquired by the Government under the Land Acquisition Act and to whom 12 percent of the land was given by the Government. This 12 percent of the land was being purchased at meager price by the deceased and accused No. 14, Janardan Bhange and was being sold on premium at later stage. During the course of that business, both of them had been exchanging the files pending with them for disposal pertaining to the said land.

6. There were some differences between the deceased Ramnarayan Gupta and accused No. 14, Janardan and hence it is alleged that the accused Janardan decided to eliminate the deceased in a false police encounter.

Hence, he hired the services of the accused, and in pursuance of the said conspiracy the deceased Ramnarayan Gupta and his friend Anil Bheda were abducted on 11.11.2006 from near a shop named Trisha Collections at Vashi, New Bombay by 4 or 5 well-built persons who appeared to be policemen and were forcibly bundled into a Qualis car. The complainant, brother of the deceased, sent telegrams and fax messages to different authorities complaining that the said two persons had been abducted by some persons who appeared to be policemen and were in danger of losing their lives.

7. It is alleged that at Bhandup Complex the deceased was shifted to an Innova vehicle. The deceased and witness Anil Bheda were taken to D.N. Nagar police station in two separate vehicles i.e. one Qualis and the other Innova. It is alleged that the deceased was killed and his dead body was thrown near Nana-Nani Park at Versova. The dead body, after some

time, was collected from the said place by the police to create a false case of police encounter. A case vide C.R. No. 302/2006 was registered on 11.11.2006 at Versova Police Station against deceased Ramnarayan Gupta on the complaint made by accused No. 9. In the said FIR it was shown that accused No. 9 and other police officers had gone to Nana-Nani Park on the basis of certain information and that the deceased was asked to surrender before the police. Instead of surrendering before the police, the deceased had attempted to kill the police and in retaliation he was shot by them.

8. It is also alleged that witness Anil Bheda was initially detained at D.N. Nagar Police Station and thereafter he was taken to Kolhapur and he was further detained at Mid Town Hotel at Andheri. As such the witness Anil Bheda was in custody of the police for about one month from 11.11.2006. His wife had lodged a missing complaint at Vashi police station on the same day, but she was compelled to withdraw that complaint.

9. The complainant is the brother of the deceased and is a practicing advocate. He came to know within a few minutes of the incident of abduction of his brother. He, therefore, along with advocate Mr. Ganesh Ayyer, started searching for his brother and in the meantime he had also sent telegrams to Police Commissioner of Thane, Mumbai and New Bombay of the alleged abduction of his brother and indicated apprehension that his brother would be eliminated in a false police encounter. On the same day it was flashed on T.V. channels that the deceased had been killed in a police encounter. The complainant, therefore, approached the High Court on 15.11.2006 by filing a writ petition (WP 2473/2006) to get directions from the High Court to the police to register a case in respect of death of his brother.

10. On the aforesaid writ petition the High Court on 13.2.2008 passed an order that the offence of murder be registered against the accused. During the investigation the statement of Anil Bheda and other witnesses were recorded. So far, the police have charge-sheeted 19 accused.

11. After the High Court by its order dated 13.2.2008 had directed the Metropolitan Magistrate, Railway Mobile Court, Andheri to make an inquiry under Section 176(1A) Cr.P.C., the Metropolitan Magistrate after holding the inquiry submitted a report dated 11.8.2008 that Ramnarayan Gupta was shot by the police when he was in police custody. The report also stated that the death had not taken place at the spot alleged by the police, and that the deceased had not disappeared from the police custody before he was done to death, but that the deceased was abducted by the

police. The report also held that a false FIR was lodged by accused No. 9 Police Inspector Pradip Suryavanshi of D.N. Nagar Police Station to show that Ramnarayan Gupta was killed in a police encounter at Nana-Nani Park, and this FIR was filed to cover up the murder of the deceased Ramnarayan Gupta.

12. After the inquiry report was submitted by the Metropolitan Magistrate, the Division Bench of the Bombay High Court by its order dated 13.8.2009 in the aforesaid criminal writ petition constituted a Special Investigation Team for investigation of this case. Mr. K.M.M. Prasanna, DCP, Mumbai City, was appointed as head of the investigation team, and he was directed to record the statement of the complainant and to treat that statement as the FIR. Copy of the order of the Bombay High Court dated 13.8.2009 is Annexure P-3 to this appeal. Accordingly, the statement of the complainant was recorded on 20.8.2009 which was treated as the FIR (Annexure P4 to this appeal) and investigation was carried out. The statement and supplementary statement of Anil Bheda, which corroborates the prosecution case, is Annexure P5 to this appeal.

13. During investigation, it was revealed that accused No.1 Police Inspector Pradip Sharma (who is described as an 'encounter specialist'), accused No.9 - PI Pradip Suryavanshi and accused No. 14 - Janardan Bhanage, had entered into a conspiracy to eliminate Ramnarayan Gupta. It appears that accused No.14 Janardan Bhanage had some personal enmity with Ramnarayan Gupta. Thereafter other officers and some criminals were involved in the execution of the said conspiracy. Accused No.4 - Shailendra Pande, accused No.5 - Hitesh Solanki, accused No.6 - Akil Khan, accused No.8 - Manoj Mohan Raj, accused No.12 - Mohd. Moiddin and accused No.21 - Suresh Shetty and accused No.7 police constable Vinayak Shinde had abducted Ramnarayan Gupta and Anil Bheda from Vashi, on 11.11.2006. Accused No.1 PI Pradip Sharma, accused No.2 Police Constable Tanaji Desai, accused No.9 P.I. Pradip Suryavanshi, accused No.15 API - Dilip Palande were the persons who actually fired and shot dead the deceased. Accused No.11 API Nitin Satape and accused no.22 PSI Arvind Sarvankar claimed to have fired during the encounter, though the bullets fired from their fire arms were not recovered. Accused Nos. 13,16, 17, 18 and 19, whose bail orders were cancelled by the High Court, are said to be the members of the team which shot him dead. Accused No.13 Devidas Sakpal had allegedly guarded Anil Bheda at Hotel Mid Town on certain occasions and accused No.16 Head Constable Prakash Kadam had joined the abductors at about 4.30 p.m. and since then he was with Anil Bheda. He was also with Anil Bheda when he was

taken out from D.N.Nagar Police Station in the evening and also later on at Hotel Mid Town from time to time.

14. On behalf of the prosecution, it is pointed out that in the FIR lodged by P.I. Pradip Suryavanshi showing the killing of Ramnarayan Gupta in an encounter at Nana-Nani Park, he had given names of police officers and police staff, who were in that team. The names of accused Nos.13,16, 17, 18 and 19 are shown in the said FIR. On that basis an entry was made in the station diary, where also the names of these persons were shown. It is also pointed out that in the magisterial enquiry, which was initially directed by the Police Commissioner, these persons had claimed to be members of the encounter team. When the complainant filed the Writ Petition against the State for taking action against the culprits, some of these persons had appeared to contest the writ petition. After the writ petition was allowed and this Court directed investigation, accused Nos. 13, 16, 19 and 20 filed Special Leave Petition challenging that order, which was dismissed.

Everywhere they had taken the plea that Ramnarayan Gupta was shot dead in an encounter and that they were members of the Police team involved in that encounter and were also present at the time of the alleged encounter.

The learned Counsel also pointed out that there is sufficient material to show that these persons were involved in the commission of the crime.

15. The Sessions Court granted bail to the appellants but that has been cancelled by the High Court by the impugned judgment.

16. It was contended by learned counsel for the appellants before us, and it was also contended before the High Court, that the considerations for cancellation of bail is different from the consideration of grant of bail vide *Bhagirathsinh s/o Mahipat Singh Judeja vs. State of Gujarat* (1984) 1 SCC 284, *Dolat Ram and others vs. State of Haryana* (1995) 1 SCC 349 and *Ramcharan vs. State of M.P.* (2004) 13 SCC 617.

17. However, we are of the opinion that that is not an absolute rule, and it will depend on the facts and circumstances of the case. In considering whether to cancel the bail the Court has also to consider the gravity and nature of the offence, prima facie case against the accused, the position and standing of the accused, etc. If there are very serious allegations against the accused his bail may be cancelled even if he has not misused the bail granted to him. Moreover, the above principle applies when the same Court which granted bail is approached for canceling the bail. It will not

apply when the order granting bail is appealed against before an appellate/ revisional Court.

18. In our opinion, there is no absolute rule that once bail is granted to the accused then it can only be cancelled if there is likelihood of misuse of the bail. That factor, though no doubt important, is not the only factor. There are several other factors also which may be seen while deciding to cancel the bail.

19. This is a very serious case and cannot be treated like an ordinary case. The accused who are policemen are supposed to uphold the law, but the allegation against them is that they functioned as contract killers. Their version that Ramnarayan Gupta was shot in a police encounter has been found to be false during the investigation. It is true that we are not deciding the case finally as that will be done by the trial court where the case is pending, but we can certainly examine the material on record in deciding whether there is a prima facie case against the accused which disentitles them to bail.

20. Accused No. 11 API Nitin Sartape, accused No.17 PSI Ganesh Harpude, and accused No.19 PSI Pandurang Kokam, who were attached to Versova Police Station, as per the station diary entry 33 of Versova Police Station left Versova Police Station to go to D.N.Nagar Police Station on a special assignment. That entry No.33 was taken in the station diary of Versova Police Station at 18.05 hours. Entry No.25 in the station diary of D.N.Nagar Police Station at 18.55 hrs. shows that Police Inspector Suryavanshi, API Dilip Palande (accused No.15), PSI Arvind Sarvankar (accused No.22), PSI Patade (accused No.18) and API Sartape (accused No.11), PSI Harpude (accused No.17) and Police Constable Batch No.26645 i.e. Pandurang Kokam (accused No.19) left the Police Station to go near Nani Nani Park to verify and to arrest a hardened criminal. It appears that 3 police officers i.e. AP Sartape, PSI Harpude and Constable Pandurang Kokam were specially called from the Versova Police Station and they were in the team of the police officers and staff who accompanied PI Suryavanshi.

This team left the police station at 18.55 hrs. as per the said entry and it appears that at about 8 to 8.15 p.m. Ramnarayan was shot dead. At this stage, the defence of the accused need not be taken into consideration, because during the investigation, it has been found that there was no encounter and Ramnarayan Gupta was shot dead in a fake encounter. This station diary No.25 of 18.55 hrs. goes to show that accused No.17 PSI Hapude, accused No.18 PSI Patade and accused No.19 Constable Pandurang Kokam were the members of the team which killed

Ramnarayan. Not only this, as per the record of D.N.Nagar Police station, on 11.11.2006, at 6 p.m. Police Inspector Suryavanshi, API Sartape and PSI Anand Patade had collected weapons and ammunition. Naturally, those weapons were collected by the said officers to go to some place for a mission. According to them, they went to at Nana Nani Park where Ramnarayan Gupta was killed. In view of this, the presence of PSI Patade in the team which executed the said plan and killed Ramnarayan does not appear to be in doubt. Merely because accused No.18 PSI Patade himself did not fire is not sufficient. Accused Nos. 17 Ganesh Harpude and accused No.19 Pandurang Kokam, as pointed out above, were also members of that team. It is also material to note that these accused persons had consistently taken a stand that they were present at the time of the said encounter and this is clear from their stand taken before the High Court as well as before the Supreme Court in Special Leave Petition filed by the accused Nos. 13, 16, 19 and 21. In that SLP also they had stated that accused Nos. 17 and 18 were also in the encounter team.

Hence there is a prima facie case against them.

21. As far as accused Nos. 16, 17, 18 and 19 are concerned, there is sufficient material to prima facie establish their role in this conspiracy and the alleged execution of Ramnarayan Gupta. Accused No.13 was allegedly given duty of guarding Anil Bheda at Hotel Mid Town where he was being detained illegally. It is contended by the learned Counsel for the accused that if any duty of guarding or surveillance is given to a Police Constable by his superiors, he is bound to discharge that duty and merely because he was given the guarding duty, it cannot be said that he was party to the conspiracy. However, it cannot be forgotten that accused No.13 was one of the petitioners before the Supreme Court and had claimed that he was a member of the encounter team along with PI Suryavanshi and others, and this admission finds corroboration from the contents of the FIR registered by PI Suryavanshi himself.

22. In fact, the prosecution material collected during the investigation prima facie indicates that Ramnarayan Gupta was abducted during the day time and was taken to D.N.Nagar Police Station and from there he was taken to some unknown place where he was shot dead. At 9 p.m. some police officers came back to the police station and deposited their weapons and kept their blood stained clothes.

23. In our opinion this is a very serious case wherein prima facie some police officers and staff were engaged by some private persons to kill their opponent i.e. Ramnarayan Gupta and the police officers and the staff acted as contract killers for them. If such police officers and staff can be

engaged as contract killers to finish some person, there may be very strong apprehension in the mind of the witnesses about their own safety. If the police officers and staff could kill a person at the behest of a third person, it cannot be ruled out that they may kill the important witnesses or their relatives or give threats to them at the time of trial of the case to save themselves. This aspect has been completely ignored by the learned Sessions Judge while granting bail to the accused persons.

24. In our opinion, the High Court was perfectly justified in canceling the bail to the accused-appellants. The accused/appellants are police personnel and it was their duty to uphold the law, but far from performing their duty, they appear to have operated as criminals. Thus, the protectors have become the predators. As the Bible says “If the salt has lost its flavour, wherewith shall it be salted?”, or as the ancient Romans used to say, “Who will guard the Praetorian guards?” (see in this connection the judgment of this Court in CBI vs. Kishore Singh, Criminal Appeal Nos.2047-2049 decided on 25.10.2010).

25. We are of the view that in cases where a fake encounter is proved against policemen in a trial, they must be given death sentence, treating it as the rarest of rare cases. Fake ‘encounters’ are nothing but cold blooded, brutal murder by persons who are supposed to uphold the law. In our opinion if crimes are committed by ordinary people, ordinary punishment should be given, but if the offence is committed by policemen much harsher punishment should be given to them because they do an act totally contrary to their duties.

26. We warn policemen that they will not be excused for committing murder in the name of ‘encounter’ on the pretext that they were carrying out the orders of their superior officers or politicians, however high. In the Nuremburg trials the Nazi war criminals took the plea that ‘orders are orders’, nevertheless they were hanged. If a policeman is given an illegal order by any superior to do a fake ‘encounter’, it is his duty to refuse to carry out such illegal order, otherwise he will be charged for murder, and if found guilty sentenced to death. The ‘encounter’ philosophy is a criminal philosophy, and all policemen must know this. 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.

27. For the above reasons, these appeals are dismissed.

28. Before parting with this case, it is imperative in our opinion to mention that our ancient thinkers were of the view that the worst state of affairs

possible in society is a state of lawlessness. When the rule of law collapses it is replaced by Matsyanyaya, which means the law of the jungle.

In Sanskrit the word 'Matsya' means fish, and Matsyanyaya means a state of affairs where the big fish devours the smaller one. All our ancient thinkers have condemned Matsyanyaya vide 'History of Dharmashastra' by P.V.

Kane Vol. III p. 21. A glimpse of the situation which will prevail if matsyanyaya comes into existence is provided by Mark Antony's speech in Shakespeare's 'Julius Caesar' quoted at the beginning of this judgment.

29. This idea of matsyanyaya (the maxim of the larger fish devouring the smaller ones or the strong despoiling the weak) is frequently dwelt upon by Kautilya, the Mahabharata and other works. It can be traced back to the Shatapatha Brahmana XI 1.6.24 where it is said "whenever there is drought, then the stronger seizes upon the weaker, for the waters are the law," which means that when there is no rain the reign of law comes to an end and matsyanyaya beings to operate.

30. Kautilya says, 'if danda be not employed, it gives rise to the condition of matsyanyaya, since in the absence of a chastiser the strong devour the weak'. That in the absence of a king (arajaka) or when there is no fear of punishment, the condition of matsyanyaya follows is declared by several works such as the Ramayana II, CH. 67, Shantiparva of Mahabharat 15.30 and 67,16. Kamandaka II. 40, Matsyapurana 225.9, Manasollasa II. 20.1295 etc.

31. Thus in the Shanti Parva of Mahabharat Vol. 1 it is stated:-

"Raja chen-na bhavellokey prithivyaam dandadharakah Shuley matsyanivapakshyan durbalaan balvattaraah"

32. This shloka means that when the King carrying the rod of punishment does not protect the earth then the strong persons destroy the weaker ones, just like in water the big fish eat the small fish. In the Shantiparva of Mahabharata Bheesma Pitamah tells Yudhishtir that there is nothing worse in the world than lawlessness, for in a state of Matsyayaya, nobody, not even the evil doers are safe, because even the evil doers will sooner or later be swallowed up by other evil doers.

33. We have referred to this because behind the growing lawlessness in the country this Court can see the looming danger of matsyanyaya.

34. The appeals are dismissed, but it is made clear that the trial court will decide the criminal case against the appellants uninfluenced by any observations made in this judgment, or in the impugned judgment of the High Court.

.....J.

(Markandey Katju)

.....J.

(Gyan Sudha Misra) New Delhi;

13th May, 2011

11.4 Supreme Court judgment in People's Union for Civil Liberties Vs State of Maharashtra, 23.9.2014

People's Union for Civil Liberties & Another Versus State of Maharashtra & Others

Citation: CDJ 2014 SC 831

Court: Supreme Court of India

Case No: Criminal Appeal No. 1255 of 1999 With Criminal Appeal No. 1256 of 1999

Criminal Appeal No. 1367 of 1999 Writ Petition (C) No. 316 of 2008 Contempt Petition (C) No. 47 of 2011 In Writ Petition (C) No. 316 of 2008 Transferred Case (C) No. 27 of 2011

Judges: THE HONOURABLE CHIEF JUSTICE MR. R.M. LODHA & THE HONOURABLE MR. JUSTICE ROHINTON FALI NARIMAN

Appearing Advocates:

For the Appearing Parties: Manjit Singh, AAG, Suryanarayana Singh, AAG, Shekhar Naphade, Sr. Advocate, B.H. Marlapalle, Sr. Advocate, Gopal Sankaranarayanan, Amicus Curiae [Vikramaditya, Rohit K. Singh, Somnadri Goud, Sanjana Ramachandran (For M/s. Parekh & Co.), P. N. Puri, Vishwajit Singh, Triloki Nath Razdan, Usha Kejriwal, Aniruddha P. Mayee, Salvin Raja, Charudatta Mahindrakar, Ajit Wagh, Jatinder Kumar Bhatia, Mukesh Verma, Nupur Choudhary, Vivekta Singh (for Kamal Mohan Gupta), K. Enatoli Sema, Amit Kumar Singh, Balaji Srinivasan, Hemantika Wahi, Puja Singh, V.G. Pragasam, S. Aristotle, Prabu Ramasubramanian, Sapam Biswajit Meitei, Khwairakpam Nobin Singh, Pragati Neekhra, K.V. Jagdishvaran, G. Indira, Amit Anand Tiwari, Avinash Tripathi, Subramaniam Prasad, Varun Shankar, Anip Sachthey, Anil Katiyar, G. Prakash, Gopal Singh, Kamini Jaiswal, Sanjay Parikh, Tara Chandra Shrama, M/s. Arupatham Aruna & Co., Shreekant N. Terdal, D.S. Mahra, Irshad Ahmad, Ranjan Mukherjee, D. Bharathi Reddy, Krishnanand Pandeya, Anil Shrivastava, Sanjay R. Hegde, D. Mahesh Babu, M/s. Corporate Law Group, Anitha Shenoy, C.D. Singh, P.V. Yogeswaran, Kuldeep Singh, S. Thananjayan, Balaji Srinivasan, Gunnam Venkateswara Rao, Liz Mathew, Sunil Fernandes, Ashok Panigrahi, Dr. Nafis A. Siddiqui, Yash Pal Dhingra, B. Balaji, Samir Ali Khan, Ashok Kumar Singh, B. Krishna Prasad, Kamendra Mishra, Dr. Kailash Chand, Amit Anand Tiwari, Sudarshan Rajan, Praveen Agrawal, M/s. Karanjawala

& Co., M/s. COAC, Abhishth Kumar, Rajiv Nanda, Anil K. Chopra, Shibashish Misra, Shobha, Dr. Surat Singh, Advocates.

Date of Judgment:

23-09-2014

Head Note:

Constitution of India – Articles 32 & 21- Public Interest Litigation – The procedure to be followed in investigating police encounters – Directions issued - Whenever the police is 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. See for more directions.

Cases**Referred:**

D.K. Basu (D.K. Basu v. State of West Bengal; [(1997) 1 SCC 416]), Om Prakash and Ors. v. State of Jharkhand through the Secretary, Department of Home, Ranchi-1 and Anr.; [(2012) 12 SCC 72]) Chaitanya Kalbagh (Chaitanya Kalbagh and Ors. v. State of U.P. and Ors.; [(1989) 2 SCC 314]), R.S. Sodhi, Advocate v. State of U.P. and Ors.; [1994 Supp (1) SCC 143] Satyavir Singh Rathi, Assistant Commissioner of Police and Ors. v. State through Central Bureau of Investigation; [(2011) 6 SCC 1]) Prakash Kadam (Prakash Kadam and Ors. v. Ramprasad Vishwanath Gupta and Anr.; [(2011) 6 SCC 189]) B.G. Verghese (B.G. Verghese v. Union of India and Ors.; [(2013) 11 SCC 525] Rohtash Kumar (Rohtash Kumar v. State of Haryana through the Home Secretary, Government of Haryana, Civil Secretariat, Chandigarh and Ors.; [(2013) 14 SCC 290])

Comparative Citations:

2014 AIR(SCW) 5940, 2014 (4) KLT 103 (SN) (C.No.130), 2014 (10) SCC 635,

Judgment:

R.M. Lodha, CJI.

1. On 03.09.2014, the arguments were heard on the question of the procedure to be followed in investigating police encounters. The present order is confined to the above question.
2. In the three writ petitions, which were filed by People's Union for Civil Liberties (for short, "PUCL") before the Bombay High Court, the issue of genuineness or otherwise of nearly 99 encounters between the Mumbai police and the alleged criminals resulting in death of about 135 persons between 1995 and 1997 was raised. Inter alia, the following prayers were made:
 - i) directing the Respondent Nos. 1 to 3 to furnish the particulars regarding the number of persons killed in last one year in police encounters, their names, addresses, the circumstances in which they were killed, the inquiries, if any, conducted with respect to the said killings and any other relevant information and the action taken, if any, by them;
 - ii) directing the respondent No. 1 i.e. State of Maharashtra to register offence under Section 302 of Indian Penal Code and other enactments against the police officers found prima facie responsible for the violations of fundamental rights and other provisions of the Indian Penal Code and other relevant enactments;
 - iii) directing the 4th respondent viz., the Coroner of Mumbai to submit a detailed report and the details of action taken by him under the provisions of the Coroners Act 1871;
 - iv) directing an appropriate authority to enquire into and report to this Court in all the police encounters that have taken place not only in the city of Mumbai but also in the entire State of Maharashtra in which persons have been killed or injured in police encounters;
 - v) directing the State of Maharashtra to constitute the Maharashtra State Human Rights Commission as provided under Section 21 and other provisions contained in the Human Rights Act 1993,
 - vi) directing the State Government to frame appropriate guidelines governing planning and carrying out encounters for the purpose of protection of life and liberty guaranteed under Article 21 read with Article 14 of the Constitution of India.

3. It is not necessary to notice the facts of the three writ petitions in detail. Suffice it to say that while considering the above prayers, the High Court directed the following guidelines to be followed necessarily and mandatorily by the police in the State:
 1. Whenever the respondents-police are on the receipt of intelligence or a tip off about the criminal movements and activities pertaining to the commission of grave crimes, it shall be entered into a case diary. If the receiving authority is the police officer of a particular police station, the relevant entry has to be made in the General diary and if the receiving authority is the higher police officer, the relevant entry to the said effect has to be made by a separate diary kept and provided therefore and then pursue further in accordance with the procedural law.
 2. Regarding any encounter operation is over and persons are killed or injured and the same is reported to either orally or writing to the police in furtherance of Section 154 of the Criminal Procedure Code, it shall be registered in Crime Register of that particular police station and that further the said First Information Report along with copies to the higher officials and the Court in original shall be sent with immediately without any delay whatsoever through proper channel so as to reach to the Court without any delay at all. A report, as enjoined under Section 157(1) of the Criminal Procedure Code, shall also be followed necessarily by the concerned police station.
 3. After setting the law in motion by registering the First Information Report in the Crime Register by the concerned police officer of the particular police station, the investigating staff of the police shall take such steps by deputing the man or men to get the scene of crime guarded so as to avoid or obliterate or disfigure the existing physical features of the scene of occurrence or the operation encounter. This guarding of the scene of occurrence shall continue till the inspection of occurrence takes place by the investigating staff of the police and preparation of spot panchnama and the recovery panchnama.
 4. The police officer who takes part in the operation encounter or the investigating officer of the concerned police station, shall take all necessary efforts and arrangements to preserve finger prints of the criminals or the dreaded gangster of the weapons

who handled immediately after the said criminal was brought down to the ground and incapacitated and that the said fingerprints, if properly taken and preserved, must be sent to the Chemical Analyzer for comparison of the fingerprints of the dead body to be taken.

5. The materials which are found on the scene of occurrence or the operation encounter and such of the materials including the blood stained earth and blood stained materials and the sample earth and other moveable physical features, shall also be recovered by the investigating staff under the cover of recovery panchnama attested by the independent witnesses.
6. To fix the exact date and actual place of occurrence in which operation encounter has taken place, a rough sketch regarding the topography of the existing physical features of the said place shall be drawn by the police or the investigating staff of the police either by themselves or by the help of the staff of the Survey Department even during the spot panchnama is prepared.
7. The inquest examination shall be conducted by the investigating staff of the police on the spot itself without any delay and statements of the inquest witnesses are to be recorded under Section 161 of the Code of Criminal Procedure and the inquest panchnama shall be sent along with the above case record prepared along with the First Information Report without any delay whatsoever to the Court.
8. If the injured criminals during the operation encounter are found alive, not only that they should be provided medical aid immediately but also arrangements and attempts shall be taken by the police to record their statements under Section 164 of the Criminal Procedure Code either by a Magistrate, if possible and if not, by the Medical Officer concerned duly attested by the hospital staff mentioning the time and factum that while recording such statements the injured were in a state of position that they will be able to give statements and the connected certificates by the doctors appended thereto.
9. After the examination of further witnesses and completing the investigation inclusive of securing the accused or accused persons, the concerned police is directed to send final report to the Court of competent jurisdiction as required under

Section 173 of the Criminal Procedure Code for further proceeding.

10. Either in sending the First Information Report or sending with the general diary entry referred in the guideline nos. 1 and 2, the concerned police shall avoid any iota of delay under any circumstances whatsoever so also rough sketch showing the topography of the scene and the recovery of the materials and the blood stained materials with the sample earth and the blood stained earth with the other documents viz, the spot panchnama, recovery panchnama - all seems very vital documents – the respondents-police are also directed to send them to the Court of concerned jurisdiction without any delay.
4. PUCL was not satisfied with the adequacy of the reliefs granted by the High Court and, consequently, it filed three SLPs against the judgment and order dated 22-25.02.1999. Few other matters have been connected with these three petitions.
5. After initial grant of leave, the matters came up for consideration before the two-Judge Bench on 05.11.2008. On that day, Mr. Prashant Bhushan, learned counsel appearing for the appellants placed before the Court the guidelines issued by the National Human Rights Commission (for short, “NHRC”) and also his own suggestions. Looking at the gravity of the matter, the Court on that day directed issuance of notice to the Union of India, States and Union Territories for consideration of issuance of final directions / guidelines in the matter by this Court. After the notice was issued, the Union of India, States and Union Territories, have filed their affidavits.
6. On 28.08.2014, having regard to the importance of the matter, we appointed Mr. Gopal Sankaranarayanan as amicus curiae to assist the Court in the matter. Mr. Sankaranarayanan, learned counsel, after thorough research and study, placed before us his written submissions including the suggestions / guidelines
7. Article 21 of the Constitution of India guarantees “right to live with human dignity”. Any violation of human rights is viewed seriously by this Court as right to life is the most precious right guaranteed by Article 21 of the Constitution. The guarantee by Article 21 is available to every person and even the State has no authority to violate that right.

8. In *D.K. Basu (D.K. Basu v. State of West Bengal; [(1997) 1 SCC 416])*, this Court was concerned with custodial violence and deaths in police lockups. While framing the requirements to be followed in all cases of arrest or detention till legal provisions are made in that behalf, this Court issued certain directives as preventive measures.

While doing so, the Court in para 29 (page 433 of the Report) made the following weighty observations :

29. How do we check the abuse of police power?

Transparency of action and accountability perhaps are two possible safeguards which this Court must insist upon. Attention is also required to be paid to properly develop work culture, training and orientation of the police force consistent with basic human values. Training methodology of the police needs restructuring. The force needs to be infused with basic human values and made sensitive to the constitutional ethos. Efforts must be made to change the attitude and approach of the police personnel handling investigations so that they do not sacrifice basic human values during interrogation and do not resort to questionable forms of interrogation. With a view to bring in transparency, the presence of the counsel of the arrestee at some point of time during the interrogation may deter the police from using third-degree methods during interrogation.

9. The observations made by this Court in *Om Prakash (Om Prakash and Ors. v. State of Jharkhand through the Secretary, Department of Home, Ranchi-1 and Anr.; [(2012) 12 SCC 72])*(para 42, page 95 of the Report) are worth noticing:

42. It is not the duty of the police officers to kill the accused merely because he is a dreaded criminal. Undoubtedly, the police have to arrest the accused and put them up for trial. This Court has repeatedly admonished trigger-happy police personnel, who liquidate criminals and project the incident as an encounter. Such killings must be deprecated. They are not recognised as legal by our criminal justice administration system. They amount to State-sponsored terrorism. But, one cannot be oblivious of the fact that there are cases where the police, who are performing their duty, are attacked and killed. There is a rise in such incidents and judicial notice must be taken of this fact. In such circumstances, while the police have to do their legal duty of arresting the criminals, they have also to protect themselves. The requirement of sanction to prosecute affords protection to the policemen, who are sometimes required to take

drastic action against criminals to protect life and property of the people and to protect themselves against attack. Unless unimpeachable evidence is on record to establish that their action is indefensible, mala fide and vindictive, they cannot be subjected to prosecution. Sanction must be a precondition to their prosecution. It affords necessary protection to such police personnel. The plea regarding sanction can be raised at the inception.

10. The statistics of the National Crime Records Bureau, 2013 are worth noticing. Table 14.2 under the title “Persons Killed Or Injured in Police Firing During 2013 (Event-Wise)” shows that there were 684 occasions of police firing classified as “Riot Control”, “Anti-Dacoity Operations”, “Against Extremists and Terrorists” and “Against Others” in 2013 and, in these police firings, 103 civilians were killed and 213 were injured and, as regards policemen, 47 were killed and 1158 were injured.

10.1 Table 15.1 gives details of police personnel killed across the country in 2013 in terrorist/extremists operations, dacoity operations or other raids by riotous mobs and by other criminals.

10.2 Table 16.1 catalogues the complaints/cases registered against police personnel during 2013. During the year 2013, 51120 complaints were received, of which 26640 were declared false or unsubstantiated. Of the rest, 14928 were dealt departmentally. Of this, 3896 were reported for regular departmental action while 799 were sent up for trials/chargesheeted. In the completed trials, 53 were convicted. In departmental proceedings, 544 were dismissed from service and 3980 had been awarded major punishment.

10.3 Incidence of human rights violations by police during 2013 is indicated in Table 16.2. This Table lists only two fake encounters (both from Assam). The figure raises doubts about its correctness.

11. In some of the countries when a police firearms officer is involved in a shooting, there are strict guidelines and procedures in place to ensure that what has happened is thoroughly investigated. In India, unfortunately, such structured guidelines and procedures are not in place where police is involved in shooting and death of the subject occurs in such shooting. We are of the opinion that it is the constitutional duty of this Court to put in place certain guidelines adherence to which would help in bringing to justice the perpetrators of the crime who take law in their own hands.

12. Prashant Bhushan, learned counsel for PUCL has suggested the following guidelines :

Whenever the police are in receipt of any intelligence or tip off regarding criminal movements or activities pertaining to the commission of grave criminal offences, it shall be entered into a case diary. If the receiving authority is the police officer of a particular police station, the relevant entry must be made in the general diary and if the receiving authority is a police officer of higher rank, the relevant entry must be made in a separate diary kept and provided therefore and then be pursued further in accordance with the procedural law.

A dedicated investigative team / separate cadre of police be formed/ established which shall be attached to the NHRC/SHRC to investigate encounters and other matters of which NHRC/SHRC is seized. Till the time such dedicated team/police cadre is established, it is mandatory that the matters relating to encounter deaths/injuries are handed over for investigation to an independent investigating agency such as CBI/SHRC. NHRC/SHRC shall direct as to who will conduct the investigation.

Whenever a police party is involved in an encounter it shall immediately inform the NHRC/SHRC and the local police station of the encounter and shall seal off the premises to avoid any contamination till such investigative team of the NHRC/SHRC arrives subject to compliance with the other guidelines regarding the preservation of fingerprints etc.

When a Police Officer receives any information, either orally or in writing, in furtherance of section 154 of the Cr.P.C. regarding death or injuries caused in the course of an encounter operation between the Police party and others, he shall enter the information in the Crime Register or any other appropriate register of that particular police station and shall immediately send the Report (First Information Report) to the court without any further delay through a proper channel.

The copies of the said report shall also be sent to the higher officials including the DGP of the concerned State and NHRC/SHRC. The DGP must also send his report with regard to such encounter death to NHRC. The DGP shall take disciplinary action against the officer-in-charge of the police station if he/she fails to send the report regarding the encounter death to NHRC and DGP. A report, as

enjoined under section 157(1) of the Criminal Procedure Code, shall also be followed necessarily by the concerned police station.

The independent investigating team shall take such steps by deputing the man or men to get the scene of crime guarded so as to avoid or obliterate or disfigure the existing physical features of the scene of occurrence or the operation encounter. This guarding of the scene of occurrence shall continue till the inspection of occurrence takes place by the aforesaid independent investigating team and preparation of spot panchnama and the recovery panchnama.

The police officer involved in the encounter operation and the independent investigating team, shall make all necessary efforts and arrangements immediately after the said criminal was brought down to the ground and incapacitated to preserve finger prints of the criminals or the dreaded gangster, and those on the weapons handled during the course of the encounter. The said fingerprints, properly taken and preserved, must be sent to the Chemical Analyzer for comparison of the fingerprints of the dead body to be taken.

The materials which are found on the scene of occurrence or the operation encounter and such of the materials including the blood stained earth and blood stained materials and the sample earth and other moveable physical features, shall also be recovered by the independent investigating team under the cover of recovery panchnama attested by independent witnesses.

To fix the exact date and actual place of occurrence in which operation encounter has taken place, a rough sketch regarding the topography of the existing physical features of the said place shall be drawn by the aforesaid independent investigating team either by themselves or by the help of the staff of the Survey Department when the spot panchnama is prepared.

The inquest examination shall be conducted by aforesaid independent investigating team on the spot itself without any delay and statements of the inquest witnesses are to be recorded under section 161 of the Code of Criminal Procedure and the inquest Panchnama shall be sent along with the above case record prepared along with the First Information Report without any delay whatsoever to the Court.

A Magisterial Inquiry must invariably be held in all cases of death which occur in the course of police action. The next of kin of the deceased must invariably be associated in such inquiry.

In every case when a complaint is made against the police alleging commission of a criminal act on their part, which makes out a cognizable case of culpable homicide, an FIR to this effect must be registered under appropriate sections of the I.P.C. Such case shall also be investigated by the aforesaid investigating team.

Prompt prosecution and disciplinary action must be initiated against all delinquent officers found guilty in the magisterial enquiry/the said investigation. Prosecution of such delinquent officers shall be conducted by the investigating agency. Such delinquent officers must be placed under suspension.

Question of granting of compensation to the dependents of the deceased would depend upon the facts and circumstances of each case and it shall be determined by NHRC. However, in every case of a person being killed by the police party in the course of an encounter, the compensation granted must necessarily be at least the same as that granted to the dependants of a police officer killed by terrorists in the course of duty by the Government. No out-of-turn promotion, cash award or gallantry reward shall be bestowed on the concerned officers pursuant to their role in an encounter as this may be an incentive for officers to conduct encounters.

A six monthly statement of all cases of deaths in police action in the State shall be sent by the Director General of Police to the Commission, so as to reach its office by the 15th day of January and July respectively. The statement may be sent in the following format along with post-mortem reports and inquest reports, wherever available and also the inquiry reports :-

1. Date and place of occurrence.
2. Police Station, District.
3. Circumstances leading to deaths:
 - i. Self defence in encounter
 - ii. In the course of dispersal of unlawful assembly
 - iii. In the course of affecting arrest.
4. Brief facts of the incident
5. Criminal Case No.
6. Investigating Agency
7. Findings of the magisterial Inquiry/enquiry by Senior Officers:

- a. disclosing in particular names and designation of police officials, if found responsible for the death; and
- b. whether use of force was justified and action taken was lawful.

In order to ascertain the identity of persons killed in Police encounter, their photographs and other details should be advertised on T.V., newspapers etc.

With respect to the post mortem conducted after an encounter it is imperative that such a post mortem is, at the least, conducted in the District Level Government Hospital in the presence of at least three qualified doctors of which one must be a senior doctor. All such post-mortems must also necessarily be videotaped and copies of such videotapes preserved.

If the injured criminals during the operation encounter are found alive, not only that they should be provided medical aid immediately but also arrangements and attempts shall be taken by the independent investigative team to record their statements under Section 164 of the Criminal Procedure Code, either by a Magistrate, if possible and if not, by the Medical Officer concerned, duly attested by the hospital staff mentioning the time and factum that while recording such statements the injured were in a state of position that they will be able to give statements and the connected certificates by the doctors appended thereto.

After the examination of further witnesses and completing the investigation inclusive of securing the accused or accused persons, the independent investigative team is directed to send final report to the Court of Competent jurisdiction as required under Section 173 of the Criminal Procedure Code for further proceeding.

Either in sending the First Information Report or sending with the general diary entry referred in the guideline nos. 1 and 2, the concerned police / independent investigative team, shall avoid any iota of delay under any circumstances whatsoever so also rough sketch showing the topography of the scene and the recovery of materials and the blood stained materials with the sample earth and the blood stained earth with the other documents viz, the spot panchnama, recovery panchnama - all seems very vital documents – the respondents police are also directed to send them to the Court of concerned jurisdiction without any delay.

13. The revised guidelines/procedures to be followed in cases of deaths caused in police action framed by NHRC read as under:

- A. When the police officer in charge of a police station receives information about death in an encounter with the police, he shall enter that information in the appropriate/ register.
- B. 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 investigation agency, such as State CBCID.
- C. Whenever a specific complaint is made against the police alleging commission of a criminal act on their part, which makes out a cognizable case of culpable homicide, an FIR to this effect must be registered under appropriate sections of the I.P.C. Such case shall be investigated by State CBCID or any other specialized investigation agency.
- D. 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 witnesses having information of the circumstances leading to encounter, police station records etc. must be examined while conducting such enquiry.
- E. Prompt prosecution and disciplinary action must be initiated against all delinquent officers found guilty in the magisterial enquiry/police investigation.
- E. 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.
- G. (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:
 1. Date and place of occurrence
 2. Police station, district
 3. Circumstances leading to death:

- (i) Self-defence in encounter
 - (ii) In course of dispersal of unlawful assembly
 - (iii) In the course of effecting arrest
 - (iv) Any other circumstances
4. Brief facts of the incident
5. Criminal case No.
6. 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 following information:
 1. Post mortem report
 2. Inquest report
 3. Findings of the magisterial enquiry/enquiry by senior officers disclosing:
 - (i) Names and designation of police official, if found responsible for the death:
 - (ii) Whether use of force was justified and action taken was lawful:
 - (iii) 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
 - (iv) Report of the Ballistic Expert on examination of the weapons alleged to have been used by the deceased and his companions.
14. Union of India in its counter affidavit has given its comments to the guidelines framed by the High Court and so also to the guidelines suggested by learned counsel for PUCL. Union of India has expressed its reservation on certain guidelines on diverse counts including the practical difficulties in their implementation. As regards States and Union Territories, their views are not uniform on the guidelines framed by the High Court and also the guidelines suggested by PUCL. In respect of some of the guidelines, some States and Union Territories have toed the line of Union of India in not accepting the same on the ground of practical difficulties in their implementation. Few States have highlighted the procedure that is being followed by them when any death or encounter takes place.

As regards investigation in such cases, some of the States have highlighted that the investigation of such cases cannot be done by officers /employees of the same police station and it is ensured that investigation of such cases is done by some higher officer. On the other hand, few States /Union Territories have stated that initial investigation may be conducted by the local police because local police is acquainted with the modus operandi of local criminals and crime.

15. Before we proceed further, we put on record our appreciation for the efforts of learned amicus curiae in collating the guidelines framed by the High Court, guidelines suggested by PUCL and guidelines issued by NHRC and their acceptability or otherwise by the Union / States /Union Territories and his own comments.
16. Article 21 of the Constitution provides “no person shall be deprived of his life or personal liberty except according to procedure established by law”. This Court has stated time and again that Article 21 confers sacred and cherished right under the Constitution which cannot be violated, except according to procedure established by law. Article 21 guarantees personal liberty to every single person in the country which includes the right to live with human dignity.
17. In line with the guarantee provided by Article 21 and other provisions in the Constitution of India, a number of statutory provisions also seek to protect personal liberty, dignity and basic human rights. In spite of Constitutional and statutory provisions aimed at safeguarding the personal liberty and life of a citizen, the cases of death in police encounters continue to occur. This Court has been confronted with encounter cases from time to time. In *Chaitanya Kalbagh* (*Chaitanya Kalbagh and Ors. v. State of U.P. and Ors.*; [(1989) 2 SCC 314]), this Court was concerned with a writ petition filed under Article 32 of the Constitution wherein the impartial investigation was sought for the alleged killing of 299 persons in the police encounters. The Court observed that in the facts and circumstances presented before it, there was an imperative need of ensuring that the guardians of law and order do in fact observe the code of discipline expected of them and that they function strictly as the protectors of innocent citizens.
18. In *R.S. Sodhi* (*R.S. Sodhi, Advocate v. State of U.P. and Ors.*; [1994 Supp (1) SCC 143]), a writ petition was brought to this Court under Article 32 of the Constitution relating to an incident in which 10 persons were reported to have been killed in what were

described as “encounters” between the Punjab militants and the local police. The Court observed, “Whether the loss of lives was on account of a genuine or a fake encounter is a matter which has to be inquired into and investigated closely”. The Court entrusted the investigation to the Central Bureau of Investigation (for short, “the CBI”) to ensure that the investigation did not lack credibility.

19. In *Satyavir Singh Rathie (Satyavir Singh Rathie, Assistant Commissioner of Police and Ors. v. State through Central Bureau of Investigation; [(2011) 6 SCC 1]*), the matter before this Court arose from the First Information Report (for short, “FIR”) registered against police personnel involved in a shoot-out for an offence punishable under Sections 302/34 of the Indian Penal Code (for short, “IPC”). In the complaint, it was alleged that the police officials had surrounded the car and had fired indiscriminately and without cause at the occupants, killing the two and causing grievous injuries to the third. This Court concurred with the High Court and the trial Court on the conviction under Section 302 IPC and rejected the defence set up by the accused persons relying on Exception 3 in Section 300 IPC as it was found to be not in good faith or due discharge of their duty.
20. In *Prakash Kadam (Prakash Kadam and Ors. v. Ramprasad Vishwanath Gupta and Anr.; [(2011) 6 SCC 189]*), the allegation was that the accused persons decided to eliminate the deceased in a false police encounter. The Court noted that this was a very serious case wherein prima facie some police officers and staff were engaged by some private persons to kill their opponent and the police officers and the staff acted as contract killers for them. The Court warned policemen that they would not be excused for committing murder in the name of “encounter” on the pretext that they were carrying out the orders of their superior officers or politicians. The Court said that the “encounter” philosophy is a criminal philosophy.
21. In *Om Prakash*², the allegation against the accused persons was that the complainant’s son was killed by them in a fake police encounter. The Court, however, held that the encounter was a genuine one though NHRC guideline for photography of the autopsy was not complied with.
22. A two-Judge Bench of this Court in *B.G. Verghese (B.G. Verghese v. Union of India and Ors.; [(2013) 11 SCC 525]*) dealt with two writ petitions. In Writ Petition (Criminal) No.31/2007, it was stated that during the years 2003-2006, 21 police encounter killings took

place in the State of Gujarat. It was alleged that the so-called police encounters were fake and the persons were killed by the police officials in cold blood. In the writ petition a prayer was made for ordering an inquiry into all the cases of police encounters, which, according to the petitioner, were fake in order to establish the rule of law and to bring out the truth in each case. In the other Writ Petition (Criminal) No. 83/2007, the allegation related to the killing of one person in a police encounter. It was alleged that this too was an instance of fake encounter in which the victim was killed by the officers of the crime branch of police in cold blood and in a premeditated manner. The prayer was made in the writ petition to order an independent investigation by a special investigation team into all the fake encounters. During the pendency of the matter before this Court, the State of Gujarat had constituted a Monitoring Authority and Special Task Force for investigation of police encounters. Since the former Judge of this Court was appointed as Chairman of the Monitoring Authority, the Court requested the Chairman of the Monitoring Authority to look into all the cases of alleged fake encounters as enumerated in the two writ petitions and to have them thoroughly investigated so that full and complete truth comes to light in each case.

23. In *Rohtash Kumar (Rohtash Kumar v. State of Haryana through the Home Secretary, Government of Haryana, Civil Secretariat, Chandigarh and Ors.; [(2013) 14 SCC 290])*, again a two-Judge Bench of this Court was confronted with killing of a person in an encounter by the police officials. Having found that the death took place in the fake police encounter, the Court directed an independent investigating agency to conduct the investigation so that guilty could be brought to justice.
24. The above cases have been referred only by way of illustration to show that killings in police encounters require independent investigation. The killings in police encounters affect the credibility of the rule of law and the administration of the criminal justice system.
25. We are not oblivious of the fact that police in India has to perform a difficult and delicate task, particularly, when many hardcore criminals, like, extremists, terrorists, drug peddlers, smugglers who have organized gangs, have taken strong roots in the society but then such criminals must be dealt with by the police in an efficient and effective manner so as to bring them to justice by following

rule of law. We are of the view that it would be useful and effective to structure appropriate guidelines to restore faith of the people in police force. In a society governed by rule of law, it is imperative that extra-judicial killings are properly and independently investigated so that justice may be done.

26. Learned amicus curiae submits that when a police encounter occurs, it is important that a complaint is registered; the evidence is preserved; independent and fair investigation takes place; victims are informed and inquest is conducted.

27. Sections 174 (Section 174. Police to inquire and report on suicide, etc.

(1) When the officer in charge of a police station or some other police officer specially empowered by the State Government in that behalf receives information that a person has committed suicide, or has been killed by another or by an animal or by machinery or by an accident, or has died under circumstances raising a reasonable suspicion that some other person has committed an offence, he shall immediately give intimation thereof to the nearest Executive Magistrate empowered to hold inquests, and, unless otherwise directed by any rule prescribed by the State Government, or by any general or special order of the District or Sub-divisional Magistrate, shall proceed to the place where the body of such deceased person is, and there, in the presence of two or more respectable inhabitants of the neighbourhood shall make an investigation, and draw up a report of the apparent cause of death, describing such wounds, fractures, bruises, and other marks of injury as may be found on the body, and stating in what manner, or by what weapon or instrument (if any), such marks appear to have been inflicted.

(2) The report shall be signed by such police officer and other persons, or by so many of them as concur therein, and shall be forthwith forwarded to the District Magistrate or the Subdivisional Magistrate.

(3) When-

- (i) the case involves suicide by a woman within seven years of her marriage; or
- (ii) the case relates to the death of a woman within seven years of her marriage in any circumstances raising a reasonable suspicion that some other person committed an offence in relation to such woman; or

- (v) the case relates to the death of a woman within seven years of her marriage and any relative of the woman has made a request in this behalf; or
- (vi) there is any doubt regarding the cause of death; or
- (vii) the police officer for any other reason considers it expedient so to do, he shall, subject to such rules as the State Government may prescribe in this behalf, forward the body, with a view to its being examined, to the nearest Civil Surgeon, or other qualified medical man appointed in this behalf by the State Government, if the state of the weather and the distance admit of its being so forwarded without risk of such putrefaction on the road as would render such examination useless.

(4) The following Magistrates are empowered to hold inquests, namely, any District Magistrate or Sub-divisional Magistrate and any other Executive Magistrate specially empowered in this behalf by the State Government or the District Magistrate.), 175 (Section 175. Power to summon persons. - (1) A police officer proceeding under section 174, may, by order in writing, summon two or more persons as aforesaid for the purpose of the said investigation, and any other person who appears to be acquainted with the facts of the case and every person so summoned shall be bound to attend and to answer truly all questions other than questions the answers to which have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

(2) If the facts do not disclose a cognizable offence to which section 170 applies, such persons shall not be required by the police officer to attend a Magistrate's Court.) and 176 (Section 176. Inquiry by Magistrate into cause of death. - (1) when the case is of the nature referred to in clause (i) or clause (ii) of sub-section (3) of section 174, the nearest Magistrate empowered to hold inquests shall, and in any other case mentioned in sub- section (1) of section 174, any Magistrate so empowered may hold an inquiry into the cause of death either instead of, or in addition to, the investigation held by the police officer; and if he does so, he shall have all the powers in conducting it which he would have in holding an inquiry into an offence.

(1A) Where,-

- (a) any person dies or disappears, or

(b) rape is alleged to have been committed on any woman, while such person or woman is in the custody of the police or in any other custody authorized by the Magistrate or the Court, under this Code in addition to the inquiry or investigation held by the police, an inquiry shall be held by the Judicial Magistrate or the Metropolitan Magistrate, as the case may be, within whose local jurisdiction the offence has been committed.

(2) The Magistrate holding such an inquiry shall record the evidence taken by him in connection therewith in any manner hereinafter prescribed according to the circumstances of the case.

(3) Whenever such Magistrate considers it expedient to make an examination of the dead body of any person who has been already interred, in order to discover the cause of his death, the Magistrate may cause the body to be disinterred and examined.

(4) Where an inquiry is to be held under this section, the Magistrate shall, wherever practicable, inform the relatives of the deceased whose names and addresses are known, and shall allow them to remain present at the inquiry.

(5) The Judicial Magistrate or the Metropolitan Magistrate or Executive Magistrate or police officer holding an inquiry or investigation, as the case may be, under sub-section (1A) shall, within twenty four hours of the death of a person, forward the body with a view to its being examined to the nearest Civil Surgeon or other qualified medical man appointed in this behalf by the State Government, unless it is not possible to do so for reasons to be recorded in writing.

Explanation.- In this section, the expression “relative” means parents, children, brothers, sisters and spouse.) of the Code of Criminal Procedure, 1973 (for short “Code”) provide for Magisterial inquiries into cases of unnatural death. It is apposite to mention that a system for investigating the cause of death in cases of unusual or suspicious circumstances is in place in most countries. The system centers around the policy to have reassurance that unexplained deaths do not remain unexplained and that the perpetrator is tried by a competent court established by law.

28. Universal Declaration of Human Rights (UDHR) has framed certain general principles on the effective prevention and investigation of extra-legal, arbitrary and summary executions.

1. Requiring states to provide the investigative authority with sufficient power to compel any relevant parties including the official implicated to testify (Provision 10).
 2. Obligating states to provide for an independent inquiry into alleged police misconduct through an appointed commission when existing procedures are inadequate or when there are allegations of such inadequacies. The commission members must be independent of individuals implicated in the incident (Provision 11).
 3. Requiring that those conducting autopsies must be able to function independently and impartially (Provision 14).
 4. Requiring states to protect those who witness or allege police misconduct and obligating states to remove the implicated officers from any involvement in the investigation (Provision 15).
 5. Affording the victim's family and legal representative the right to request that an independent qualified representative be present during the autopsy of the victim's body (Provision 16).
 6. Calling for the prompt submission of a written report on the investigation specifically detailing the methods utilized as well as the findings of fact and law resulting from the inquiry. It further requires that such reports be released to the public (Provision 17).
 7. Recognizing that those undertaking these investigations must "have at their disposal all the necessary budgetary and technical resources for effective investigation" into police killings.). The principles so framed by the UDHR are intended to guarantee independence while investigating police killings and help in preventing potential for abuse, corruption, ineffectiveness and neglect in investigation.
29. The United Nations Code of Conduct for Law Enforcement Officers (which includes all officers of the law, who exercise police powers) lays down that in the performance of duties, Law Enforcement Officers shall respect and protect human dignity and maintain and uphold human rights of all persons. Basic human rights standards for good conduct by Law Enforcement Officers by Amnesty International, inter alia, suggest, (1) Do not use force except when strictly necessary and to the minimum extent required under the

circumstances and (2) Do not carry out, order or cover up extra-judicial executions or “disappearances” and refuse to obey any order to do so.

30. Minnesota Protocol (Model protocol for a legal investigation of extra-legal, arbitrary and summary executions) establishes a long line of requisite steps. The Protocol sets the principles and medico legal standards for the investigation and prevention of extra legal, arbitrary and summary executions. The Protocol provides for in-depth guidance in a general way on the subjects (1) purpose of an inquiry (2) procedure for an inquiry (3) processing of the crime scene (4) processing of the evidence (5) avenues to investigation (6) personal testimony etc. In Section C of the Minnesota Protocol, a long list of requisite steps is suggested, some of which being:
 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. investigators should promptly record the condition of the body;
 4. weapons such as guns, projectiles, bullets and cartridge cases should be taken and preserved;
 5. tests for gunshot residue and trace metal detection should be performed on the victims’ bodies and the police officers involved;
 6. fingerprints of relevant persons should be preserved;
 7. information should be obtained from witnesses;
 8. all persons at the scene should be identified;
 9. a report detailing the work of the investigators during their on-site visit should be kept and later disclosed;
 10. evidence should be properly collected, handled, packaged, labeled, and placed in safekeeping to prevent contamination and loss of evidence.
31. In light of the above discussion and having regard to the directions issued by the Bombay High Court, guidelines issued by NHRC, suggestions of the appellant – PUCL, amicus curiae and the affidavits

filed by the Union of India, State Governments and the Union Territories, we think it appropriate to issue the following requirements to be followed in the matters of investigating police encounters in the cases of death as the standard procedure for thorough, effective and independent investigation:

- (1) Whenever the police is 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 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:
 - (a) To identify the victim; colour photographs of the victim should be taken;
 - (b) To recover and preserve evidentiary material, including blood-stained earth, hair, fibers and threads, etc., related to the death;
 - (c) To identify 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 rough sketch of 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 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 videographed 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 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 concerned Court.
- (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 chargesheet 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 to NHRC by 15th 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.
 - (iv) Criminal Case No.
 - (v) Investigating Agency.
 - (vi) Findings of the Magisterial Inquiry/Inquiry by Senior Officers:
 - (a) disclosing, in particular, names and designation of 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 use of firearm amounting to offence under the 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 a 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 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 officers 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 incident. Upon such complaint being made, the concerned Sessions Judge shall look into the merits of the complaint and address the grievances raised therein.
32. The above guidelines will also be applicable to grievous injury cases in police encounter, as far as possible.
 33. Accordingly, we direct that the above 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.

11.5 Supreme Court Judgment in Extra Judicial Execution Victim Families Association versus Union of India 14.7.2017

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL ORIGINAL JURISDICTION
WRIT PETITION (CRL.) NO. 129 OF 2012

Extra Judl. Exec. Victim Families Assn. & Anr.	Petitioners
	versus	
Union of India & Ors.		...Respondents

**WITH
WRIT PETITION (C) NO. 445 OF 2012
J U D G M E N T**

Madan B. Lokur, J.

1. In the present petitions, the allegation was that 1528 persons had been killed in fake encounters by police personnel and personnel in uniform of the armed forces of the Union. By our judgment and order dated 8th July, 2016³²⁵ we respectfully followed the view laid down by a Constitution Bench of this Court in *Naga People's Movement of Human Rights v. Union of India*³²⁶ The Constitution Bench held that an allegation of use of excessive force or retaliatory force by uniformed personnel resulting in the death of any person necessitates a thorough enquiry into the incident. We were of opinion that even the 'Dos and Don'ts' and the 'Ten Commandments' of the Chief of Army Staff believe in this ethos and accept this principle. However, after considering the submissions at law, we found that the documentation was inadequate to immediately order any inquiry into the allegations made by the petitioners and therefore directed them to complete the documentation indicating whether the allegations were based on any judicial enquiry or an enquiry conducted by the National Human Rights Commission or an enquiry conducted under the Commissions of Inquiry Act, 1952.

2. A tabular statement has since been filed by learned counsel for the petitioners and this statement has been accepted by learned Amicus and no objection was raised by the Union of India or by the State of Manipur. We therefore proceed on the basis of the tabular statement before us.

³²⁵. (2016) 14 SCC 578 (2)

³²⁶. (1998) 2 SCC 109

3. The petitioners have been able to gather information with regard to 655 deaths out of 1528 alleged in the writ petitions. The break-up is as follows:

Sl. No.	PARTICULARS	No. of cases
1	Commission of Inquiry cases	35
2	Judicial Inquiry and High Court cases	37
3	NHRC cases	23
4	Cases with written complaint	170
5	Cases with oral complaint	78
6	Cases with eye witnesses	134
7	Family claimed cases	178

4. We have perused the tabular statement given with regard to cases with written complaints, oral complaints and eye-witness accounts as well as family claimed cases but find that apart from a simple allegation being made, no substantive steps appear to have been taken by either lodging a First Information Report (FIR) or by filing a writ petition in the concerned High Court or making a complaint to the National Human Rights Commission (NHRC). The allegations being very general in nature, we do not think it appropriate to pass any direction for the time being in regard to the cases concerning these written complaints, oral complaints, cases with eye-witness accounts and family claimed cases. It is not that every single allegation must necessarily be inquired into. It must be remembered that we are not dealing with individual cases but a systemic or institutional response relating to constitutional criminal law.

Deaths investigated by Commissions of Inquiry

5. With regard to 35 deaths dealt with in reports given by Commissions constituted under the Commissions of Inquiry Act, 1952 we find that two of the deaths: in respect of L.D. Rengtuiwan and N. Sanjita Devi were not mentioned in the writ petition. We pass no orders in respect of these two cases.

6. As far as the death of Thangjam Manorama is concerned, the issues are pending in this Court in Civil Appeal Nos. 65-69 of 2015 and therefore we make no comment in this regard.

7. As far as the remaining 32 deceased victims are concerned, we find that independent Commissions of Inquiry have made adverse comments against personnel of the Manipur Police and the Central Reserve Police force (as the case may be) for the use of excessive force or retaliatory force. In our opinion, more than a *prima facie* case is made out for lodging an FIR in the appropriate police station in respect of the death of these 32 persons. We direct the registration of FIRs in these cases. The details of 'Commissions of Inquiry Cases' are given below in Table-I.

COMMISSIONS OF INQUIRY CASES

TABLE-I

Sl.No.	NAME OF VICTIM (Total = 35)	NOTIFICATION Date	UNIT
1	L. D. Rengtuiwan	16.03.2005	Not in WP
2	Thangjam Manorama	?	Pending in SC
3	N. Sanjita Devi	06.12.2003	Not in WP
4 to 14.	Amom Rajan Meitei and 10 others	04.07.2001	CRPF
15 to 19.	Major Shimareingam Shaiza and 4 others	?	Manipur Police
20 to 21.	Thoudam Munindro Singh and another	27.12.1996	Manipur Police
22	Oinam Ongbi Amina Devi	06.04.1996	CRPF
23 to 35.	Angom Raghumani Singh and 12 others	15.06.1985	CRPF

Deaths considered by Judicial Inquiries and High Court

8. With regard to the 'Judicial Inquiry and High Court cases' the Gauhati High Court had entertained writ petitions into allegations of the death of as many as 37 persons in fake encounters through the use of excessive or retaliatory force and in some cases ordered a judicial enquiry.

9. Two writ petitions are still pending in the High Court and we request Hon'ble the Chief Justice of the concerned High Court (whether it is the Gauhati High Court or the Manipur High Court) to expeditiously dispose of the writ petitions if they have not already been disposed of.

10. One writ petition [W.P. (Criminal) No.103 of 2009] has been dismissed meaning thereby that the High Court found no substance in the allegations made and therefore this case may be treated as closed.

11. There is no specific information with regard to two other writ petitions and we leave it to the investigating team that we propose to appoint to ascertain the correct factual position.

12. With regard to the remaining writ petitions, the High Court has awarded compensation to the next of kin of the deceased meaning thereby that more than a *prima facie* case has been found of a fake encounter or the use of excessive or retaliatory force contrary to the decision of the Constitution Bench of this Court. We direct the registration of FIRs in these cases. The details of these writ petitions are given below in Table - II.

Judicial Inquiry & High Court Cases

TABLE- II

S. No.	Name of Victim (Total= 37)	Case No.	Result	Unit
1to 3.	Moirantem Ibungo + 2 others	W.P. (C) No. 92 of2013	Pending	Manipur Police, Assam Rifles
4	Athokpam Angousana Meitei	W.P. (Crl.) No. 108 of 2011	Compensation awarded	Manipur Police
5	Leishangthem Santosh	W.P. (Crl.) No. 40 of2009	Compensation awarded	Manipur Police
6	Sorensangbam Sanayaima	W.P. (Crl.) No. 103 of 2009	Dismissed	Manipur Police
7	Ningthoujam Thokchao Singh	W.P. (C) No. 75 of2008	Compensation awarded	BSF
8	Ningthoujam Binoy alias Khaiba Singh	W.P. (Crl.) No. 25 of2009	Compensation awarded	Manipur Police
9	Sagolsem Vikram Singh	W.P. (Crl.) No. 5 of2007	Compensation awarded	Assam Rifles
10	Pheiroijam Keshorjit	W.P. (Crl.) No. 2 of2006	Compensation awarded	Assam Rifles
11to 12.	Sanasam Ngongo + 1 other	W.P. (C) Nos. 1201 and 1205 of2005	Compensation awarded	21 PARA
13	Pharoijam Sanajit	W.P. (Crl.) No. 2 of 2005 and W.P. (Crl.) No. 16 of2012	Compensation awarded	Rajput Rifles
14 to 17.	Seikholun Baite + 3 others	W.P. (C) No. 752 of 2010 and W.P. (C) No. 663 of 2007	Compensation awarded	CRPF
18 to 27.	Kshetrimayum Inaocha + 9 others	W.P. (C) No. 1268 of 2002	Compensation awarded	Assam Rifles
28	R.K. Lakshana alias Beto	W.P. No. 10 of 2010 (Ref: W.P. (C) No. 1986 of 2001)	Compensation awarded (but not yet paid)	Manipur Police
29	Ramaso Shingnaisui	W.P. No. 591 of 1999	Compensation awarded	Assam Rifles
30	Md. Zakir	W.P. (C) No. 114 of 1999	Compensation awarded	CRPF
31 to 32.	Seram Priyokumar + 1 other	W.P. (C) No. 840 of 2014	Pending	Assam Rifles
33	Khudrakpam Tejkumar	W.P. (Crl.) No. 3 of2005	Compensation awarded	Assam Rifles
34	Asem Romajit	W.P. (C) No. 646 of 2007	?	CRPF
35	Yumnam Robita	W.P. (C.) No. 647 of 2007	?	CRPF
36	Kangujam Ojit	Reported as 1999 Cri. L. J. 3584	Compensation awarded	Indian Army
37	Naorem Krishnamohon Singh	First Revision Appeal No. 3 of 2009	Compensation awarded	Manipur Police

Deaths inquired into by the NHRC

13. As many as 20 deaths were reported to the NHRC as a result of fake encounters or the use of excessive or retaliatory force. Of them, 7 complaints are pending before the NHRC. We request the NHRC to take a decision on these complaints as soon as possible.

14. There is no specific information with regard to two complaints and we leave it to the investigating team to ascertain from the NHRC the result of these complaints.

15. In the remaining complaints, the NHRC has awarded compensation to the next of kin of the deceased meaning thereby that

there is more than a prima facie case of a fake encounter or the use of excessive or retaliatory force. We direct the registration of FIRs in respect of these complaints.

16. The details of the complaints in which a reference has been made to the NHRC are given below in Table-III.

NHRC Cases

TABLE- III

S. No.	Name of Victim (Total= 23)	Result	Unit
1	Md. Zamir Khan	Compensation awarded	Imphal West Police Commando
2 to 3.	Md. Ishaque Ali + 1 other	Compensation awarded	Imphal East and West Police Commando
4	Hawaibam Amujao	Pending	Assam Rifles
5 to 6.	Oinam Ananda alias Girani Meitei + 1 other	Pending	Assam Rifles
7	Longjam Dhamen	Pending	Imphal East and West Police Commando
8	Wahengbam Jayenta	Pending	Imphal West Police Commando
9	Sorem Ranjit Singh alias Rojit	Compensation awarded	Imphal East Police Commando
10	Wahengbam Manglemba Singh	Compensation awarded	BSF
11	Ningthoujam Premkumar	?	Manipur Police Commando
12	Thokchom Somorjit	Pending	Manipur Police Commando, Maratha Light Infantry
13 to 14.	Kshetrimayum Govind + 1 other	Pending	Imphal West Police Commando, Maratha Light Infantry
15	Thangjam Anil	Compensation recommended, but not yet received.	Imphal West and East Police Commando, Sikh Regiment
16	Irengbam Ratankumar	Compensation recommended, but not yet received.	Imphal West Police Commando
17	Laishram Ranbir alias Eshel	Compensation awarded	Imphal West Police Commando
18	Laishram Lincoln alias Nicolson	Pending	Imphal West Police Commando
19	Thokchom Ranjit	Compensation awarded	Imphal East Police Commando
20 to 23.	Khular Prakash Lamkang + 3 others	?	BSF

Inquiry by Justice Santosh Hegde Commission

17. It may be recalled that six cases were earlier considered by a Commission headed by Justice Santosh Hegde (a retired judge of this Court) and which finds mention in our earlier orders. There is no doubt that in these cases also an FIR must be lodged and after due investigations, further steps need to be taken in accordance with law. We direct the registration of FIRs in these cases also.

Submissions and consideration

18. It was submitted by the learned Attorney General that some of the incidents are of considerable vintage and at this point of time it may not be appropriate to re-open the issues for investigation. We are not in agreement with the learned Attorney General. If a crime has been committed, a crime which involves the death of a person who is possibly innocent, it cannot be over-looked only because of a lapse of time. What is also not acceptable is that the law having been laid down by the Constitution Bench, it was the obligation of the State to have suo motu conducted a thorough inquiry at the appropriate time and soon after each incident took place. Merely because the State has not taken any action and has allowed time to go by, it cannot take advantage of the delay to scuttle an inquiry.

19. It was also submitted by the learned Attorney General that there were local pressures and the ground level situation was such that it would not be surprising if the inquiries were biased in favour of the citizens and against the State. This is only a submission which is noted and rejected. If there had been a break-down of the rule of law in the State of Manipur, surely the Government of India was under an obligation to take appropriate steps. To suggest that all the inquiries were unfair and motivated is casting very serious aspersions on the independence of the authorities in Manipur at that point of time, which we do not think is at all warranted.

20. It was also submitted that in many instances the next of kin of the deceased had not approached this Court and there is no reason why we should entertain a petition filed by a third party. Since the next of the kin had themselves given a quietus to the incidents, there is really no occasion for this Court to take up the issue at the instance of a third party. We reject this submission as well.

21. Access to justice is certainly a human right and it has been given a special place in our constitutional scheme where free legal aid and advice

is provided to a large number of people in the country. The primary reason is that for many of the deprived sections of society, access to justice is only a dream. To provide access to justice to every citizen and to make it meaningful, this Court has evolved its public interest jurisprudence where even letter-petitions are entertained in appropriate cases. The history of public interest litigation over the years has settled that the deprived sections of society and the downtrodden such as bonded labourers, trafficked women, homeless persons, victims of natural disasters and others can knock on the doors of our constitutional courts and pray for justice. This is precisely what has happened in the present petitions where the next of kin could not access justice even in the local courts and the petitioners have taken up their cause in public interest. Our constitutional jurisprudence does not permit us to shut the door on such persons and our constitutional obligation requires us to give justice and succour to the next of kin of the deceased.

22. It was finally submitted by the learned Attorney General that compensation has been paid to the next of kin for the unfortunate deaths and therefore it may be not necessary to proceed further in the matter. We cannot agree. Compensation has been awarded to the next of kin for the agony they have suffered and to enable them to immediately tide over their loss and for their rehabilitation. This cannot override the law of the land, otherwise all heinous crimes would get settled through payment of monetary compensation. Our constitutional jurisprudence does not permit this and we certainly cannot encourage or countenance such a view.

Special Investigating Team

23. As far as the appointment of a Special Investigating Team is concerned (which we have adverted to above), it was suggested to us that officers of the Manipur Police may be associated. We do not think it appropriate to associate any officer of the Manipur Police particularly since in some of the cases the role of the Manipur Police itself has been adversely commented upon.

24. In *Bharati Tamang v. Union of India & Ors.*³²⁷ this Court held that to ensure that criminal prosecution is carried on without any deficiency a special team can be constituted under the orders of this Court. Consequently, we have no hesitation in directing the constitution of a Special Investigating Team to investigate the cases that we have mentioned above. It is interesting to note at this stage that we were informed that in

³²⁷. (2013) 15 SCC 578

none of the cases has an FIR been registered against the Manipur Police or any uniformed personnel of the armed forces of the Union. On the contrary, FIRs have been registered against the deceased for alleged violations of the law. Under these circumstances, it would be inappropriate for us to depend upon the Manipur Police to carry out an impartial investigation more particularly when some of its own personnel are said to be involved in the fake encounters and the Manipur Police has not registered any FIR at the instance of the next of the kin of the deceased.

25. In *R.S. Sodhi v. State of U.P.*³²⁸ this Court observed as follows:-

“...We think that since the accusations are directed against the local police personnel it would be desirable to entrust the investigation to an independent agency like the Central Bureau of Investigation so that all concerned including the relatives of the deceased may feel assured that an independent agency is looking into the matter and that would lend the final outcome of the investigation credibility. However faithfully the local police may carry out the investigation, the same will lack credibility since the allegations are against them.”

It is in view of the above that the more appropriate course of action would be to appoint an independent investigating team to examine the cases mentioned above.

26. Having considered the issues in their entirety, we are of opinion that it would be appropriate if the Central Bureau of Investigation (or the CBI) is required to look into these fake encounters or use of excessive or retaliatory force. Accordingly, the Director of the CBI is directed to nominate a group of five officers to go through the records of the cases mentioned in the three tables given above, lodge necessary FIRs and to complete the investigations into the same by 31st December, 2017 and prepare charge sheets, wherever necessary. The entire groundwork has already been done either by the Commissions of Inquiry or by a Judicial Inquiry or by the Gauhati or Manipur High Court or by the NHRC. We leave it to the Special Investigating Team to utilize the material already gathered, in accordance with law. We expect the State of Manipur to extend full cooperation and assistance to the Special Investigating Team. We also expect the Union of India to render full assistance to the Special Investigating Team to complete the investigation at the earliest without any unnecessary hindrances or obstacles. The Director of the CBI will nominate the team and inform us of its composition within two weeks.

³²⁸. (1994) Supp. 1 SCC 143

NHRC - a toothless tiger

27. We have also heard Mr. Gopal Subramaniam, Senior Advocate on behalf of the NHRC with regard to some issues on the basis of which it was earlier pleaded before us that the NHRC is nothing but a toothless tiger.

28. 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.

29. Keeping this in mind, as well as the Universal Declaration of Human Rights, Parliament enacted the Protection of Human Rights Act, 1993. The Statement of Objects and Reasons for the Protection of Human Rights Act, 1993 is of considerable significance and accepts the importance of issues relating to human rights with a view, inter alia, to bring accountability and transparency in human rights jurisprudence. The Statement of Objects and Reasons reads as under:-

“1. India is a party to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural rights, adopted by the General Assembly of the United Nations on the 16th December, 1966. The human rights embodied in the aforesaid covenants stand substantially protected by the Constitution.

2. However, there has been growing concern in the country and abroad about issues relating to human rights. Having regard to this, changing social realities and the emerging trends in the nature of crime and violence, Government has been reviewing the existing laws, procedures and systems of administration of justice; with a view to bringing about greater accountability and transparency in them, and devising efficient and effective methods of dealing with the situation.

3. Wide ranging discussions were held at various for a such as the Chief Ministers' Conference on Human Rights, seminars organized in various parts of the country and meetings with

leaders of various political parties. Taking into account the views expressed in these discussions, the present Bill is brought before Parliament.”

30. Under the provisions of the Protection of Human Rights Act, 1993 the NHRC has been constituted as a high-powered statutory body whose Chairperson is and always has been a retired Chief Justice of India. Amongst others, a retired judge of the Supreme Court and a retired Chief Justice of a High Court is and has always been a member of the NHRC.

31. In *Ram Deo Chauhan v. Bani Kanta Das*³²⁹ this Court recognized that the words ‘human rights’ though not defined in the Universal Declaration of Human Rights have been defined in the Protection of Human Rights Act, 1993 in very broad terms and that these human rights are enforceable by courts in India. This is what this Court had to say in this regard in paragraphs 47-49 of the Report:

“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.

Human rights are universal in nature. The Universal Declaration of Human Rights (hereinafter referred to as UDHR) adopted by the General Assembly of the United Nations on 10-12-1948 recognises and requires the observance of certain universal rights, articulated therein, to be human rights, and these are acknowledged and accepted as equal and inalienable and necessary for the inherent dignity and development of an individual. Consequently, though the term “human rights” itself has not been defined in UDHR, the nature and content of human rights can be understood from the rights enunciated therein.

Possibly considering the wide sweep of such basic rights, the definition of “human rights” in the 1993 Act has been designedly kept very broad to encompass within it all the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India. Thus, if a person has been guaranteed certain rights either under the Constitution

³²⁹. (2010) 14 SCC 209

or under an International Covenant or under a law, and he is denied access to such a right, then it amounts to a clear violation of his human rights and NHRC has the jurisdiction to intervene for protecting it.”

32. It was submitted (and we agree) that the NHRC has essentially four roles to play, namely that of protector, advisor, monitor and educator of human rights. It is in this capacity that the NHRC as a protector and monitor of human rights through effective investigations has issued guidelines from time to time with regard to various aspects including reporting of matters relating to custodial death and rape, videography of post-mortem examination etc.

33. On 14th December, 1993 the NHRC directed law and order agencies across the country to report matters relating to custodial deaths and rapes within 24 hours. (At that time, death in police action was classified under ‘custodial deaths’).

34. A couple of years later, on 10th August, 1995 the NHRC sent a letter to all Chief Ministers advising them of the necessity of introducing video-filming of post-mortem examinations from 1st October, 1995 onwards to avoid distortion of facts. This was followed by another letter dated 27th March, 1997 sent by the NHRC to all Chief Ministers recommending that all States adopt the “Model Autopsy Form” and “Additional Procedure for Inquest” prepared by the NHRC which was based on discussions with experts and the UN Model Autopsy Protocol. This was to ensure that all information was collected by the concerned officer and supplied to NHRC without delay.

35. On 29th March 1997 the NHRC issued Guidelines recommending the procedure to be followed by States and Union Territories with regard to encounter deaths. It was recommended, *inter alia*, that:

- i) Deaths should be entered in an appropriate register at the Police Station;
- ii) It should be treated as a cognizable offence and investigation should commence;
- iii) It should be investigated by an independent agency such as the State CID, and not by officers of the same Police Station;
- iv) Compensation to the victim’s dependants should be considered in cases ending in conviction.

36. These Guidelines were revised and circulated on 2nd December, 2003 to introduce greater transparency and accountability, since the States were not regularly intimating the NHRC of encounter deaths thereby affecting statistical data. The revised Guidelines contained the following major changes, in addition to the previous Guidelines:

- a) If a specific complaint was made against the police, an FIR must be lodged;
- b) A Magisterial Inquiry was now mandatory in every encounter death;
- c) It also required the State Director General of Police to send a 6-monthly statement of details of all deaths in police action to the NHRC.

37. As one would expect, there was continued non-compliance of the Guidelines by the States, making it necessary for the NHRC to further revise and circulate the Guidelines on 12th May, 2010 containing the following major changes, in addition to the previous guidelines:

- a) The Magisterial Inquiry was required to be completed within 3 months;
- b) Every death in police action was to be reported to the NHRC by the District Superintendent of Police within 48 hours;
- c) A second report was to be sent to the NHRC by the District Superintendent of Police within 3 months, with the Post-Mortem Report, Inquest Report, Ballistic Report and findings of the Magisterial Inquiry.

These Guidelines are currently operational.

38. It was submitted by the NHRC that all its communications and Guidelines have remained only on paper and are not enforced by any State Government. The submission of the NHRC was that to ensure that good quality reports are available, the Guidelines need to be strictly enforced. We agree with this submission and make it clear that the intention of the NHRC is to more effectively assist the criminal justice delivery system and avoid any factual controversies while respecting human rights. It is not as if the dignity of only living persons needs to be respected but even the dignity of the dead must be given due respect. Unless the communications and Guidelines laid down by the NHRC (which have been prepared after wide ranging and detailed consultations) are adhered

to, the respect and dignity due to the dead and the human rights of all us will remain only on paper.

Other issues concerning the NHRC

39. Apart from a lack of concern for the communications and Guidelines issued by the NHRC or the absence of attention that they deserve, the difficulty faced by the NHRC is that even if there is half-hearted compliance, there are unexplained delays on the part of the State Government in sending reports; the quality of the reports is certainly not up to the mark and as expected; sometimes some columns are left blank in the reports and on other occasions some documents are illegible etc. All this, according to the NHRC, hampers its efficient functioning and causes delays in the implementation of the human rights of aggrieved persons.

40. It was also submitted that 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 for 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. In this context, our attention was drawn to Section 11 of the Protection of Human Rights Act, 1993 which reads as follows:

“11. Officers and other staff of the Commission - (1) The Central Government shall make available to the Commission -(a) an Officer of the rank of the Secretary to the Government of India who shall be the Secretary-General of the Commission; and

(b) such police and investigative staff under an officer not below the rank of a Director-General of Police and such other officers and staff as may be necessary for the efficient performance of the functions of the Commission.

(2) Subject to such rules as may be made by the Central Government in this behalf, the Commission may appoint such other administrative, technical and scientific staff as it may consider necessary.

(3) The salaries, allowances and conditions of service of the officers and other staff appointed under sub-section (2) shall be such as may be prescribed.”

41. It is quite clear from a reading of the above provision that the Central Government is under an obligation (‘shall make available’) to provide adequate officers and staff so that the NHRC can perform its functions efficiently. The difficulties faced by the NHRC due to inadequate

officers and staff and something to worry about from a human rights perspective.

42. The general submission of the NHRC is that there should be implementation of its communications and Guidelines, enforcement of the orders passed by it and serious consideration of the recommendations made by the NHRC and necessary provision for its effective functioning.

43. The NHRC has placed before us the following table indicating the change in its work-load and a careful scrutiny of it clearly indicates the remedial steps that need to be taken with regard to the staff strength.

Table-IV

Comparison between the Investigation Division Sanctioned Strength and work load during 2014-15 with that in 1995-96.			
	Present (31-03-2015)	Previous (31-3-1995)	% Increase/decrease
Sanctioned Staff	49**	59*	- 16.94%* decrease in staff strength
Total complaints received annually	1,14,167	7843	1455% increase
Investigation	53	13	407% increase
Custodial Death Cases	5696	444	1237% increase
Fact Finding Cases	1851	706	262% increase
Rapid Action Cell (RAC) cases (started after 2007)	120 (More than 100 cases were added in last three months alone).	NIL	120 times

44. 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 favourably 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.

45. In the context of non-compliance of the orders of the NHRC, it has also been brought by the NHRC that the directions issued by it for payment of compensation to victims of violation of human rights are

sometimes not adhered to. We have seen in Table - III above that there are some instances where the directions given by the NHRC for payment of compensation have not been implemented by the State of Manipur. This is very unfortunate but we accept the assurance of learned senior counsel appearing for the State of Manipur that the compensation awarded by the NHRC will soon be paid to the next of kin of the deceased.

46. We expect all State Governments to abide by the directions issued by the NHRC in regard to compensation and other issues as may arise from time to time. If the people of our country are deprived of human rights or cannot have them enforced, democracy itself would be in peril.

State Human Rights Commissions

47. We have been informed that not all States have Human Rights Commissions and this is confirmed from the website of the NHRC.³³⁰ While the Protection of Human Rights Act, 1993 provides for the constitution of a State Human Rights Commission under Section 21 of the said Act, it is not made mandatory. However, in our opinion, the provisions of Part III of our Constitution particularly the essence of Article 21 of the Constitution does require every State to constitute a State Human Rights Commission, but we do not think it appropriate to issue any direction, particularly in the present writ petitions, to State Governments to constitute a State Human Rights Commission. But, we do feel it imperative to bring it to the notice of all State Governments that it would be but a small step in the protection of life and liberty of every person in our country if a State Human Rights Commission is constituted at the earliest.

Annual Reports

48. We must express our disappointment on the failure of the NHRC to bring out its Annual Reports. A perusal of the website of the NHRC brings out that the latest Annual Report is of 2012-2013. Several years have gone by since then, but no Annual Report has been published - we have no idea what is the stage of preparation or consideration of the subsequent Annual Reports. We express the hope that given the importance of human rights, the Annual Reports of the NHRC will be made available with due expedition.

³³⁰. nhrc.nic.in

Orders

1. As already directed, the Director of the Central Bureau of Investigation will nominate a team and inform us of its composition within two weeks, as also any other requirement. List these cases immediately after three weeks for compliance.
2. These petitions should also be listed positively in the second week of January, 2018 to ensure compliance with our directions for investigation by Central Bureau of Investigation.

.....J

(Madan B. Lokur)

.....J

(Uday Umesh Lalit)

New Delhi; July 14, 2017

12 Annexure 3: UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions

Recommended by Economic and Social Council resolution 1989/65 of 24 May 1989

Prevention

1. Governments shall prohibit by law all extra-legal, arbitrary and summary executions and shall ensure that any such executions are recognized as offences under their criminal laws, and are punishable by appropriate penalties which take into account the seriousness of such offences. Exceptional circumstances including a state of war or threat of war, internal political instability or any other public emergency may not be invoked as a justification of such executions. Such executions shall not be carried out under any circumstances including, but not limited to, situations of internal armed conflict, excessive or illegal use of force by a public official or other person acting in an official capacity or by a person acting at the instigation, or with the consent or acquiescence of such person, and situations in which deaths occur in custody. This prohibition shall prevail over decrees issued by governmental authority.
2. In order to prevent extra-legal, arbitrary and summary executions, Governments shall ensure strict control, including a clear chain of command over all officials responsible for apprehension, arrest, detention, custody and imprisonment, as well as those officials authorized by law to use force and firearms.
3. Governments shall prohibit orders from superior officers or public authorities authorizing or inciting other persons to carry out any such extra-legal, arbitrary or summary executions. All persons shall have the right and the duty to defy such orders. Training of law enforcement officials shall emphasize the above provisions.
4. Effective protection through judicial or other means shall be guaranteed to individuals and groups who are in danger of extra-legal, arbitrary or summary executions, including those who receive death threats.
5. No one shall be involuntarily returned or extradited to a country where there are substantial grounds for believing that he or she may become a victim of extra-legal, arbitrary or summary execution in that country.

6. Governments shall ensure that persons deprived of their liberty are held in officially recognized places of custody, and that accurate information on their custody and whereabouts, including transfers, is made promptly available to their relatives and lawyer or other persons of confidence.

7. Qualified inspectors, including medical personnel, or an equivalent independent authority, shall conduct inspections in places of custody on a regular basis, and be empowered to undertake unannounced inspections on their own initiative, with full guarantees of independence in the exercise of this function. The inspectors shall have unrestricted access to all persons in such places of custody, as well as to all their records.

8. Governments shall make every effort to prevent extra-legal, arbitrary and summary executions through measures such as diplomatic intercession, improved access of complainants to intergovernmental and judicial bodies, and public denunciation. Intergovernmental mechanisms shall be used to investigate reports of any such executions and to take effective action against such practices. Governments, including those of countries where extra-legal, arbitrary and summary executions are reasonably suspected to occur, shall cooperate fully in international investigations on the subject.

Investigation

9. There shall be thorough, prompt and impartial investigation of all suspected cases of extra-legal, arbitrary and summary executions, including cases where complaints by relatives or other reliable reports suggest unnatural death in the above circumstances. Governments shall maintain investigative offices and procedures to undertake such inquiries. The purpose of the investigation shall be to determine the cause, manner and time of death, the person responsible, and any pattern or practice which may have brought about that death. It shall include an adequate autopsy, collection and analysis of all physical and documentary evidence and statements from witnesses. The investigation shall distinguish between natural death, accidental death, suicide and homicide.

10. The investigative authority shall have the power to obtain all the information necessary to the inquiry. Those persons conducting the investigation shall have at their disposal all the necessary budgetary and technical resources for effective investigation. They shall also have the authority to oblige officials allegedly involved in any such executions to appear and testify. The same shall apply to any witness. To this end, they shall be entitled to issue summonses to witnesses, including the officials allegedly involved and to demand the production of evidence.

11. In cases in which the established investigative procedures are inadequate because of lack of expertise or impartiality, because of the importance of the matter or because of the apparent existence of a pattern of abuse, and in cases where there are complaints from the family of the victim about these inadequacies or other substantial reasons, Governments shall pursue investigations through an independent commission of inquiry or similar procedure. Members of such a commission shall be chosen for their recognized impartiality, competence and independence as individuals. In particular, they shall be independent of any institution, agency or person that may be the subject of the inquiry. The commission shall have the authority to obtain all information necessary to the inquiry and shall conduct the inquiry as provided for under these Principles.

12. The body of the deceased person shall not be disposed of until an adequate autopsy is conducted by a physician, who shall, if possible, be an expert in forensic pathology. Those conducting the autopsy shall have the right of access to all investigative data, to the place where the body was discovered, and to the place where the death is thought to have occurred. If the body has been buried and it later appears that an investigation is required, the body shall be promptly and competently exhumed for an autopsy. If skeletal remains are discovered, they should be carefully exhumed and studied according to systematic anthropological techniques.

13. The body of the deceased shall be available to those conducting the autopsy for a sufficient amount of time to enable a thorough investigation to be carried out. The autopsy shall, at a minimum, attempt to establish the identity of the deceased and the cause and manner of death. The time and place of death shall also be determined to the extent possible. Detailed colour photographs of the deceased shall be included in the autopsy report in order to document and support the findings of the investigation. The autopsy report must describe any and all injuries to the deceased including any evidence of torture.

14. In order to ensure objective results, those conducting the autopsy must be able to function impartially and independently of any potentially implicated persons or organizations or entities.

15. Complainants, witnesses, those conducting the investigation and their families shall be protected from violence, threats of violence or any other form of intimidation. Those potentially implicated in extra-legal, arbitrary or summary executions shall be removed from any position of control or power, whether direct or indirect over complainants, witnesses and their families, as well as over those conducting investigations.

16. Families of the deceased and their legal representatives shall be informed of, and have access to any hearing as well as to all information relevant to the investigation, and shall be entitled to present other evidence. The family of the deceased shall have the right to insist that a medical or other qualified representative be present at the autopsy. When the identity of a deceased person has been determined, a notification of death shall be posted, and the family or relatives of the deceased shall be informed immediately. The body of the deceased shall be returned to them upon completion of the investigation.

17. A written report shall be made within a reasonable period of time on the methods and findings of such investigations. The report shall be made public immediately and shall include the scope of the inquiry, procedures and methods used to evaluate evidence as well as conclusions and recommendations based on findings of fact and on applicable law. The report shall also describe in detail specific events that were found to have occurred and the evidence upon which such findings were based, and list the names of witnesses who testified, with the exception of those whose identities have been withheld for their own protection. The Government shall, within a reasonable period of time, either reply to the report of the investigation, or indicate the steps to be taken in response to it.

Legal proceedings

18. Governments shall ensure that persons identified by the investigation as having participated in extra-legal, arbitrary or summary executions in any territory under their jurisdiction are brought to justice. Governments shall either bring such persons to justice or cooperate to extradite any such persons to other countries wishing to exercise jurisdiction. This principle shall apply irrespective of who and where the perpetrators or the victims are, their nationalities or where the offence was committed.

19. Without prejudice to principle 3 above, an order from a superior officer or a public authority may not be invoked as a justification for extra-legal, arbitrary or summary executions. Superiors, officers or other public officials may be held responsible for acts committed by officials under their authority if they had a reasonable opportunity to prevent such acts. In no circumstances, including a state of war, siege or other public emergency, shall blanket immunity from prosecution be granted to any person allegedly involved in extra-legal, arbitrary or summary executions.

20. The families and dependents of victims of extra-legal, arbitrary or summary executions shall be entitled to fair and adequate compensation within a reasonable period of time.



Capt. Amarinder Singh ✓
@capt_amarinder

I felt betrayed by then PM Chandra Shekhar after 21 Khalistani militants I arranged to surrender were killed. Never spoke to him after that.

RETWEETS 691
LIKES 1,222



9:42 PM - 17 May 2017

Encounter killing that presupposes an armed encounter to justify the extrajudicial killings is India's contribution to the lexicon of human rights violations.

One of the first acts of independent India was the issuance of the Disturbed Areas (Special Powers of Armed Forces) Ordinances in Bengal, Assam, East Punjab and Delhi on 15 August 1947 authorising non-commissioned officers to "use force if necessary to the extent of causing death". These ordinances were issued to deal with the law and order situations arising out of partition of India.

In post independent India, the "use force if necessary to the extent of causing death" has become synonymous with extrajudicial executions. Initially, "use force if necessary to the extent of causing death" was justified to deal with conflicts or disturbed situations but over the years, extrajudicial executions in encounters became the customary practice of the law enforcement personnel in peacetime situations. India's National Human Rights Commission in a report in 2004 had stated that "extra-judicial killings have virtually become a part of unofficial State policy". The Supreme Court of India in a number of judgments held that fake encounter killings "amount to State-sponsored terrorism".

The State of Encounter Killings in India is the first comprehensive report on the subject providing information on the history and scale of encounter deaths in India, the modus operandi of a fake encounter, the license given to kill, analysis of the failure of the judiciary and the NHRC to effectively address encounter killings, the status of encounter killings in Uttar Pradesh, 42 emblematic fake encounter cases adjudicated by the NHRC and national and international law and standards dealing with extrajudicial executions.



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