

FAKE ENCOUNTERS IN INDIA: A Criminal Law Critique of Encounter Justice

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Abstract- Encounter killings have become one of the most debated issues in India's criminal justice system. While they are often justified as an effective response to serious crime and delays in the judicial process, allegations of fake encounters raise serious concerns regarding police accountability, legality, and due process. Public support for such actions is frequently driven by frustration with the slow pace of criminal trials and a desire for immediate justice. However, these concerns must be balanced against the fundamental principle that every individual is entitled to a fair trial and equal protection under the law. Fake encounters are not merely questions of human rights violations; they also raise important issues of criminal liability. When police officers use lethal force outside the limits prescribed by law, questions arise regarding accountability, abuse of authority, and the proper functioning of the criminal justice system. Judicial decisions of the Supreme Court have repeatedly emphasised that no person can be deprived of life except through a procedure established by law and that allegations of encounter killings must be subjected to independent investigation. This study examines fake encounters from a criminal law perspective, focusing on the limits of police power, the legal consequences of unlawful use of force, and the effectiveness of existing accountability mechanisms. It argues that while effective policing is essential for maintaining public order, the pursuit of justice cannot come at the cost of due process and the rule of law. Strengthening accountability, ensuring transparent investigations, and promoting constitutional policing are necessary to prevent the misuse of State power and preserve public confidence in the justice system.

Keywords: Fake Encounters, Police Accountability, Criminal Liability, Due Process, Rule of Law.

I. INTRODUCTION

"In every constitutional democracy, the authority to enforce the law must be balanced by accountability to the law."

The relationship between the police and the citizen is one of the most important indicators of the health of a democratic society. Police officers are entrusted with maintaining public order, preventing crime, and protecting the lives and liberties of individuals. However, the exercise of police power carries the possibility of misuse when legal authority is exercised beyond its prescribed limits. It is for this reason that modern criminal justice systems seek to balance effective law enforcement with constitutional safeguards and legal accountability. Encounter killings have emerged as one of the most controversial issues in India's criminal justice system. While some encounters occur in situations involving genuine self-defence or immediate threats to life, allegations of fake encounters have repeatedly raised concerns regarding the legality of police action and the protection of individual rights. Such incidents have generated intense public debate about the extent of police authority and the role of due process in the administration of justice. Public reactions to encounter killings often reflect a deeper frustration with delays in investigation, prosecution, and trial. In many instances, encounters are viewed as a quick response to serious crime and perceived inefficiencies within the justice system. Yet the idea of justice in a constitutional democracy is founded upon fairness, legality, and judicial determination of guilt. The desire for immediate punishment cannot replace the legal procedures that protect individual rights and prevent arbitrary exercises of State power. The issue becomes particularly significant when an encounter is alleged to be staged or fabricated. In such circumstances, the focus shifts from crime control to questions of criminal liability and accountability. An unlawful encounter is not merely a matter of excessive policing; it raises concerns relating to homicide, abuse of authority, fabrication of evidence, and the integrity of the

criminal justice system itself. The legality of police action must therefore be examined by the same standards that apply to any other act resulting in the loss of human life.

Incidents such as the Hyderabad Encounter Case (2019), the Vikas Dubey Encounter (2020), and the Sathankulam Custodial Deaths (2020) have intensified discussions on police accountability and the need for stronger safeguards against misuse of power. Judicial decisions delivered over the years have consistently emphasised that the rule of law applies equally to law enforcement agencies and ordinary citizens. No authority, however powerful, can be permitted to operate outside the framework of law. Existing discussions on encounter killings have largely focused on constitutional rights and human rights concerns. While these perspectives remain important, unlawful encounters also raise significant questions under criminal law. Where a death results from a staged encounter lacking lawful justification, issues relating to murder, criminal conspiracy, fabrication of evidence, and abuse of official authority inevitably arise. Examining fake encounters through the framework of criminal law therefore provides a deeper understanding of accountability within the criminal justice system. Viewed in this context, fake encounters represent more than isolated incidents of misconduct. They reflect a broader challenge confronting criminal justice administration: how to balance effective policing with constitutional values, individual rights, and legal accountability. The continuing debate surrounding encounter justice ultimately raises a fundamental question for every democratic society: whether justice can truly be achieved when the process meant to protect it is disregarded.

II. LITERATURE REVIEW

The existing literature on encounter killings in India can be organised into three broad categories: constitutional and human rights scholarship, criminological and policing studies, and institutional

reform literature. Each of these bodies of work makes a contribution to understanding the phenomenon, but each also leaves a gap that the present article seeks to address.

In the domain of constitutional and human rights scholarship, Upendra Baxi has examined the structural conditions under which State violence comes to be normalised and the role of constitutional litigation in challenging that normalisation.¹ Baxi's analysis, while illuminating on questions of constitutional accountability, focuses primarily on the human rights dimensions of police violence rather than on the specific criminal law offences that fake encounters constitute. Similarly, the reports of the Commonwealth Human Rights Initiative on police reform in India have documented the institutional conditions that enable encounter killings and have advanced proposals for legislative and administrative reform, but have not systematically analysed the criminal liability framework.²

In the criminological and policing literature, Arvind Verma's study of the Indian police examines the organisational culture and incentive structures that produce aggressive policing practices, including encounters.³ R.K. Raghavan has analysed the relationship between police effectiveness and institutional accountability, noting the tension between the public demand for results and the legal constraints on police conduct.⁴ These works provide an important sociological context, but their focus is primarily descriptive rather than legal.

K.D. Gaur's work on criminal law in India provides a doctrinal foundation for the analysis of offences against the person, including the limits of the right of private defence and the conditions under which homicide attracts criminal liability.⁵ However, Gaur's general criminal law scholarship does not specifically address the encounter context or the particular challenges that arise when the accused is a State actor operating under the colour of official authority.

¹ Upendra Baxi, *The Future of Human Rights* (3rd edn, Oxford University Press 2008) ch 5.

² Commonwealth Human Rights Initiative, "Feudal Forces: Reform Delayed - Moving from Force Accountability to Police Accountability" (2008) 18-24.

³ Arvind Verma, *The Indian Police: A Critical Evaluation* (Regency Publications 2005) 205-218.

⁴ R.K. Raghavan, "The Indian Police: Problems and Prospects" (2003) 33(4) *Publius: The Journal of Federalism* 119, 131-135.

⁵ K.D. Gaur, *Criminal Law: Cases and Materials* (8th edn, LexisNexis 2019) 302-315.

The institutional reform literature, represented by Law Commission reports and the Human Rights Watch documentation of police impunity, has catalogued the inadequacies of existing accountability mechanisms in considerable detail.⁶ What this literature has not done is connect the institutional analysis to the specific provisions of the criminal law that are available - and underused - to address fake encounters. The present article addresses this gap directly, arguing that the criminal law framework is adequate on paper and that the problem lies in its enforcement rather than its content.

III. CONCEPT AND EVOLUTION OF ENCOUNTER KILLINGS IN INDIA

Encounter killings are not a recent development in Indian policing. The practice can be traced to the anti-dacoit campaigns of Uttar Pradesh and Madhya Pradesh in the 1970s, where police forces confronting heavily armed gangs in the Chambal valley began eliminating suspects outside the formal legal process. This practice received tacit administrative approval because no statute regulated the conditions under which lethal police force could be used, and prosecutorial institutions rarely questioned police accounts of self-defence.⁷ The practice then moved from rural settings into urban organised crime through the Maharashtra Police's encounter operations of the 1990s and early 2000s. As the D-Company under Dawood Ibrahim and rival criminal syndicates expanded, the Maharashtra Police created dedicated encounter squads whose function was the elimination of suspected gangsters. Officers, including Pradeep Sharma, Daya Nayak, and Sachin Waze, became publicly associated with large numbers of such operations. By 2003, the Maharashtra Police had conducted over 400 encounter killings since 1993, prompting the NHRC to intervene directly.⁸ In Andhra Pradesh, the Greyhounds force conducted operations against Naxalite suspects under a doctrine of pre-emptive encounter that successive state governments defended as a counterinsurgency measure. In Manipur

and Jammu and Kashmir, security forces relied on the Armed Forces (Special Powers) Act, 1958, claiming that its provisions on immunity for acts done "in good faith" shielded them from criminal law. In *Naga People's Movement of Human Rights v. Union of India*,⁹ a Constitution Bench upheld the constitutionality of the AFSPA but held that the Act cannot be used to justify acts amounting to criminal offences and does not displace the obligation to act with minimum force. This ruling established at an early stage that the AFSPA does not confer blanket immunity from criminal prosecution. The more recent phase, roughly from 2014 to the present, is marked by two distinct features. First, encounter killings have become more openly associated with stated crime control policy: in Uttar Pradesh after 2017, data indicate that over 8,472 encounters were reported in five years, resulting in 183 deaths. Second, advances in digital forensics - mobile phone records, CCTV footage, and ballistic analysis - have in several cases produced independent evidence that directly contradicts the official police account, making fabrication harder to sustain.

IV. CRIMINAL LAW FRAMEWORK GOVERNING POLICE USE OF FORCE

Right of Private Defence under the BNS

The right of private defence, set out in Sections 34 to 44 of the Bharatiya Nyaya Sanhita, 2023, is the main legal justification that police personnel advance in encounter cases. Section 34 of the BNS recognises the right to use force in defence of the body, subject to Section 36, which prohibits causing more harm than is necessary for defence. Section 37(2) allows the right to extend to causing death only where there is a reasonable apprehension of death, grievous hurt, rape, kidnapping, wrongful confinement, or an acid attack.¹⁰ This defence is difficult to sustain in the context of a fake encounter. Private defence requires a genuine, imminent, and unprovoked threat. In *State of U.P. v. Ram Swarup*,¹¹ the Supreme Court held that the right

⁶ Human Rights Watch, "Broken System: Dysfunction, Abuse, and Impunity in the Indian Police" (2009) 10-15; Law Commission of India, 152nd Report on Custodial Crimes (1994) para 1.1-1.5.

⁷ *ibid* (Human Rights Watch) 22-25.

⁸ People's Union for Civil Liberties, "Encounter Killings in Maharashtra: A PUCL Fact-Finding Report" (2003) 3-7

⁹ *Naga People's Movement of Human Rights v. Union of India*, (1998) 2 SCC 109; *Extra Judicial Execution Victim Families Association v. Union of India*, (2016) 14 SCC 536, 562-564.

¹⁰ Bharatiya Nyaya Sanhita, 2023 (Act 45 of 2023), s 37(2)(a)-(f).

¹¹ *State of U.P. v. Ram Swarup*, (1974) 4 SCC 764, 771.

cannot be used as a cover for aggression or where the person claiming the right has himself created the situation of danger. A police officer who lures a suspect to a location, subdues him, and then shoots him cannot claim private defence - the essential conditions for the right simply do not exist in such a situation. The proportionality analysis under Section 36 adds a further layer of scrutiny. In *Darshan Singh v. State of Punjab*,¹² the Court set out a clear test: the accused must show that the perceived threat was reasonable, that lesser force would not have sufficed, and that the harm caused did not exceed what was necessary. Post-mortem evidence in numerous encounter cases has shown multiple shots fired at close range, entry wounds on the back, no defensive injuries on the officers, and firearms on the deceased that showed no sign of recent use - findings inconsistent with any genuine claim of proportionate self-defence.

Powers of Police Officers under the BNSS

Section 43 of the Bharatiya Nagarik Suraksha Sanhita, 2023, permits police officers to use all means necessary to effect an arrest where a person forcibly resists or attempts to evade. However, Section 44 of the BNSS expressly prohibits causing the death of a person not accused of an offence punishable with death or life imprisonment, even in the course of making an arrest.¹³ This is a clear statutory limit that cannot be set aside on grounds of operational necessity. In *Joginder Kumar v. State of U.P.*,¹⁴ the Supreme Court held that the power of arrest must be exercised with care and respect for personal liberty and must not be used as a routine measure or a demonstration of authority. The same principle applies with equal force to the use of lethal force: a police officer who shoots a person fleeing from arrest for a non-capital offence has not merely used excessive force but has committed an act that Section 44 expressly prohibits.

Statutory Use of Force Gap

Neither the BNS nor the BNSS contains a positive use-of-force standard - a statutory statement of the conditions under which lethal force may lawfully be used. The Law Commission of India, in its 152nd Report on Custodial Crimes in 1994, recommended that guidelines be enacted modelled on the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, 1990, which require that lethal force be used only as a last resort, that a warning be given beforehand where feasible, and that the force used be strictly proportionate to the threat.¹⁵ This recommendation has not been implemented in over three decades. The BNSS, enacted in 2023, did not address the gap.

Constitutional Limits on State Power

The Supreme Court's recognition of limits on State power in the criminal procedure context provides an important doctrinal backdrop to the encounter problem. In *People's Union for Civil Liberties v. Union of India* (Telephone Tapping),¹⁶ the Court held that the State's powers of surveillance and investigation are not unlimited and must be exercised within the boundaries prescribed by law, subject to procedural safeguards, and with accountability for abuse. While the immediate subject of that case was telephone interception, the broader principle - that State authority in law enforcement is always bound by law and subject to 8 judicial oversight - is directly applicable to the exercise of lethal force. An encounter that occurs outside the conditions prescribed by the BNS and the BNSS is not merely an excess of authority; it is a negation of it.

Genuine versus Fake Encounters: The Legal Distinction.

Not every encounter killing is unlawful. A police officer confronted with deadly force in the course of a lawful operation who responds proportionately may have a valid private defence claim under the BNS. The question is whether the facts support that claim - and the answer must come from an independent

¹² *Darshan Singh v. State of Punjab*, (2010) 2 SCC 333, 347-352.

¹³ Bharatiya Nagarik Suraksha Sanhita, 2023 (Act 46 of 2023), s 44.

¹⁴ *Joginder Kumar v. State of U.P.*, (1994) 4 SCC 260, 266.

¹⁵ Law Commission of India, 152nd Report on Custodial Crimes (1994) para 4.12; United Nations, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990) Principles 9-11.

¹⁶ *People's Union for Civil Liberties v. Union of India*, (1997) 1 SCC 301, 336-338.

investigation, not the police account alone. The NHRC has identified specific indicators that raise questions about genuineness: no injuries on police personnel; entry wounds inconsistent with the claimed direction of fire; firearms on the deceased showing no evidence of recent discharge; victims recently in custody; FIRs filed after the killing; and the absence of independent witnesses.¹⁷ Where these indicators are present, it becomes the State's responsibility to demonstrate the genuineness of the encounter.

V. FAKE ENCOUNTERS AS CRIMINAL OFFENCES

Murder and Culpable Homicide under the BNS

At its core, a fake encounter is a deliberate killing. Section 101 of the BNS (corresponding to Section 300 of the IPC) defines murder as culpable homicide committed with the intention of causing death, or with the knowledge that the act is so dangerous that it will in all probability cause death.¹⁸ Deliberately shooting a restrained or defenceless person satisfies the first and fourth conditions simultaneously. The Supreme Court in *Prakash Kadam v. Ramprasad Vishwanath Gupta*¹⁹ held clearly that a police officer who commits a fake encounter is guilty of murder, and that such a killing falls within the "rarest of rare" category under *Bachan Singh v. State of Punjab*.²⁰ Warranting the death penalty. Justice Katju observed that police personnel who kill a person under the cover of official duty and then fabricate a self-defence account are in a worse position than private killers, since they betray the public trust placed in them and corrupt the institutional apparatus of law enforcement itself. The decision also removes any argument that the officer's institutional position should attract a lighter sentence. The Court was categorical: the position of trust is an aggravating circumstance, not a mitigating one. The powers, resources, and authority placed at the officer's disposal by the State - and their deliberate misuse to commit murder - make the offence more serious, not less.

Criminal Conspiracy under Section 61 BNS

Planning a fake encounter necessarily involves more than one person: the officers who carry out the shooting, those in the chain of command who authorise the operation, and the personnel who prepare false documentation. Section 61 of the BNS defines criminal conspiracy as an agreement between two or more persons to commit an illegal act, where a further act is done in furtherance of that agreement.²¹ A premeditated encounter killing meets all these requirements and, critically, holds every participant liable - including superior officers who gave the order but did not personally fire any weapon.

Fabrication of Evidence under Sections 237-239 BNS

Almost every fake encounter is followed by the preparation of false records: an FIR describing a non-existent exchange of fire, a weapon placed beside the body, a fabricated case diary. Section 238 of the BNS penalises fabrication of false evidence for use in a judicial proceeding; Section 239 specifically targets fabrication intended to justify a killing as lawful.²² In *Ram Sharan Sharma v. State of Maharashtra*,²³ the Bombay High Court held that the preparation of a false panchanama, case diary, and FIR constitutes fabrication of evidence independently of the underlying charge of murder - a ruling that extends criminal liability to the cover-up layer of the encounter operation.

Abuse of Official Authority under Section 197 BNS

Section 197 of the BNS makes it an offence for a public servant to knowingly disobey the law with the intention or knowledge that this will cause injury to another person.²⁴ A police officer who kills a person outside the conditions legally justifying lethal force commits this offence in addition to murder, capturing the institutional dimension: the wrong is not only a personal crime, but a misuse of the authority delegated to the officer by the State.

JUDICIAL RESPONSE TO FAKE ENCOUNTERS

¹⁷ National Human Rights Commission, Guidelines on Encounter Deaths (2010) para 3(a)-(g).

¹⁸ Bharatiya Nyaya Sanhita, 2023, s 101(a)-(d).

¹⁹ *Prakash Kadam v. Ramprasad Vishwanath Gupta*, (2011) 6 SCC 189, 203-206 (Katju J).

²⁰ *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684.

²¹ Bharatiya Nyaya Sanhita, 2023, s 61.

²² Bharatiya Nyaya Sanhita, 2023, ss 238-239.

²³ *Ram Sharan Sharma v. State of Maharashtra*, 2016 SCC OnLine Bom 4501, para 24.

²⁴ Bharatiya Nyaya Sanhita, 2023, s 197.

Prakash Kadam v. Ramprasad Vishwanath Gupta (2011)

*Prakash Kadam v. Ramprasad Vishwanath Gupta*²⁵ is the Supreme Court's most important decision on criminal liability for fake encounters. A police officer had been convicted of staging a murder to resemble an armed exchange. The Court affirmed the conviction and sentence of death, holding that fake encounter killings are premeditated murder committed under colour of official duty and fall within the "rarest of the rare" category. On mens rea, the Court rejected the argument that the officer's subjective belief in the danger posed by the victim could constitute a defence: the belief must be objectively reasonable, and the circumstances of a staged encounter - planned, conducted at night in an isolated location, against an unarmed person - do not generate such an apprehension. Once staging is established, private defence is unavailable as a matter of law.

Om Prakash v. State of Jharkhand (2012)

*Om Prakash v. State of Jharkhand*²⁶ addressed whether a police officer participating in a fake encounter on superior orders can invoke Section 21 of the BNS (formerly Section 76 of the IPC), which protects a person acting pursuant to a lawful order. The Court held that the provision applies only where the order is lawful on its face. An order to kill a person in a staged encounter is plainly unlawful, and the defence is unavailable regardless of who gave the instruction. The Court further held that a police officer has a positive legal duty to refuse such an order and that disciplinary consequences for refusal are impermissible - directing the issuance of standing instructions to all state police personnel on these principles.

People's Union for Civil Liberties v. State of Maharashtra (2014)

*People's Union for Civil Liberties v. State of Maharashtra*²⁷ (the "PUCL case") laid down sixteen guidelines, enforceable as directions under Article 142

of the Constitution, governing the investigation of every encounter death. The key guidelines include: mandatory registration of an FIR under Section 101 BNS upon any complaint about an encounter death, without preliminary inquiry; investigation by the CID or a separate police team; independent magisterial inquiry completed within three months; mandatory NHRC reporting within forty-eight hours; and the requirement that officers involved not be rewarded or promoted until the matter is judicially resolved.²⁸ In *Narmada Bai v. State of Gujarat*,²⁹ the Court extended the framework by holding that allegations involving senior officers may warrant a CBI investigation directed under Article 32.

Nilabati Behera v. State of Orissa (1993)

*Nilabati Behera v. State of Orissa*³⁰ established State liability under Article 21 for deaths caused by unlawful police action, independently of any civil suit. The State - as the institution that trained, deployed, and supervised the officers - bears a constitutional obligation for their conduct. This principle was applied in *Extra Judicial Execution Victim Families Association v. Union of India*,³¹ where the Court held Manipur constitutionally responsible for the systematic pattern of encounter killings by its security forces, regardless of the status of individual prosecutions.

D.K. Basu v. State of West Bengal (1997)

*D.K. Basu v. State of West Bengal*³² is the leading authority on procedural safeguards in custodial situations. The Court's observation that custodial death is among the worst crimes in a civilised society applies directly to encounter killings. The D.K. Basu guidelines - requiring documentation of the time, place, and reason for each exercise of police authority - provide a procedural infrastructure that, if consistently followed, would make the fabrication of encounter narratives significantly more difficult.

²⁵ *Prakash Kadam v. Ramprasad Vishwanath Gupta*, (2011) 6 SCC 189.

²⁶ *Om Prakash v. State of Jharkhand*, (2012) 12 SCC 72.

²⁷ *People's Union for Civil Liberties v. State of Maharashtra*, (2014) 10 SCC 635.

²⁸ *ibid*, 667-670 (Guidelines 1-16).

²⁹ *Narmada Bai v. State of Gujarat*, (2011) 5 SCC 79, 100.

³⁰ *Nilabati Behera v. State of Orissa*, (1993) 2 SCC 746.

³¹ *Extra Judicial Execution Victim Families Association v. Union of India*, (2016) 14 SCC 536.

³² *D.K. Basu v. State of West Bengal*, (1997) 1 SCC 416.

People's Union for Democratic Rights v. Police Commissioner, Delhi (1989)

*People's Union for Democratic Rights v. Police Commissioner, Delhi*³³ held that the police cannot claim a general discretion to act outside the law in the name of maintaining order or controlling crime. All police authority derives from law and is bound by it; any exercise of force outside those legal limits constitutes an abuse of the powers entrusted to the officers. In the encounter context, this means that no general policing objective - whether crime control, deterrence, or public safety - can serve as legal justification for deliberately killing a person outside the conditions set by the BNS and the BNSS.

Extra Judicial Execution Victim Families Association v. Union of India (2016)

*Extra Judicial Execution Victim Families Association v. Union of India*³⁴ held, in the context of over 1,528 alleged fake encounters in Manipur, that the AFSPA does not confer immunity for murder; that Article 21 applies in full force in disturbed areas; and that the State's duty to investigate deaths caused by security forces cannot be abrogated by statute. The Court directed a CBI investigation of representative cases. This judgment closes the AFSPA exception, establishing a uniform accountability standard for all State actors regardless of the statutory framework under which they operate.

Selvi v. State of Karnataka (2010)

*Selvi v. State of Karnataka*³⁵ held that the State cannot bypass constitutional protections on grounds of investigative efficiency. The argument for encounter killings often rests on precisely this efficiency logic - that encounters deliver results the formal system cannot. The Court's reasoning in *Selvi* directly undermines this justification: the fact that bypassing a constitutional protection may be more convenient does not make the bypass lawful.

Prakash Singh v. Union of India (2006)

*Prakash Singh v. Union of India*³⁶ identified the structural conditions that enable fake encounters: excessive political control over police operations, insufficient tenure protection for officers, and the absence of independent complaints mechanisms. The Court's seven directions for police reform - separating investigation from law and order, establishing state security commissions, and creating police complaints authorities - address these conditions directly. Individual accountability measures have limited systemic impact unless these structural reforms are also implemented.

VI. CONTEMPORARY CASE STUDIES

The Hyderabad Encounter (2019)

On 27 November 2019, a veterinary doctor was found dead near Hyderabad after being subjected to gang rape and murder. Four persons were arrested as suspects. On 6 December 2019 - nine days after the crime - all four were shot dead by Telangana Police at 3:30 a.m. at the scene of the original offence, during what police described as a site visit during which the accused attempted to seize weapons and escape. The official account was immediately questioned on forensic and factual grounds. The NHRC issued notice to the Telangana government, stating that the circumstances raised serious questions about whether the encounter was genuine.³⁷ The Supreme Court took suo motu cognisance and appointed a three-member commission headed by former Justice V.S. Sirpurkar. The Commission concluded that the encounter was staged: the accused were already under police control; the described sequence of events was physically implausible; forensic evidence was inconsistent with an attempted escape. The Commission recommended prosecution of the officers involved for murder and related offences. The public response to this incident warrants analysis. The killings were welcomed by significant sections of the public, with politicians openly praising the officers. This response reflects genuine frustration with the pace of the criminal justice system in serious crimes against women. It also illustrates why encounter killings find sustained public

³³ *People's Union for Democratic Rights v. Police Commissioner, Delhi*, (1989) 4 SCC 730.

³⁴ *Extra Judicial Execution Victim Families Association v. Union of India*, (2016) 14 SCC 536, 571-574

³⁵ *Selvi v. State of Karnataka*, (2010) 7 SCC 263, 316.

³⁶ *Prakash Singh v. Union of India*, (2006) 8 SCC 1.

³⁷ NHRC notice to Telangana Government, dated 6 December 2019; NHRC Annual Report 2019-20 (n 2) 58.

acceptance even when legally indefensible: they provide a visible and immediate response to public outrage that the formal trial process, operating over years, cannot offer. The constitutional position is unaffected - approval cannot transform an unlawful killing into a lawful one - but an honest reform agenda must grapple with this political reality rather than ignoring it.

The Vikas Dubey Encounter (2020)

On 3 July 2020, a gang led by Vikas Dubey ambushed and killed eight Uttar Pradesh Police officers in Bikru village. Dubey was arrested in Ujjain, Madhya Pradesh, on 9 July 2020. On 10 July 2020, during road transport, the police vehicle reportedly overturned; Dubey allegedly seized a weapon and was shot dead while attempting to escape. Six associates had also been killed in separate encounters in the intervening days. The Supreme Court declined to accept the police account without scrutiny. A judicial commission was appointed under former Justice B.S. Chauhan. The Commission examined the circumstances of Dubey's death, the institutional factors that had allowed his criminal career to continue despite multiple FIRs over two decades, and the decision to transport him by road rather than air.³⁸ The inquiry raised questions about whether Dubey's death served institutional interests beyond crime control: a trial would have required him to give an account of his relationships with others. Encounter killings, in this dimension, suppress evidence as much as they suppress crime.

Uttar Pradesh Encounter Policy (2017-2022)

NCRB data records over 8,472 encounters in Uttar Pradesh between 2017 and 2022, resulting in 183 deaths and 3,302 injuries.³⁹ Senior government figures described this as effective crime control. The Allahabad High Court, in a series of orders, directed the CBI and NHRC to examine specific cases and expressed concern about what appeared to be a systematic pattern of extrajudicial killing presented as police action. The demographic profile of encounter victims in Uttar Pradesh is relevant to any assessment

of the practice. A disproportionate number of those killed came from minority communities and Scheduled Castes - groups that are structurally disadvantaged within the criminal justice system and whose families have the least practical capacity to challenge police accounts. This pattern raises the question of whether the practice operates not only as an excess of law enforcement zeal but also as an expression of social authority that the formal rule of law is supposed to constrain.

VII. INVESTIGATION AND ACCOUNTABILITY MECHANISMS

NHRC Guidelines

The NHRC has issued guidelines on encounter deaths since 1997, consolidated in 2010. The guidelines require: mandatory reporting within forty-eight hours; registration of an FIR against the officers involved; forensic examination of any weapon recovered; video-recorded post-mortem examination; and transmission of the inquiry report to the Commission.⁴⁰ The NHRC has consistently treated non-compliance as a rights violation and has directed interim compensation in cases where the State failed to investigate promptly. Between 2013 and 2020, the NHRC made prosecution recommendations in over 200 encounter deaths; the number of prosecutions actually initiated as a result is very small - illustrating the central accountability problem.

Magisterial Inquiry under Section 194 BNSS

Section 194 of the BNSS (Section 176 of the CrPC) requires a Magistrate to hold an inquiry into the cause of death where a person dies in police custody. Following D.K. Basu, this requirement extends to deaths under operational police control, including encounter deaths. In practice, such inquiries have often relied on police-supplied documents and have been completed quickly without independent evaluation. The PUCL guidelines require 15 days' completion within three months and transmission to the competent court, but compliance has been inconsistent.

³⁸"SC-appointed commission probing Vikas Dubey killing submits report," *The Hindu* (15 January 2021); Allahabad High Court order dated 16 July 2020 constituting Judicial Commission under Justice (ret'd) B.S. Chauhan.

³⁹ National Crime Records Bureau, *Crime in India 2021* (Government of India, 2022) tbl 16A; Amnesty International India, "Encounter Killings in India: Fact or Fiction?" (2022) 11.

⁴⁰ NHRC, *Guidelines on Encounter Deaths* (2010) para 5.

Independent Investigation: The Structural Problem.

The fundamental problem is not the absence of legal authority but the absence of institutional independence. The police investigate the police. The CID remains within the state police hierarchy and shares its institutional culture. The CBI requires a court direction or state consent - consent that is rarely granted where the state government has supported the encounter policy. Comparative experience confirms that independent oversight is achievable. England and Wales established the Independent Office for Police Conduct with statutory authority to investigate all lethal force incidents. Canada's Special Investigations Unit - a civilian body independent of all police services - automatically investigates every police-involved death. India has not created an equivalent body despite specific recommendations in the Law Commission's 154th Report and the Prakash Singh directions.

Prior Sanction for Prosecution: Section 218 BNSS

Section 218 of the BNSS requires prior government sanction before a police officer can be prosecuted for acts done in the exercise of official duty. This provision has been used to block prosecution in encounter cases on the argument that even a staged encounter falls within official duty. The Supreme Court in the Extra Judicial Execution Victim Families Association⁴¹ held clearly that an unlawful killing is not an act done in the exercise of official duty and does not attract the prior sanction requirement. Despite this, state governments have continued to withhold sanctions, forcing victims' families into separate litigation before any prosecution can begin.

VIII. ENCOUNTER JUSTICE VERSUS DUE PROCESS

The Case for Encounter Justice: Counter-Arguments.

Any serious analysis must engage with the arguments made in favour of encounter killings rather than dismissing them without examination. The most substantial is the institutional failure argument: India's criminal justice system is severely under-resourced - 16 trials take decades, witnesses are frequently

intimidated, and acquittal rates for serious offences are high. Where the formal system cannot deliver accountability, encounter killings are presented as filling a functional gap.⁴² A second argument is based on deterrence: the threat of an encounter deters criminal activity more effectively than the prospect of eventual imprisonment after many years of adjournment. A third argument, widely felt but less often formally stated, is the retributive one: where a person has committed a crime of exceptional cruelty, the formal system's insistence on procedural fairness is experienced as an injustice to the victim and the public.

The Criminal Law and Constitutional Response.

Each of these arguments fails under criminal law and constitutional analysis. The institutional failure argument proposes resolving the failures of the criminal justice system by directing the consequences against individual suspects, some of whom may be innocent. If institutional failure justifies bypassing due process for serious crimes, the same logic applies to minor offences. Followed to its conclusion, this produces a system in which police officers determine guilt and impose punishment without judicial oversight - a different form of institutional failure rather than a solution to the existing one. The deterrence argument lacks empirical foundation. No rigorous study demonstrates that encounter killings produce a sustained reduction in serious crime as distinct from a temporary displacement of criminal activity. The decline in organised crime in Mumbai in the late 1990s coincides with multiple other developments - financial intelligence measures, international asset recovery, and disruption of hawala networks - that make specific attribution to encounter policy analytically unreliable.⁴³ The retributive argument is the most important to address directly. The instinct for retribution in the face of exceptional cruelty is real. A constitutional democracy places this instinct at some distance from the legal process, not because the instinct is wrong, but because a legal system derives its legitimacy from independence from momentary public feeling. In *Nandini Satpathy v. P.L. Dani*⁴⁴, the Supreme Court held that police cannot

⁴¹ Extra Judicial Execution Victim Families Association (n 33), 575-576.

⁴² R.K. Raghavan (n 6) 133-134.

⁴³ Arvind Verma (n 5) 211-215.

⁴⁴ *Nandini Satpathy v. P.L. Dani*, (1978) 2 SCC 424, 437.

employ coercive methods simply because public opinion endorses them; the same reasoning applies to lethal force. In *Kartar Singh v. State of Punjab*,⁴⁵ the Court held that security concerns cannot override 17 the due process guarantees of Article 21 - a principle that applies with greater force to arguments based merely on public satisfaction.

Presumption of Innocence and the Encounter

Section 20 of the BNS expressly preserves the right to be treated as innocent until found guilty by a court of competent jurisdiction. An encounter eliminates this right: it substitutes the police officer's personal assessment of guilt for the court's determination, and imposes the most severe penalty - death - without any of the procedural safeguards that the law requires. Post-encounter inquiries have in several cases established that the victim had no criminal record, that the killing was motivated by a personal dispute, or that the victim was an inconvenient witness. The encounter system has no mechanism to distinguish the guilty from the innocent because it does not require guilt to be determined before the penalty is applied.

Rule of Law versus Popular Justice

Fake encounters represent a particular form of the rule of law problem: State actors using the forms of law - FIRs, post-mortem reports, case diaries - to conceal conduct that the law itself prohibits. This internal misuse of legal processes is more damaging to the rule of law than straightforward lawlessness because it is harder to detect and more corrosive of public trust in legal institutions. A society that endorses encounter killings as a response to the failures of the formal system has not addressed institutional failure; it has added one more form of institutional violence to a system already burdened with it.

IX.CONSTITUTIONAL ANALYSIS

Article 21: Right to Life and Due Process

Article 21 of the Constitution provides that no person shall be deprived of life or personal liberty except according to procedure established by law. Since

Maneka Gandhi v. Union of India,⁴⁶ this has been read to require that the procedure be fair, just, and reasonable. Fake encounters violate Article 21 at the most basic level: they deprive a person of life without any legal procedure; no amount of subsequent documentation remedies this. The constitutional guarantee must be available to the person before the deprivation, not constructed after it has occurred.

Article 14: Equality before the Law

Article 14 guarantees equality before the law and equal protection of the law. The demographic profile of encounter victims - disproportionately drawn from minority communities, Scheduled Castes, and the economically marginalised - suggests that the practice is not applied uniformly. Those killed in encounters are largely those least able to invoke legal protections for themselves. The Supreme Court in *Om Prakash v. State of Jharkhand* held that equality before the law requires that police officers accused of murder be investigated and prosecuted with the same rigour as any other accused. Systematic failure to meet this standard constitutes a violation of Article 14.

Article 22: Safeguards against Arbitrary Arrest

Article 22 provides safeguards against arbitrary arrest: the right to be informed of grounds, the right to legal representation, and the right to be produced before a Magistrate within twenty-four hours. In many encounter cases, the victim was in police custody at the time of death, and these protections were never made available. The practical unavailability of Article 22 protections to persons held in informal, undocumented custody is one of the structural conditions that enable encounter killings.

Constitutional Limits on State Power

The Constitution imposes limits on State power that exist independently of popular opinion. As the Supreme Court observed in *Navtej Singh Johar v. Union of India*⁴⁷ and *Indian Young Lawyers Association v. State of Kerala*,⁴⁸ adherence to constitutional procedures is not an option available to the State - it is an obligation. The State's response to

⁴⁵ *Kartar Singh v. State of Punjab*, (1994) 3 SCC 569, 634

⁴⁶ *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248, 282.

⁴⁷ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, 308 (*Chandrachud J.*).

⁴⁸ *Indian Young Lawyers Association v. State of Kerala*, (2019) 11 SCC 1.

crime must be structured by law and subject to judicial supervision regardless of the severity of the alleged offences or the intensity of public feeling. Encounter killings, precisely because they are defended on grounds of public approval and institutional necessity, test whether this constitutional obligation is real or merely aspirational.

X.CRITICAL ANALYSIS

Indian criminal law already contains the provisions needed to prosecute and punish fake encounters as murder, criminal conspiracy, and fabrication of evidence. The problem is not the absence of applicable law but the failure to enforce it. Three structural features explain this enforcement failure.

First, investigative capture: the institution that conducts encounters investigates them. Transferring the investigation to the CID, as the PUCL guidelines recommend, does not fully resolve this because the CID remains within the same state police hierarchy as the officers under investigation.

Second, prosecutorial capture: state governments that have approved or encouraged an encounter policy are asked, under Section 218 of the BNSS, to decide whether to sanction the prosecution of the officers who carried it out. The result is predictable. Despite the Supreme Court's ruling that unlawful killings do not attract the prior sanction requirement, state governments continue to withhold sanction and force victims' families into separate litigation.

Third, judicial inconsistency: trial courts have recorded high acquittal rates in encounter prosecutions, attributable to witness intimidation, destruction of evidence, and an institutional culture that measures policing success by results rather than process. Appellate correction is slow, expensive, and practically unavailable to most victims' families.

The persistence of fake encounters in India reveals a structural contradiction within criminal justice administration. While the legal framework formally condemns extrajudicial violence, institutional incentives frequently reward aggressive policing and

measure police effectiveness through immediate results rather than lawful process. Officers who conduct encounters are promoted, decorated, and publicly praised before any inquiry is complete; officers who refuse are transferred or marginalised. This tension creates conditions in which accountability mechanisms exist in theory but remain ineffective in practice. Addressing encounter killings, therefore, requires not only strengthening the legal framework but also restructuring the institutional incentives that make extrajudicial killing professionally rational for those who carry it out.

The comparative perspective reinforces the need for structural reform. In *Tennessee v. Garner*,⁴⁹ the United States Supreme Court held that the Fourth Amendment prohibits a police officer from using deadly force to prevent the escape of a fleeing suspect unless the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury. This decision, rendered in 1985, established a constitutional use-of-force standard based on objective reasonableness - a standard that Indian criminal law has never formally adopted. In *McCann and Others v. United Kingdom*,⁵⁰ the European Court of Human Rights held under Article 2 of the European Convention on Human Rights that the use of lethal force must be "necessary" - a higher standard than simple reasonableness - and that the State has a procedural obligation to conduct an effective independent investigation into every death caused by its agents. The UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has specifically noted India's failure to meet this standard and recommended the establishment of an independent investigative body.⁵¹ The convergence of these international standards around the principles of necessity, proportionality, and independent investigation underscores the inadequacy of India's current legal framework.

XI.FINDINGS

- First, fake encounters amount to murder under Section 101 of the BNS and cannot be defended on grounds of private defence, arrest powers, or

⁴⁹ *Tennessee v. Garner*, 471 U.S. 1, 11 (1985).

⁵⁰ *McCann and Others v. United Kingdom* (1995) 21 EHRR 97, paras 148-149

⁵¹ United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Country Visit Report: India (UN Doc A/HRC/23/47/Add.1, 2013) paras 45-52.

official duty where the factual conditions for those defences are absent. Prakash Kadam establishes this as settled law.

- Second, the empirical data from the NCRB, the NHRC, and the specific cases examined in this article establish that the problem is systemic. The Hyderabad and Vikas Dubey encounters confirm that the pattern persists.
- Third, the institutional mechanisms for investigating and prosecuting encounter killings are structurally compromised by the absence of independent investigation, the misuse of the prior sanction requirement, and the inadequacy of magisterial oversight.
- Fourth, the arguments advanced in favour of encounter justice - institutional failure, deterrence, and retribution - do not justify extrajudicial killing under criminal law or the Constitution.
- Fifth, the BNS and BNSS, enacted in 2023, did not address the use-of-force deficit identified by the Law Commission in 1994.

XII.SUGGESTIONS AND REFORMS

- First, the BNSS should be amended to include a positive use-of-force standard for police officers, setting out the conditions under which lethal force may lawfully be used, 21 modelled on the UN Basic Principles of 1990 and the constitutional reasonableness standard established in *Tennessee v. Garner*. Any departure from this standard should be treated as an aggravating factor in any prosecution arising from the use of force.
- Second, each state should establish an Independent Police Accountability Authority - a civilian body independent of the police and the executive, with statutory power to investigate all police-involved deaths and with authority to file charge-sheets without government sanction. Section 218 of the BNSS should be expressly amended to exclude offences involving death caused by police officers.
- Third, the BNSS should incorporate the PUCI guidelines as a statutory minimum, providing a

mandatory, time-bound investigation framework for encounter deaths with reports submitted directly to the competent court. Failure to comply should carry criminal consequences.

- Fourth, a Witness Protection Act should be enacted, giving statutory effect to the recommendations of the Law Commission's 198th Report.⁵² The current Witness Protection Scheme of 2018 lacks statutory backing and has been insufficient in encounter cases where witnesses are colleagues and subordinates of the officers under investigation.
- Fifth, the structural reforms directed in *Prakash Singh v. Union of India*⁵³ - establishment of police complaints authorities at the state level and separation of investigation from law and order functions - should be given binding statutory form. The Court's directions have been widely ignored; legislative implementation is the only way to make them effective.
- Sixth, institutional incentives that reward encounter killings must be restructured. Officers involved in encounter deaths should not be decorated, promoted, or publicly commended until all inquiries are concluded. Promotion criteria for police officers should explicitly include compliance with legal use-of-force standards and the absence of any adverse inquiry finding.

XIII.CONCLUSION

Under Indian criminal law, a fake encounter is a premeditated murder committed by a State agent under colour of official authority, followed by the systematic preparation of false records. The law on this point is clear. The Supreme Court has stated it consistently in a line of decisions spanning over two decades. The problem is not the absence of legal principle, but the failure of institutions to apply it - a structural failure, and that will not be remedied by judicial directions alone. The reform proposals advanced in this article are specific, comparatively grounded, and achievable. Their implementation requires absent political will. The BNSS's failure in 2023 to codify a use-of-force standard, to create an independent investigation

⁵² Law Commission of India, 198th Report on Witness Identity Protection and Witness Protection Programmes (2006) para 9.1-9.5.

⁵³ Law Commission of India, 198th Report on Witness Identity Protection and Witness Protection Programmes (2006) para 9.1-9.5.

mechanism, or to remove the prior sanction barrier to prosecution is a measure of how far that political will remains from what the rule of law requires. The true test of a constitutional democracy is not how it treats the innocent but how it treats those accused of the most serious crimes. When the State abandons due process in pursuit of immediate punishment, it risks undermining the very legal order it seeks to protect. The challenge before Indian criminal justice is therefore not to choose between security and legality, but to ensure that the pursuit of one does not destroy the other.

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