

Position Paper
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APCLC & PUDR

ENCOUNTERS

Dictionary meanings of the term ‘encounter’ range from the benign to ruthless. You have an encounter both when there is a chance/unplanned meeting and also when there is a violent clash between adversarial factions. Over the years, however, the meaning of encounter is no longer ambivalent. An encounter is always violent, almost always planned, and more often than not, results in the death of a ‘wanted criminal’ or ‘outlaw’. From Kashmir to Andhra Pradesh through Delhi & Punjab and most recently Manipur, encounter has become an administrative practice of the Indian state particularly its police, para-military, military and other security forces. The civil liberties and democratic rights movement in India has rallied around this issue, raising relentless campaigns to unmask the murders that shroud the euphemistic encounters. In the context of political developments during the ‘emergency’ imposed by the Indira Gandhi government, ‘encounters’ assumed the center stage of critical political debates in India. Soon after the emergency was lifted and the Janata party formed the government at the centre, an inquiry committee was constituted by Jayaprakash Narayan under the chairmanship of V.M. Tarkunde, a retired Supreme Court judge, to look into the issue of encounters between police and naxalites in the state of Andhra Pradesh. Although the Tarkunde committee was not appointed by the government, it marked a significant departure. By ‘mainstreaming’ the hitherto marginal debates on encounters, the Tarkunde Committee made alarming revelations about state practice on ‘encounters’. In its report titled *Encounters are Murders*. The Tarkunde Committee confirmed that the police and the government of Andhra Pradesh were involved in the cruel practice of committing planned murders and covering it up as encounter. It recommended that the central government institute an independent commission of inquiry to verify facts about encounters. Clearly, what was being labeled by the government as encounters was a planned strategy of the government and its security forces to combat dacoits gangsters, members of the underworld, terrorists, naxalites, petty criminals, etc. Moreover, as the chronicle of encounter stories in the next section shows, what is claimed as an encounter by the government is in actual practice a heinous act of planning and committing murder.

The binding thread of Encounter Stories

A chronicle of encounter cases investigated by civil liberties and democratic rights groups in last thirty five years reveals a familiar pattern behind each encounter. The police which carries out the encounter states that the person killed was a terrorist or a dreaded criminal or a gangster or naxalite. They claim to have got information about their whereabouts through private, secret and other unverifiable sources. They identify the bodies and find evidence which show the intention of the accused to commit a terrorist or subversive act (literature, weapons, etc.). They lodge an FIR against the dead person. The FIR reiterates the police version of events. No FIR is filed into the incident of killing against the police team.

Other aspects of the curious common pattern about encounters across the country is that the site of the encounter is almost always a deserted, isolated spot, the time is almost always late night or very early in the morning, before dawn, and almost universally no policeman gets injured. The general absence of any eyewitnesses or the failure of eyewitnesses, when there are any, to come forward and counter the police statement contributes to the overall silence on the issue. In just a handful of encounter killings there are alternative accounts provided by family members or eyewitnesses of how the person killed was picked up by the police prior to the encounter or who may have seen that the police version is less than accurate. These come to be called fake encounters, and some questions are raised by the media and, on rare occasions, inquiries are initiated against the police. In the absence of any regular investigation into these cognizable offences committed by the police, whether an encounter can be established as real or fake becomes dependent on the arbitrary factor of whether or not there were eyewitnesses or others willing and able to counter the police story – a difficult task under any circumstances.

The political context of the encounter might vary from region to region and case to case, but the manner in which the encounter story is established and perhaps legitimised remains the same. The general trend of an encounter story is that the police version is accepted as the only 'authentic' source of the story. Lack of eyewitnesses who are willing to counter the police version of encounter as well as a lack of an independent and impartial investigation by state agencies into the circumstances leading up to encounter erodes accountability of the police and security forces as well as the rule of law.

Encounter and Quest for Justice

Clearly, since all encounters involve loss of life of a person, they bring into question the issue of rule of law and constitutional justice as provided in Article 21 of the Indian constitution. There are relevant provisions under the Criminal Procedure

Code (CrPc) and the Indian Penal Code (IPC) which limit the extent to which the police may use force in preventing an offence or arresting a person (see Box). These laws read in conjunction with Article 21 of the Indian constitution prescribe limits to the power of the police and security forces to abrogate the right to life of a person. Certainly, without a proper and impartial investigation it cannot be ascertained whether the action of the police and security force falls within the prescribed limits enumerated in these provisions.

There may be no dispute about the fact that many of the encounter cases - though not all - are reported from the areas where a sustained movement and struggle against the Indian state are ongoing. Indisputably many of such movements as in India's North-East, Kashmir and several other places like Chhattisgarh, Jharkhand or Andhra Pradesh are armed. Yet the guarantees provided under relevant provisions of the constitution and laws are absolute and cover all persons. Abrogation of right to life (causing death of a person) under all circumstances has to be justified under procedure established by law. And of course there is no other way outside an independent and impartial inquiry that such justification can be sought. It is therefore alarming that in almost all encounter cases the police account of the sequence of the encounter has come to be accepted as the authentic version, without seeking any verification of the facts and circumstances of the encounter.

Article 21 of the Indian constitutions guarantees that no person shall be deprived of his life and personal liberty "except according to the procedure established by law". Besides Section 46 of the CrPC if a person forcibly resists the endeavour to arrest him, then a police officer may use all means necessary to effect the arrest. However, it is clearly stated in this section that under no circumstances can the police exercise force to cause death of a person, except in case where a person is accused of an offence punishable with death or with imprisonment for life. Note that section 46 of the CrPC is a restrain upon action of the police in exercise of its duty. It is not a blanket provision that enables the police to cause death of a person whom they assume to be punishable by death or life imprisonment. Whether the police have caused such death in rightful exercise of its duty or such excuse is available to the police has to be established through a fair and impartial investigation and in course of a trail. Similarly Section 100 of the IPC lays down the ground for exercise of right to self defence to the extent of causing death of a person. This law lays a person in exercise of right to self defence may cause death of another person : Where the assault may reasonably cause the apprehension that death or grievous hurt will be the consequence of such assault : An assault with the intention of committing rape or gratifying unnatural lust; an assault with the intention of kidnapping or abduction; and an assault with the intention of wrongfully confining a person, under circumstances causing a reasonable apprehension that the person will not have recourse to public authorities for his release.

Encounters and the Meandering Pathway to Justice

Several encounter cases have been taken up at the level of the Supreme Court and the High Courts besides petitioning the National Human Rights Commission. Few cases, however, resulted in the issue by the courts of any relevant orders which condemn the ubiquity of encounters as a repressive practice of the state. On some occasions the Supreme Court has either suggested that the appellants seek local redress by filing personal cases with local magistrate courts or submit memorandum to the state government. On yet other occasions the Supreme Court and State High Courts have issued orders giving relief to the families of the victims and laying down procedures to investigate encounter cases. In one such incident, which involved the death of two persons in police encounter in Manipur in 1997, in response to the writ petition filed by the PUCL, the Supreme Court directed that an inquiry be conducted by the District and Session Judge. The inquiry revealed that the encounter claimed to have taken place by the police never happened, and that the deceased were in fact killed while in custody.

Similarly occasional interventions made by the NHRC and State High Courts while responding to the petition of democratic rights organisations have laid robust ground for police accountability. This fact is borne by the directive issued by the NHRC on procedural guidelines to investigate encounter death to the Chief Minister of all states and through them to the Director General of Police of each state in 1996. The NHRC directive was issued in the backdrop of petitions filed by Andhra Pradesh Civil Liberty Committee (APCLC) in 285 cases of fake police encounters in Andhra Pradesh. The NHRC could investigate only five of these cases since rest of it were beyond stipulated time limit of reporting the case to NHRC. However, after hearing the cases and cross examining the witnesses, the NHRC observed that the version of said encounters presented by the APCLC was far more reliable than the police and the state version of the incidents. Importantly the procedural guidelines laid out by NHRC suggested: a) that every encounter death shall be treated as a cognizable offence and immediate steps shall be taken to investigate facts and circumstances leading to the death; b) As the police themselves are involved in perpetrating encounter, it would be appropriate that cases are made over to some other investigating agency. Undoubtedly NHRC's recommendation clearly states that all cases of encounters are cognizable offence until the police version is verified by an independent investigating agency.

In yet another case of encounter death of a CPI (ML) leader in Andhra Pradesh in 1996, the AP High Court observed that the act of encounter itself is culpable homicide. Whether or not such act is excusable or whether such death was caused in lawful exercise of duty by the police officer shall have to be established by investigation as per law. The AP High Court further observed that it would neither be fair nor proper to ignore registration of a case of culpable homicide against the police personnel whose action caused the death of the alleged CPI (ML) leader.

Despite these directives of the NHRC and the AP High Court, encounter cases continued in Andhra Pradesh without being followed by any investigation into them let alone criminal cases brought against the delinquent police officials. Consequently there is a situation where there exist some rich history of contextually evolved jurisprudence and guidelines on encounter which is completely set aside by the police and the security forces in their usual practice on encounter. It thus makes the police and security forces unaccountable elevating them above the rule of law. Conversely on occasions courts have not found it suitable to issue any directives in encounter cases in public interest. Instead they have conceived it as a matter of individual redress to be sought through private complains and the local level through routine litigation.

The Present Situation

The Andhra Pradesh High Court Judgment of February 2009 in APCLC case has re opened the debate on encounters. The said Judgment came in the wake of roughly 1800 encounter deaths in the state between 1997-2007. The NHRC guidelines and AP High Courts directives on encounters issued in 1997 were completely set aside in these cases. No inquiry was instituted to verify the facts and circumstances leading to these encounters, let alone the registration of criminal case against the aberrant police personal. On the other hand, the Andhra Pradesh High Court Judgments in some of these cases steadily eroded the space to ascertain procedural and legal accountability of police personnel in encounter cases. Moreover, by 2007 there came about a subtle twist in Andhra Pradesh High Court's position on encounter deaths. In one of its Judgment in 2007 against the petition filed by APCLC, the Andhra Pradesh High Court reversing its earlier Judgment of 1997 stated that it was not required to register a criminal case against the police personnel in *all* cases of encounter deaths. The High Court held that FIR against the police personnel in incidents of encounter death shall be registered *only* if a specific complain is made alleging that an identified individual has caused the death of such a person. This by implication means that someone has to come forward to challenge each case of encounter and the police version of it. Moreover, in order to credibly challenge the police version of an encounter death one has to name the individual police officer who has caused the death by firing upon the deceased. Undoubtedly the 2007 judgement has made the enforcement of police accountability an arduous task.

The 2007 Judgment of the Andhra Pradesh High Court was, however, not disposed with unanimity but was decided on the basis of majority judgment. Keeping in mind a large number of encounter deaths in the state the matter was further referred to a full bench of the Andhra Pradesh High Court. The full bench while appreciating the issues raised by the APCLC referred the matter to a five judge bench of the Andhra Pradesh High Court. The five Judge Bench while delivering its Judgment in February

2009, stressed on three main points: a) in all cases of encounter deaths at the hands of the police, an FIR must be registered; b) an independent and impartial investigation be ensured and c) the plea for self defence has to be established at the stage of trial not during the course of investigation.

Aggrieved by this Judgement the Andhra Pradesh Police Association approached the Supreme Court of India to grant an interim *ex parte* stay on the Andhra Pradesh High Courts order of February 2009. The crux of the Andhra Pradesh Police Association's argument was that the Andhra Pradesh High Court Judgment was misplaced and de-contextulised as it ignored the challenge faced by the Andhra Pradesh police in combating the Maoists, and would therefore, spell doom on the morale of the police, and facilitate the growth of Maoists in the state.

The issue of Encounter deaths as it is presently placed in India raises several questions about the rule of law and the basic framework of justice that a democratic society shall adopt. The police and the security forces claim impunity from investigation by an outside agency on the ground that it would demoralize the forces responsible for enforcing law and order. However, investigations taken up by agencies outside the police force into the cases of encounter deaths, have consistently revealed that the police have been on the wrong side of the law. Democracy requires strict and uniform adherence to the rule of law by all including those entrusted with the responsibility of law enforcement. A non partisan investigation and a fair trial in all cases of encounter deaths as laid down in the NHRC guidelines and the court judgment mentioned above is the minimal guarantee of accountability on the part of the law enforcement agencies and assurance of justice to the aggrieved. Without strict adherence to such principles, rule of law will become a dead letter and justice ever occluded and fettered.