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Close Encounters

a report on police shoot-outs in Delhi

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People's Union for Democratic Rights

People's Union for Civil Liberties

Delhi

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Introduction

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- On 31 March 1997 two businessmen were shot dead in broad daylight by the Delhi Police in New Delhi's busy Connaught Place. The two men were unarmed and the police team involved planted some guns to show the killing was justified. After being caught out in the attempt, the killing was later presented as a case of 'mistaken identity'.
- On 26 December 2000 one person, Abu Shamal, was picked up by the police in front of witnesses from his Batla House residence in Okhla, New Delhi and later shot dead by the police. The police alleged that he had been involved in the bomb blast in the Red Fort on 22 December 2000.
- On 11 January 2002, a youth named Upender, wanted by the U.P police, was picked up by the police at night and killed outside his house in Delhi's Pandav Nagar area in front of eyewitnesses.
- On 9 May 2002, two persons named Abu Bilal and Abu Zabiullah were shot dead near the parking lot of Humayun's tomb. The police claimed that the dead men were Pakistani militants, who with 3 Kashmiri LeT militants were planning a series of terrorist attacks. There were no eyewitnesses.
- On 3 November 2002, two persons were shot dead by the police in south Delhi's posh shopping complex, Ansal Plaza, in front of an eyewitness. According to the police the two killed were terrorists of LeT and were killed in cross firing. The eyewitness refuted this claim.
- On 30 August 2003, the police shot dead two men at the Millenium Park in New Delhi. The police claimed that both were dreaded terrorists who were waiting for a consignment of arms. There were no eye witnesses.
- On 8 December 2003, the police shot dead two persons, allegedly Pakistani terrorists, near the Lotus Temple in South Delhi. There were no eyewitnesses.
- On 15 August 2004, at around 10 p.m., police shot dead a person near a shopping complex in Dwarka in South West Delhi. The police claimed that he was a 'terrorist'.
- On 6 October 2004, at around 11 p.m., the police shot dead Amit Shokeen, aged 22, in North-West Delhi. The police claimed to have arrested one of his accomplices, Sher Singh. The second associate, Dharmendar, managed to escape. According to the Police they were on their way to extort money from a businessman in Rohini area.

The above list of a particular category of killings committed by the police in Delhi, officially termed 'encounters', is by no means comprehensive. While the immediate context of encounters, and the police or authorities that commit such killings vary across the country, certain features remain common. Whenever an unnatural death takes place the police are supposed to file a case and investigate the incident because it is a cognizable offence. In other words the police have to take note of it. In the case of ordinary

citizens it is through the investigation and trial that it is finally determined whether the death was due to an accident or deliberate murder or whether the killing was done in self defence. But when the person/s killed suffer unnatural death caused by agents of the state the killing is never investigated. The routine police claim that the person killed in an encounter actually fired at the police team and that the police fired in self-defence is not corroborated but accepted as truth.

The police who carry out the encounter state that the person killed was a terrorist or a dreaded criminal or gangster. They claim to have got 'information' about their whereabouts through private, secret and again unverifiable sources. They identify the bodies and find 'evidence' which show the intention of the accused to commit a terrorist 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 the killing against the police team. As per the law the police can legitimately cause the death of (kill) a person either in exercise of powers of arrest or in the exercise of the right to private defence. The circumstances under which such exercise is permissible are delimited and clearly laid down. Under all other circumstances the killing is a murder or culpable homicide (See box - What the law says). Only an investigation by an impartial agency can ascertain whether the police action was justified as per the law.

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 rather, the failure of eyewitnesses even if 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.

Several court cases and petitions to the National Human Rights Commission (NHRC) have been filed regarding such killings, alleging that those were fake encounters. Following one such petition filed by the Andhra Pradesh Civil Liberties Committee (APCLC) into five cases of false encounters in AP in 1995, the NHRC issued instructions to all Chief Ministers and through them to the DGPs that every encounter killing must be investigated independently as a cognizable offence in itself and the police version of events established following inquiry. (See Annexure on NHRC Directions). The NHRC clearly directs the police to carry out independent investigation to establish the police version of every such killing. These directives have not been followed, till date.

The fact of the matter remains however, that every time the police claims to have killed someone in an 'encounter', its version of events remains unverified. What's more, the police force is congratulated on its success in eliminating a 'dreaded criminal or terrorist'. Public opinion is moulded to accept the police claim, and in an atmosphere of general fear and suspicion regarding public safety, no one bothers to question the police. In short, the police are treated as above law and the implication is extremely serious. To believe readily that the person killed was indeed guilty and he or she need not have been arrested, interrogated and put to trial but instead ought to have been killed is a dangerous one. By treating the police as different and above law, it allows for the routine violation of the rule of law. And each time this happens, democracy and rule of law die a little.

Apart from encounters, people die in the custody of the police too; that is after they have been formally arrested by the police. Custodial

What The Law Says

There are two laws governing the exercise of power of police to the extent of causing death of a person. These are related to the exercise of power for arrest and right to private defence. Under law such exercise is permissible is delimited and clearly laid down:

Arrest

Under Section 46 of the Code of Criminal Procedure (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 that nothing in this section gives a right to cause the death of a person who is not accused of an offence punishable with death or with imprisonment for life.

Right of Private Defence

The right of voluntary causing the death of a person in exercise of the right of private defence is laid down in Section 100 of the Indian Penal Code (IPC) and is available to any person. There are no special rights of private defence available to police officers.

Section 100 IPC spells out the situations in which right of private defence may be exercised to the extent of causing death of a 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.

Whether the causing of death falls within the prescribed limits enumerated in these provisions can only be ascertained by a proper investigation by an impartial agency.

deaths are also blatant murders committed by the state authorities and are heinous crimes. However, there is an important difference between these and encounter killings. Custodial killings occur in the context of custodial torture - often while using third degree methods of torture while interrogating a suspect. The fundamental objective is thus not to kill - custodial killings are the unintended result of routine police torture. Encounter killings are however brought about, most often, by well-armed posses of police who specifically target and kill the alleged accused. They are summary killings by the state, and unlike in custodial deaths the intention and preparedness of the perpetrators of the killing is not in doubt.

They therefore violate the rule of law fundamentally. To think otherwise is to imbue the police with total infallibility and incorruptibility, for which there is little ground. No agency of the state or society is above the law. Why then should these claims of the police not be investigated?

Protests against the killings by the police have happened. Besides, family members of the deceased, civil rights organizations have been raising the question of encounters, particularly false encounters. Since, such killings take place quite frequently in areas where struggles and movements against the state are ongoing, the police version needs to be doubly cross-checked. It is true that there

are movements that are armed and it is also true that there are occasions of genuine exchange of fire between armed persons and the police. It is for this reason that the distinction between 'real' and 'fake' becomes crucial. It is a fact that in areas of sustained struggles like Punjab (1980s), or ongoing struggles in Kashmir, North-East or Andhra Pradesh, killing the activists of the movements, their associates or even sympathizers through fake encounters have been used by the state as a means of repression against the movements. Yet, even when the person killed in the encounter is definitively identified as being part of a militant group, or is a known criminal, there is at present no procedural mechanism to prove that the encounter took place in the manner the police claims.

Apart from killings that happen in movement areas, the practice of eliminating individuals within city limits is a relatively new phenomenon. As the list provided at the start of this report indicates, encounter killings in Delhi are not replays of genuine

exchange of fire between the militant and the police. In some of these cases, the presence of eyewitnesses (who later turned hostile) or the sheer absurdity of the police claim has made it possible to examine the story more minutely. This report is an attempt to raise some questions about a few of these 'encounters' – regarding both the identity of the victim, and the actual event and what follows after. PUDR and PUCL have raised the issue and have been trying to investigate the increasing numbers of encounter killings in Delhi. Of the cases listed above, PUDR had previously investigated the Okhla encounter of 2000 and the encounter killing of Upender at Pandav Nagar in 2002. Besides verifying the police claim, the attempt was also to find out whether an independent investigation into the killing had been conducted, as per NHRC guidelines. However, fact-findings into encounter killings are hard to carry out, primarily because there are no witnesses, and only the police version is available, and that too with some difficulty. The attempt to meet officials of the Special Cell proved fruitless and the Police Commissioner was equally

National Human Rights Commission Recommendations

The procedure routinely followed by the police in encounter killings has been pronounced as unjust, unfair, unreasonable and in violation of the right to life under Article 21 of the Constitution by the National Human Human Rights Commission (NHRC). The Commission has clearly laid down that:

1. The procedure of drawing up First Information Reports (FIRs) with the deceased in the 'encounter' as the accused persons and then closing the case without investigation on account of the death of the accused persons was not permissible under law.
2. That when information is received that death was caused in an encounter as a result of firing by the police, prima facie the ingredients of culpable homicide under section 299 of the Indian Penal Code (IPC) are satisfied. This is sufficient to suspect that an offence of culpable homicide has been committed.
3. Any plea like causing of the death does not constitute an offence either because it was done in exercise of the right of private defence or in the exercise of the powers of arrest can be accepted only after investigating into the facts and circumstances.
4. It is in public interest and to avoid the possibility of bias the investigation in such cases should be entrusted to an independent agency by a general order of the Government.

unwilling to answer queries (see box "Unanswered Queries").

In 2003, however the joint team was able to begin investigation into at least one encounter killing, and make some headway. This was the encounter that took place on 30 August 2003 at the Millennium Park in Delhi. In this encounter, we were able to proceed only because the mother of one of the two men killed, a resident of Sikandrabad (Bulandshahar, U.P), had filed a petition in the NHRC alleging that her son (Rafiq) had been picked up by the police prior to the encounter. Two of her other sons have been arrested under POTA. We met the local Sikandrabad police, though the officials of the Special Cell in Delhi refused to meet us, and the Police Commissioner is still considering his response. We were also able to read the charge sheet filed in the case. We were able to meet Rafiq's family and neighbours in Sikandrabad. The other person killed was supposedly from Pakistan, and as usual, no details could be got about him.

In the course of following up the Millennium Park encounter and meeting lawyers who were handling such cases, we were also able to come across the charge sheet in the case of the encounter killing that took place outside Humayun's Tomb in May 2002. In this case, those killed were allegedly Pakistani militants. A close reading of the charge-sheet exposed the kind of irregularities that occur in encounter case investigations, and a complaint made in court by a person arrested as an alleged conspirator in the case provided an avenue to question the police version.

This difficulty of getting information about encounter killings is part of the problem. In both these cases, the police have arrested persons who are crucial to the way in which the encounter is staged or to the case. However, it has not been possible to meet them and get an independent account from them. In the Millennium Park encounter, the

Unanswered Queries

We met the Police Commissioner of Delhi Police on 21 April 2004 and asked him for a complete list of encounter killings in Delhi and the police version of the incidents. Apart from this some other queries put to him were:

What is the role of the Special Cell? How long has it existed? What is its arena of activity, and nature of accountability? Are all police authorised to carry out encounters?

In our experience, it is either Special Branches attached to particular Police Stations or the Special Cell that carry out encounters. Are they not required in law to take the permission of the local police? What kind of coordination is done on the ground, in practice, with police of local areas (where the encounter occurs) when these teams go to apprehend the accused?

What is the process of identification of bodies of those killed in encounters? To what extent are NHRC Directions on Encounters passed in 1996 being followed?

We were told that the Commissioner would get back to us with his response after the Delhi elections on 10 May 2004.

We are still waiting!

presence and willingness of the family members to talk to the civil rights team and in the other, the presence of a letter to the court by one of the accused, opened up the possible ways of inquiry. This report seeks to make more visible the entire range of violations that take place in this mode of policing, by looking more closely at the Millennium Park and the Humayun's Tomb encounters.

The Millenium Park Encounter

On 30 August 2003, Rafiq, a resident of Sikandrabad, U.P and Mumtaz Sahid aka Zahoor, allegedly a Pakistani militant were killed in an 'encounter' by a team of the Special Cell of the Delhi Police at the Indraprastha Park (known as Millenium Park) in Delhi. The police claimed they were 'dreaded terrorists' who had been waiting there to receive a consignment of arms to carry out terrorist attacks in Delhi. An FIR 70/2003 dated 30.8. 2003 u/s 3/4/5/20/21 POTA, 121/121 A/122/123/120B IPC, 4/5 Explosive Substance Act and 25 Arms Act, P.S. Special Cell, Lodhi Colony was lodged. The FIR named 8 men who were apparently involved. In addition to Rafiq and Mumtaz, two others (allegedly one Pakistani and one Kashmiri) had been killed in separate encounters elsewhere. Of the other accused, two were Rafiq's brothers - Rais-us- Zama and Atiq-us- Zama.

The Police Version

According to the police, they acted on intelligence reports and apprehended a truck from Kashmir carrying arms, ammunition and explosives hidden among crates of fruit. They arrested the driver and cleaner and one Noor Mohd. Tantray who had come to take the consignment from them at Qutub Road parking lot at around 7.45 p.m. on 30 August 2003. All three turned out to be JeM militants and Noor Mohd. revealed that they were to pass the consignment to one Zahoor and one Aslam at Millenium Park. The police from the Special Cell under ACP Rajbir Singh reached the Park with Noor Mohd. and when a car bearing the two drew up, told them to surrender. Instead they started firing and in self-defence, the police fired and injured both militants, who were declared dead on arrival at AIIMS. No policeman was injured. Noor Mohd. then disclosed that two brothers of one of the dead terrorists, Rafiq (identified by the police as Aslam), were also involved and that they had undergone militant training in

Pakistan. Acting on this, the police carried out a raid on their house in Sikandrabad, U.P. on 31 August. The two, Rais us Zama and Atiq us Zama were arrested, interrogated and based on their evidence, cash and explosives recovered from the house. The men were all arrested under POTA and initially remanded to the custody of the Special Cell. They gave confessional statements before the DCP, Special Branch, Ujjwal Mishra. Rais identified the body of his brother and Noor Mohd identified the other person killed in the encounter. The accused were then sent to judicial custody. The investigation was carried out by Inspector Hridaya Bhushan, also of the Special Cell and the chargesheet placed in court on 7 January 2004, just over 4 months after the incident.

Rafiq's Family Background

Rafiq us Zama, allegedly a 'dreaded terrorist', lived in Sikandrabad in Bulandshahar district, U.P. One of eight children (5 brothers and 3 sisters), he lived with his mother, Shakeela. Apart from his mother and him, the household in Sikandrabad consisted of two sisters and two brothers, Rais and Laiq. The fourth brother, Atiq, lived in Bombay.

Rafiq was primarily a tailor working on piece rate commissions, sourcing his work from a tailor master Azgar Ali. His earnings fluctuated between Rs. 50 to Rs. 100 per day amounting to Rs. 2,000-2,500 a month. In addition, since July 2003, Rafiq along with his brother Rais, had started selling slippers (*chappals*) by the roadside. They would purchase the *chappals* from Sadar Bazaar in Delhi and had rented a room in the *jhuggis* in Rana Pratap Bagh at Rs. 500 per month for this purpose. The first month they sold the goods in weekly markets in Delhi but in August they started selling on the road outside their house in Sikandrabad. Rais worked at a STD/PCO shop. Laiq is employed as a peon in a school nearby. Atiq, the Bombay

brother, used to get sequined embroidery (for which Sikandrabad is famous) done on order.

Since Rafiq's maternal grandfather lived in Karachi, the family had visited Karachi over the years. One brother, Mushfiq, had settled there in April 2000 and Rafiq was planning the same. Rafiq was nearly 31 years old when he was killed. He was engaged to be married in Karachi to his first cousin. He had visited Pakistan a few times previously, and his last visit lasted from 23 March 2000 to 5 June 2001. A month after Rafiq's return, his two brothers Rais and Atiq went to Karachi. The build-up of tension on the border and secession of diplomatic ties following the Parliament attack led to a situation where they could not return at all. In this situation, the two brothers destroyed their passports and returned to India via Bangladesh.

In 2001, Rafiq, along with some other neighbours, had intervened in a case of domestic violence involving one of their neighbours, Mohd. Amil. This resulted in a fight and a case, which was eventually dismissed on 13 August 2002. However, while the case was going on, sometime around May-June 2002, an anonymous complaint was made to the police alleging that Rafiq had established terrorist links during his Pakistan visits. Neighbours suspect that Amil had made the complaint. This led to an enquiry by the Local Intelligence Unit (LIU) at Bulandshahar, which found the charges unconfirmed. The enquiry was closed. The local PS at Sikandrabad was unable to confirm any previous case against Rafiq.

Sequence of Events

According to the family, Rafiq went to Delhi on 28 August 2003 to purchase *chappals*. He was supposed to return that night itself. When he did not return, the family was worried but assumed that he had stayed on at the rented room in Delhi.

First Visit by the Police in Plainclothes

Around 2.30 or 2.45 p.m. on the next day i.e. 29 August, four persons came looking for

Rafiq's house, and barged in claiming to be Rafiq's friends. One of them gave Shakeela, his mother, a black polythene packet containing guavas and bananas. She objected to their forcible entry and directed them to sit in the adjacent room (*mardana* area-where men could sit). Their behaviour was aggressive. One of the men made a call on his cell phone and asked Shakeela to speak to her son. Shakeela called Rafiq's name thrice before he answered. He was crying and said "*Ammi ye mere dost hain.*" (Mother, these are my friends). Then they took the cell phone away. Shakeela was shocked and thought that these were kidnappers who were holding her son.

Three of the men went into the rest of the house, apparently searching for something. They came back and told Shakeela to pay up Rs. 1.5 lakhs if she wanted her son back. When she replied that she did not have that kind of money, they told her to make arrangements for it.

The man made another call, this time speaking to some Narender. He then handed the phone to Shakeela saying she should speak to her son. Rafiq told his mother to pay them whatever they asked for. At this, Shakeela told them that she would be able to get Rs. 85,000 from the post office savings account the next day. She was told they would return for it the next day and warned her not to tell anyone about their visit. The entire visit by these four lasted barely 15 minutes.

On hearing what had happened, Rafiq's brother in Bombay, Atiq, reached Sikandrabad on August 30. In the meantime, Shakeela had withdrawn Rs. 85,000 from the post office (all her savings), but no-one came to collect the money that day. The PUDR team checked the pass book and verified withdrawal of Rs 85000 from the post office dated 30 August 2003.

The Second Visit by the Police

In the early hours of 31 August a large number of policemen, some in plain clothes and others from the local police station in

uniform, came to the house. On entering, a police officer who, she later learnt was ACP Rajbir Singh, told Shakeela that Rafiq had been killed in an encounter. Shakeela and her two daughters started crying uncontrollably.

The policemen spread themselves all over the house. They pulled the 3 sons out of

the rooms where they had been sleeping. They were questioned about their identities and employment. Then Laiq was kept in a separate room and Rais and Atiq together in another room. The ACP told Laiq that he was the one who looked most like a terrorist.

The policemen searched the house. After

Popular Perception

The advertisement for a recent Hindi film, '*Ab Tak Chappan*' about the Mumbai 'encounter specialist' policeman Daya Nayak says, "It's a dirty job, but someone has to do it" referring to encounter killings by the police.

Another statement which the real policeman who has inspired the film made in the course of a press interview is "I am the No. 1 cop in India, and I have the greatest job in the world,....I get to kill gangsters."

The word 'encounter' is now quite familiar in vernacular speaking regions and cities across India. In hard definition encounter killings are extra-judicial killings by the police, often from some specialized wing or branch. Among the metros it was Mumbai where the method of encounter killings first became a 'normal' part of policing since the early 1990s to combat the underworld and gangsters. Post bomb-blast in 1993 saw the rise of several policemen as 'encounter specialists' in the city, who now targeted 'terrorists'. Police sub-inspector Daya Nayak has killed at least 82 people in encounters in Mumbai. Others like Pradip Sharma also in Mumbai have killed at least 100 persons in such encounters'. Thus, approximately 600 persons have been killed in Mumbai in such 'encounters' between 1998 and 2004 (10.8.04, www.newsday.com, article by Dan Morrison)

The same method was used in U.P where in the mid 1990s a large number of petty criminals, gangsters, 'dacoits' began to be similarly killed by the police. At about the same time such 'encounters' started being carried out by the police in Delhi, initially against 'criminals' and 'gangsters' often at the U.P border, and then increasingly against 'terrorists'. The problem of terrorism is a real one, but public fears about terrorist attacks in the capital are often directly correlated to the use of encounters as a regular tool of law enforcement. The encounters are often timed to create a sense of moral panic among the public, a feeling that the nation is under siege. Consequently, there is often public sanction to the idea of killing 'terrorists', whether or not they have actually committed a crime, in the name of public safety. Delhi has developed its own 'encounter specialists' among policemen. In popular perception, in view of the fears about terrorism, these police officers who kill terrorists and gangsters in summary manner emerge as modern day heroes, delivering instant justice.

The Special Cell of the Delhi police has over the past half a decade or so emerged as the prime unit in the city which has specialised in crimes related to 'terrorism'. Not coincidentally therefore certain officials of the Special Cell of the Delhi Police are among those who are spectacularly 'successful' in carrying out several encounter killings. Apart from the Special Cell, Special Branch units in various police districts have also killed several gangsters and known criminals in such encounters. The outcome of participation in 'successful' encounters is often promotions, and higher ranks.

most of the policemen had moved out of the rooms, one policeman came out with three small black plastic pieces and some wires and Rs. 85,000. They were told that detonators and money had been recovered from the house. Shakeela was asked to sign a statement stating that these belonged to Rafiq. She refused. The police party then took the three sons out of the house. During this period other residents were forced into their houses and not allowed to witness the happenings.

The Sikandarabad PS Version of events

A policeman at the Sikandrabad PS confirmed to the PUCL-PUDR team that a team from the Special Cell, Delhi, had come there on the morning of 31 August. They brought Rafiq's three brothers (Rais, Laiq, and Atiq) to the PS. The policeman stated that 30 detonators, 3 remote control devices and cash had been recovered from the house. According to the Sikandrabad police, Rais and Atiq confessed to the crime. Despite a clear rule that special police going into areas covered by other PS should contact the local police, the Sikandrabad police denied that any such rule existed.

While at the PS, Laiq saw 2 of the men who had come to their house on 29 August sitting with the Delhi police team. This led him to connect the two visits. He was questioned at the P.S. separately from his brothers. All 3 were made to sign on blank sheets of paper. Laiq recalls that the ACP chastised the local SHO for making an entry in the General Diary (GD) at the PS pertaining to the coming of the Special Cell and the picking up of the 3 men. Laiq was then given a slip of paper with the name and phone numbers of the ACP to collect the body of his brother. The Special Cell policemen left Sikandrabad and took Rais and Atiq with them around 11-11:30 a.m. They were apparently arrested though no custody memo was given. The local police let Laiq off in the evening as they had been asked to do by the ACP, Special Cell.

Laiq's Struggle to get Rafiq's body

Laiq went to Delhi the next day along with a local Congress worker to obtain Rafiq's body. At the Special Cell, Rajbir Singh repeatedly told them to bury the body in Delhi itself. The family refused to do so. Even getting the body was difficult and it was only after a court ruled in their favour on 4th September, that they got the corpse.

The post mortem examination was being carried out when the family reached AIIMS, in the presence of ACP Rajbir Singh and other policemen. Rajbir Singh warned Laiq not to go to the court over the encounter killing because Rais and Atiq were in their custody. He even offered legal assistance to ensure that lesser charges were framed against these two.

Rafiq was eventually buried in Sikandrabad, with the family given a mere two hours time by the police to complete the burial. Family members noticed marks around his wrist and legs, which could be the consequence of being tied up.

Atiq and Rais under POTA

After they were picked up by the police, Atiq and Rais were taken immediately to the courts and remanded to custody of the Special Cell for 10 days. On 10 September they were presented in court and remanded to judicial custody under POTA. During the period when they were in Special cell custody, (on 6 September) Rajbir Singh got Atiq and Rais to call their mother and brother saying that ACP Rajbir was demanding to see them. Ostensibly it was to get the family to collect their clothes and other possessions before they were sent to jail. Shakeela Begum did not go to see Rajbir Singh on this occasion. She approached the NHRC on 29 September 2003 alleging that the encounter was fake.

The fact that Rajbir Singh had been urging them to not counter the police version in court, also his later demand to see Shakeela Begum while Rais and Atiq were in his custody, perhaps explains the harshness of the charges filed against her sons. (under FIR

70/03, Special Cell, Lodhi Colony). The chargesheet was filed on 7 January 2004 and the court has filed the charges and it is currently listed for evidence recording.

Questions

No case filed regarding the killing: Two persons were killed in the incident. The police are perpetrators of the killing. However no FIR has been filed into the incident of the killing itself nor has any independent inquiry been initiated. This violates the rule of law. It is also a blatant violation of NHRC directives on encounter killings.

Violation of Natural Justice: Given the allegations made against the Special Cell by Rafiq's mother to the NHRC (Case no. 2461/30/2003-2004) the fact that the same Special cell is investigating the cases against Rais and Atiq goes against the principles of natural justice and also casts doubt on the impartiality of the investigation.

Pre-meditated Encounter: Rafiq was killed on 30 August. His mother's statement describing the visit of the Special Cell personnel on 29 August, their demand for money, the phone conversation on their cell phone with the detained Rafiq via one 'Narender'- all suggest that Rafiq was already in custody, and there was no real encounter.

The Bypassing of Normal Policing Provisions: "Encounter specialists" seem to be a law unto themselves, even in relation to other sections of the police force. For instance, when entering into another district, permission has to be sought from the local police- it is unclear whether such permission was taken by the Special Cell personnel when they went to Sikandrabad. Indeed, even such a normal practice as entering the day's events into the general diary, seems to have been frowned upon by the Special Cell. Also, the fact that the same policemen who killed Rafiq were present during the post mortem examination, casts doubt on the impartiality of such examinations.

The Perils of POTA: The entire case against Rais and Atiq rests on a statement by a co-accused, Noor Mohd. Tanttrey and 'confessional statements' by them made before the police. In fact, according to the police, it was Noor Mohd.'s statement which led the police to carry out the 'encounter'. What is the evidentiary value of these statements? In the face of Laiq's statement that all three brothers were made to sign blank sheets of paper, the police claim that these were 'free and fair' confessions becomes extremely weak. It is here that extraordinary laws like POTA come in, giving unchecked powers to the police and executive. It is only under POTA that 'confessions' regardless of how they are procured, can become the basis for arbitrary charging and detaining persons in custody for lengths of time. Such flimsy evidence would not be acceptable in any normal court of law. It must be reiterated that all the confessional statements were taken under POTA while the accused were in custody of the Special Cell.

This case also is an example of the hollowness of the supposed safeguard of POTA - that the confessions before higher police officials are free and voluntary. In this case, on 8 September, the two accused asked for some time from the DCP to think over the matter. Immediately after this request they were taken back to police custody. When presented before the DCP the next day they showed their willingness to 'confess'. Following this, both Rais and Atiq 'recorded' almost identical 'confessional statements'. The possibility that this sudden change was the result of torture meted out in police custody cannot be ruled out.

The Millenium Park encounter and the subsequent arrests show how laws like POTA abet the lawlessness of the executive. They create an alibi for encounters like these, which, pending verification and independent investigation, amount to nothing short of murder.

The Humayun's Tomb Encounter

In the alleged encounter killing which occurred outside Humayun's Tomb, near the Nizamuddin Railway Station on 9 May 2002 two men, Abu Zabiullah and Abu Bilal were killed. Two separate FIRs were filed: one against the two men who were killed and in which, the case was subsequently closed (9/2002); and another against 3 other accused who were apprehended by the police before the encounter (8/2002). The Special Cell, Lodhi Colony, carried out both these operations.

The Police Version

The gist of the police account given in the FIR is that 3 Kashmiri 'LeT' militants- Sajjad, Mehrajuddin and Firoz were apprehended by the police near the VIP parking area outside Nizamuddin Railway Station at around 8.30 p.m. on 9 May 2002. The police led by Inspector Mohan Chand Sharma had acted on the basis of 'secret information'. Explosives, detonators, RDX and Rs. 2 lakh in cash were supposedly recovered from them and they confessed to being LeT militants who were going to carry out terrorist attacks. They supposedly revealed that they were to meet 2 Pakistani LeT militants ('Abu Bilal' and 'Abu Zabiullah') in the parking lot outside Humayun's tomb in a Maruti car, with the number plate, DL 4C F 5392. They also told the police that the 2 Pakistanis would be heavily armed.

After this, a team of policemen from the Special Cell under the leadership of ACP Rajbir Singh, went by Gypsy and 3 private cars, and reached the Tomb parking. They split into 4 teams, surrounded the car of the 2 'terrorists' and told them to surrender. The two 'terrorists' fired at the police team and the police fired at them in retaliation. In the course of the supposed exchange of fire, one of the terrorists ('Abu Zabiullah') managed to go inside the DDA Park near the parking lot outside Humayun's Tomb while the other ('Abu Bilal') reached its 'zigzag' entrance.

They were both severely injured. The police disarmed them, and took the two for 'treatment' to hospital. The FIR then states that the two were accused of attacking officers on duty with an intention to kill. The above account is signed by Inspector Mohan Chand Sharma of the Special Cell. One Inspector Gurcharan Singh adds to the FIR account, describing how he reached the spot after the 'encounter', recovered empty cartridges, guns etc. at the site of the 'encounter', and found the Maruti car and other signs of the 'encounter'. He reports that the 'terrorists' (who had supposedly been taken for 'treatment' to AIIMS) were 'brought dead' to AIIMS at 10.55 p.m. The dead men were charged with attacking the police, intending to carry out terrorist activities and thereby challenging the unity, integrity and security of India, under S. 353/186/307/34 IPC and S. 25/27 Arms Act, S. 3, 4 of POTA.

Mehrajuddin's Version

Mehrajuddin, one of the men arrested near Nizamuddin Railway Stations, on whose tip off the police allegedly acted, had a completely different story to tell. In a letter submitted to the POTA court, Mehrajuddin refuted the police claim that he and two others had revealed information that led the police to the two dead 'terrorists'. Mehrajuddin's letter denies any involvement with terrorist activity.

Mehrajuddin's story begins from the time when he was a student in Bombay. He had recently returned from Kashmir where he had gone as his exams in Mumbai had got postponed. When he returned on 25 April 2002, he went to one Mohd. Shafi's house, a fellow Kashmiri since he needed a place to stay. He knew nothing of Shafi's work. On 29 April, around noon, two persons who he initially thought were carpet sellers but later learnt were Inspector Mohan Chand Sharma and S.I Dutt came to the room and asked for

Mohd. Shafi. Mehrajuddin told them that he had gone out about half an hour earlier. He was then duped into coming out of the room, pushed into a car, blindfolded and beaten and repeatedly asked about Shafi's whereabouts. When he repeated his earlier response and pleaded ignorance, he was beaten further. He was also threatened with death if he asked questions as to why he had been picked up. He was then taken in a plane with wooden seats (again blindfolded) and brought, as he later learnt, to Delhi. He was taken blindfolded on a 20-30 minute road journey to a room where he was illegally detained for about 10 days. Then he was told to bathe, change clothes and shave and told that he was to be released. However, he was taken after a 40-50 minute road journey (again blindfolded) to a room where he found Inspector Mohan Chand Sharma who showed him two other unknown men (who he later learnt were called Sajjad and Feroz) and asked if he recognized them. Neither recognized each other.

Mohan Chand Sharma then told them that they would have to 'recognize' the dead bodies of two men or else they would all be killed like those men (Bilal and Zabiullah) had been. Mehrajuddin and the other two agreed. They were again handcuffed and taken to Nizamuddin Railway Station, where their handcuffs were removed and they were asked to get off and walk. Even as they did so, the police made loud sounds of 'Pakad liya' ('Caught them')- after which the police again handcuffed them. Bags were put before them and a few packets, claimed by the police to be RDX were 'found' inside the bags, even as people had started gathering around. They were then taken to the 2 dead bodies, which they were asked to 'recognize'. After this they were taken to the Special Cell, Lodhi Colony where they were given death threats if they disclosed anything, or did not obey the police in the future. Then all three were made to sign a number of blank papers.

The following day they were presented before the press and then in court. Some days later they were made to sign a few papers but were not allowed to read what was written in them. After this they were forced to write a statement expressing willingness to depose before the DCP (similar to Rais and Atiq's statement of 7 September 2003 following their arrest after the Millenium Park encounter). They were then presented before the CMM who only asked about their names, ages, residence and qualifications. The police including Insp. Mohan Chand Sharma were always there with them. They were then shifted to jail.

Questions

No case filed regarding the killing: Two persons were killed in the incident. The police are perpetrators of the killing. No FIR has been filed into the incident of the killing itself nor has any independent inquiry been initiated. This violates the rule of law. It is also a blatant violation of NHRC directives on encounter killings.

Pre-meditated Encounter: Mehrajuddin in his account presented in court stated that he was wrongly arrested and forced to falsely 'identify' the dead terrorists. The police had threatened to kill him in an 'encounter' if he failed to comply. This casts severe doubt on the police version of their guilt and arrest. It interrogates the police story of an 'encounter'. It also exposes the methods used by the police of illegally detaining, harassing, interrogating people and ultimately concocting an 'encounter' which remains uninvestigated.

Identification of the Accused: The police alone were responsible for 'identifying' the 2 allegedly Pakistani 'terrorists'. No questions have been raised about the basis of the identification of the 'bodies' and the police version again remains unverified, despite Mehrajuddin's severe charges against them.

Encounter killing in Pandav Nagar

On January 11, 2002, the Special Staff, East Delhi, killed a young man Upender at his residence in Pandav Nagar. The police claimed that it was an encounter but the family maintained that it was a cold-blooded murder as Upender neither resisted arrest nor fired at the police. PUDR investigated the case.

Police version: According to the then Additional DCP East district, Mr. R.K.Sharma, the DCP had created a special team of policemen which was under his direct control. A few days before, a team of UP Police had come to Delhi looking for Upender 'Kanu', a criminal suspected in the case of the murder of Inspector Pritam Singh of the STF in Ghaziabad. However, the police had not been able to find concrete evidence against Upender. A CBI investigation was conducted and Upender was interrogated, but allowed to leave due to lack of evidence. The police were, however, certain that he was involved. This time, when Upender was killed, the police had received information that a horde of weapons was stashed away in his house and had gone to recover them. They also claimed that there were several cases against Upender in UP and also a reward of Rs. 10000 on his arrest.

On 11 January, a team of 10-12 policemen (special team) went to his place upon orders they had received from the DCP. They knocked on the door at night, 10.30- 11.00 p.m. The house is on the first floor but with a low balcony from which a desperate man could jump off, so police not only came to the front door but also stood below the balcony. Upender probably figured out that the police had come and bolted the front door. He took out his country weapon and started firing at the policemen below, while taking cover. The policemen fired from below and Upender was shot probably once or twice and there after he either jumped off or fell from the balcony. When the Add. DCP reached the spot he saw the body on the ground with a country made gun (katta) in his hand. He then conducted a search and found a second country made gun from the house and some ammunition. The PUDR team was told that there were journalists present when these were found while searching the house. The police agree that there were no cases against Upender in Delhi.

The police at Trilok Puri P.S filed two FIRs on the same day No. 14 and 15; one regarding the firing and the second regarding the recovery of weapons (cartridge and one country made pistol). No FIR was filed against the police.

Family version: According to the family, on the fateful night at around 11 p.m., they heard loud knocking on the door of their first floor rented house. Even as they were unlocking the door, a group of policemen in civilian dress entered through the balcony. They entered the corner room where Upender was sleeping, picked him up and pushed him out of the window. According to the petition filed by the family in High court, the brother heard Upender asking the police " why are you firing? I will come with you." That was the last time they heard his voice. After throwing Upender out, the police then shot him dead right outside the house. A big pool of blood could be seen even two weeks after the incident even though it had rained several times in that period.

After this Upender's brother Devender, his father Chandra Bhan and his mother were taken to the Trilok Puri P.S. The mother was allowed to leave after some time, but the father and

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brother, were handcuffed and detained throughout the night and the following morning. The father's handcuffs were removed only after an ACP came and asked the police to do so. At around 12 noon both were taken to the LBS hospital for medical examination. The father was released in the evening of January 12 and Devender was produced before the magistrate and remanded to judicial custody. He was arrested under the Arms Act. He was later released on bail on January 14.

According to the family, Upender was unemployed and was studying at the University. There were two cases against him in Ghaziabad u/s 307 and 302 and he was out on bail. There was no case against him in Delhi. Upender's family claimed that the police tried to cover up the fake encounter. To substantiate their contention the following arguments were made by them.

The family filed a case in Karkardooma court on 14 January, 10 a.m., requesting that the post mortem be conducted in the Lal Bahadur Shastri (LBS) Hospital where the body had been kept. The court sent notice to the police and hospital by a special message to respond. It reached the police by 3 p.m. They responded by saying that a team of doctors at the Sabzi Mandi Mortuary was already conducting the post mortem examination. But the family through their lawyer, later discovered that the body had been actually shifted out at 4.30 p.m. from LBS hospital. They claimed that it was a violation of a recent order of the LG that post mortem must be conducted in the nearest hospital marked as a 'police' hospital to avoid delays in the same. By this logic all dead bodies under Kalyanpuri, Trilokpuri, New Ashok Nagar, Mandavali, Preet Vihar, Mayur vihar and Shakarpur, should be taken only to the LBS hospital for post mortem.

According to the family the police did not want the post mortem to be conducted in LBS to avoid dermal nitrate test for backspatter, which can prove whether there was any firing from the side of the deceased. At LBS one of the doctors' carries out this test in cases of such killings and the police were scared that in this case too, such a test would be ordered and the truth would come out. Moreover the family also states that Upender's clothes etc. were not sent for post mortem.

The police also claimed that a 'mukhbir' had informed SI Vinay Tyagi that Upender had stashed arms, but the party that killed Upender in fact did not search the place – the search was conducted by the team which came later. The family also raised the question that if Upendra also fired at the police, how is it that no policemen was injured. Police claim that they found 10 AK 47s and 3 pistols in the house but no receipt of *baramadi* was given to the family. The family refused to take the body and filed a case in the High Court on January 17 and the court ordered a CBI inquiry into the incident and dermal nitrate test. The request for a second post mortem however was not accepted. The body was finally cremated on February 23.

The PUDR team talked to 5-6 neighbours. All of them said that they were not there at that time of the incident or that they did not see anything because it occurred late at night and that too in winters or that they were sleeping. It was quite obvious that they were not willing to speak because of the fear of the police.

This incident of killing by the police is exceptional in the sense that an independent investigation is taking place into it. This became possible only because of continuous perseverance by the family. The principle of natural justice demands that independent investigation should be mandatory and the police should not be allowed to sit on judgment over its own acts.

Conclusion

Every other day the newspapers carry the news of some persons being shot dead by the police. These killings are termed as 'encounters' by the police. It is only after the death that the official version declares that the person killed was 'in fact' a dreaded terrorist or gangster. The word 'encounter' has become a part of the vocabulary of the common people. In fact, Bollywood has been 'inspired' to encash the issue in a number of films the latest being 'Ab tak Chappan'.

In an atmosphere full of insecurity and fear due to high levels of violence in society, elimination of criminals has unfortunately come to be accepted not only as normal but also as the only way out by a sizable section in society. This acceptance is an undermining and denial of the first principle of any civilized criminal jurisprudence, the 'presumption of innocence'. It is easy to accuse any one. Shifting the onus of proof - i.e. that the 'accused' must then prove their innocence is bad enough. In an encounter, however, there is not even an opportunity to prove innocence after an accusation as death penalty is meted out straightaway.

It is a mockery of the criminal justice system involving arrest, trial and establishing the guilt of the accused. It does away with investigation and collection of evidence and confers impunity on the police for committing acts, which may be outside the law and criminal.

However, along with partial acceptance of 'encounters' there is a healthy skepticism in society of the official version based on experience of daily life where the police hardly emerge as paragons of truth and virtue.

After every incident of 'encounter', the police claim that the person killed was a 'gangster', 'dreaded criminal' or 'terrorist' and was killed in cross firing or while trying to resist arrest. In some instances the media and eyewitnesses challenge the police story on the basis of discrepancies in their account. But

even in these instances, questions disappear from the media and also from public memory very soon. In many other instances such questions are not even raised. In either case ultimately it is the police version that prevails and is accepted as "true".

Elementary logic and the principles of natural justice demand that 'No one can be a judge in their own case'. The police cannot be permitted to decide whether the killing was justified in law. Every time the police kill a person it is essential that a case of culpable homicide be registered and investigated by an independent agency. The police are not above the law. It will also act as deterrence for the police to engage in false encounters.

In 1996, the National Human Rights Commission had issued instructions to all Chief Ministers and the DGPs that every encounter killing must be investigated independently as a cognizable offence in itself and the official version of events established following investigation. Barring a few exceptions no case is registered against the police in the incidents of encounters. The NHRC was supposed to have set up a monitoring cell to oversee the implementation of these guidelines, it doesn't seem to have been set up as yet. Given the rise in numbers of extra judicial killings by the state over the years under the pretext of killing terrorists and gangsters and the tremendous escalation in the powers of the police that these imply, it is extremely urgent to ensure that these directions are publicised and implemented. Prosecution of policemen is likely to act as a deterrent to staging false encounters.

As per the law, the police can kill a person only under two circumstances: (i) if they do so in the exercise of the right to private defence (S. 100, IPC), or (ii) if they do so in the course of effecting an arrest of a person accused of an offence punishable with death or imprisonment for life (under S. 46(3) CrPC). It should be reiterated that killing of even the

most dreaded criminal or a person accused of a real heinous crime is legally not permissible under any other circumstances. If after killing a person the police claim that the killing is justified in the pretext of any of the above two circumstances, then this claim may or may not be true. In the absence of any investigation it cannot be ascertained whether the police acted within the realm of these laws or simply committed a murder?

There is another side to the existing state of affairs. Section 46(3) as such gives undue licence to the police and to make the matters worse draconian legislations like POTA increase the scope of section 46(3) of CrPC because under such laws the possibility of punishment of life imprisonment or death is much wider. Secondly in an atmosphere surcharged with real and created fear of 'terrorism' there is not even a need for the police to provide any proof of the guilt of the deceased. Whenever after any such killing noise is made about its being a fake encounter, the police manages to side line the issue by claiming that the deceased was a terrorist, had links with a terrorist organisation or was

going to commit a terrorist act. In practice these days such an assertion is accepted as final. This is absurd. The police have to establish whether – they legitimately used the power granted under the above-mentioned sections of CrPC.

There is above all a need to have greater transparency in all cases of encounter killings. There is a need to let people know the basis of identification of bodies for instance, not merely taking the police version of the dead being 'Pakistanis' or 'Kashmiris' at face value. Photographs of the dead need to be publicized in their respective native places, so that families can claim the bodies, bury their dead, and if applicable, counter the police accounts.

The immunity enjoyed by the police including the high profile Special Cell in the capital in cases of encounter killing goes against the fundamental right to life, to equality before the law, and against the basic spirit of the Constitution. The deceased are pronounced guilty by their own killers. Lack of any further investigation and action against the killers, is a denial of justice even in death.