



II. On Cases of Encounter Deaths



Letter to Chief Ministers regarding the Procedure to be followed in cases of deaths in police encounters

Justice M.N. Venkatachaliah
Chairperson

(Former Chief Justice of India)

राष्ट्रीय मानव अधिकार आयोग
National Human Rights Commission

Sardar Patel Bhawan, Sansad Marg,
New Delhi-110001.

March 29, 1997

Dear Chief Minister,

The Commission has been receiving complaints from the members of the general public and from the non-governmental organisations that instances of fake encounters by the police are on the increase and that police kill persons instead of subjecting them to due process of law if offences are alleged against them. No investigation whatsoever is made as to who caused these unnatural deaths and as to whether the deceased had committed any offences.

2. Complaint Nos. 234 (1 to 6)/93-94 brought before the Commission by the Andhra Pradesh Civil Liberties Committee (APCLC), referred to one such instance. It was stated in the complaint that the police had shot and killed some persons alleging that they were members of the outlawed People's War Group who attempted to kill the police party that was attempting to arrest them. The case of the APCLC, on the other hand, was that these are cases of unjustified and unprovoked murders in what they describe as 'fake encounters'.

3. The practice obtaining in Andhra Pradesh, as perhaps elsewhere also, is that when an encounter death takes place, the leader of the police party engaged in the encounter furnishes information to the Police Station about the encounter and the persons that died. The stand taken by the police in all these cases brought by the APCLC was that the deceased persons, on sighting the police, opened fire at them with a view to killing them and were, therefore, guilty of the offence of attempt to murder under Section 307 IPC. The police justified their firing and killing as done in exercise of their right of self-defence. This information was recorded in the Police Station describing the persons killed by the bullets fired by the police as accused and FIRs were drawn up accordingly. Without any more investigation, the cases were closed as having abated, in view of the death of accused. No attempt whatsoever was made to ascertain if the police officers who fired the bullets that resulted in the killings, were justified in law to doing so, and if otherwise whether and if so what offences were committed by them.

4. Under our laws the police have not been conferred any right to take away the life of another person. If, by his act, the policeman kills a person, he commits the offence of culpable homicide whether amounting to the offence of murder or not unless it is proved that such killing was not an offence under the law. Under the scheme of criminal



law prevailing in India, it would not be an offence if death is caused in the exercise of the right of private defence. Another provision under which the police officer can justify the causing of death of another person, is Section 46 of the Criminal Procedure Code. This provision authorises the police to use force, extending upto the causing of death, as may be necessary to arrest the person accused of an offence punishable with death or imprisonment for life. It is, therefore, clear that when death is caused in an encounter, and if it is not justified as having been caused in exercise of the legitimate right of private defence, or in proper exercise of the power of arrest under Section 46 of the Cr.P.C., the police officer causing the death, would be guilty of the offence of culpable homicide. Whether the causing of death in the encounter in a particular case was justified as falling under any one of the two conditions, can only be ascertained by proper investigation and not otherwise.

5. The validity of the above procedure followed by the police in Andhra Pradesh was challenged before the Commission. After hearing all the parties and examining the relevant statutory provisions in the context of the obligation of the State to conform to Article 21 of the Constitution, the Commission, by its order dated 5.11.1996, found that the procedure followed in Andhra Pradesh was wrong and the Commission laid down and indicated the correct procedure to be followed in all such cases. A copy of the order of the Commission furnishing the reasons and the correct procedure to be followed is enclosed. These recommendations have been accepted by the Andhra Pradesh Government.

6. As the decision of the Commission bears on important issues of Human Rights which arise frequently in other parts of the country as well, the Commission decided to recommend the correct procedure to be followed in this behalf to all the States. The procedure, briefly stated, is as follows:

- A. When the police officer in charge of a Police Station receives information about the deaths in an encounter between the Police party and others, he shall enter that information in the appropriate register.
- B. The information as received shall be regarded as sufficient to suspect the commission of a cognizable offence and immediate steps should be taken to investigate the facts and circumstances leading to the death to ascertain what, if any, offence was committed and by whom.
- C. As the police officers belonging to the same Police Station are the members of the encounter party, it is appropriate that the cases are made over for investigation to some other independent investigation agency, such as State CID.
- D. Question of granting of compensation to the dependents of the deceased may be considered in cases ending in conviction, if police officers are prosecuted on the basis of the results of the investigation.



7. May I request you kindly to issue directions, through the Director General of Police, to all the Police Stations in your State to follow the procedure as indicated above in regard to all cases where the death is caused in police encounters and similar situations?

With regards,

Your sincerely,

Sd/-

(M.N. Venkatachaliah)

To

Chief Ministers of all States/Union Territories



NATIONAL HUMAN RIGHTS COMMISSION
SARDAR PATEL BHAVAN
SANSAD MARG, NEW DELHI

Name of the complainant : A.P.C.L.C.

File Nos. : 234 (1)/93-94/NHRC
234 (2)/93-94/NHRC
234 (3)/93-94/NHRC
234 (5)/93-94/NHRC
234 (6)/93-94/NHRC

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

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

3. Concentration of activities has mostly been in rural areas but there have been many eventful incidents in urban areas too. Hundreds of innocent villagers and a considerable number of policemen have been done to death by the PWG men, government property has been targetted and very often set on fire causing substantial loss to government, both State and Central and even owners of buildings where public offices were being held in tenanted premises have suffered on this account. Initially, perhaps, attacks were concentrated on the richer groups but later people from the poor classes also did not escape attack, on both person and property. There have been incidents where the male members have been done to death and the female folk have been subjected to physical violence including rape. There was also a case of a man being killed and his head severed from the body, put into a basket and the widow compelled to go round the village with that headload. Normal life and social order had been destroyed/disturbed by such activities and extra legal operations of Naxallite groups is not disputable. The State Government brought in a legislation empowering it to declare an association to be or to have become unlawful and in exercise of power



under Section 3 of this legislation (Andhra Pradesh Public Security Act, 1992), PWG had been declared to be an unlawful association for a specific period. There was a short gap when the ban was not in operation but the ban has now become operative.

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

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

1. 234 (1)/93-94/NHRC (case of Kayita Yakaiah)
2. 234 (2)/93-94/NHRC (case of Chinnarapu Sangaiah)
3. 234 (3)/93-94/NHRC (case of Varikuppala Shankaraiah)
4. 234 (5)/93-94/NHRC (case of Badavath Jaitya)
5. 234 (6)/93-94/NHRC (case of Battu Anjaiah & Peddaboyina Saidulu)

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

7. Evidence in five of the cases was recorded from the side of the complainants. In some of these cases, the State led evidence; some documents were exhibited. No



evidence was led in case no. 234 (4)/93-94/NHRC on the plea that the complainant and his witnesses had been detained by the police at some unknown place. It was agreed that further hearing would take place at Delhi with opportunity to the complainant to produce his witnesses in the case where no evidence was led at Hyderabad. On 21st of September, 1995, the Commission recorded the following proceeding :

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

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

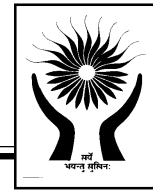
8. After we had closed the matter, the judgement of a division bench of the Andhra Pradesh High Court in Writ Petition No.16868/95 dated 14.8.1995 was produced before us in support of the stand of the petitioner. Commission's Registry reported that a Special Leave Petition had been filed against the decision and the Supreme Court ultimately has granted leave and directed the stay of operation of the judgement.

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

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

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

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



On 25.5.1993, after loading four lorries he had come to the village to take bidi leaves and after finishing that job he returned home around 10 PM and retired by 11 PM. By 1 AM, 60 to 70 policemen came to the village and when they reached his house, all the members of the family were asleep. Some 30 policemen entered into the house. They lighted a powerful torch which made PW 3 wake up. When he shouted, the other members of the family were aroused from sleep. They identified Kumaraswamy, Sub Inspector of Police who was then trying to take out Yakaiah. When the members of the family prevented his being taken away, force was applied by the police. On 26.5.1993 and the day following, PWs 1 and 3 accompanied by the Village Sarpanch (PWG) and some others went to the neighbouring police stations to ascertain the whereabouts of the deceased. He was alleged to have been killed at 9 AM on 26.5.1993 within Eturnagaram Police Station limits. PWs 1 and 2, who were respectively father and mother of the deceased, were informed about the killing of the deceased in the hands of the police. The police version was that the deceased was an un-identified naxallite notwithstanding the fact that he was arrested by the police in the pending case and had been appearing in the court on the fixed dates. Madhusudan, Sub Inspector of Police of Mangapet Police Station (RW 1), who led the raiding party which participated in the alleged encounter accepted in cross-examination that many of the Naxallites he confronted were wearing olive green uniform but the deceased was not in such uniform. The inquest report shows that the deceased was wearing a lungi and a shirt. PW 4, sister of the deceased, stated to the Commission that police had made serious attempts to keep the witnesses away from the Commission and to give effect to their designs, the widow of the deceased and PW 4 herself had been forcibly taken by the police to the village of the deceased about 140 kms from their own place. The police witnesses accepted the position that there were 24 policemen and 12 naxallites involved in the alleged encounter. The firing went on for half an hour in broad day light, and the distance between the two parties was only 50 yards. Yet no policeman sustained any injury while all the alleged naxallites were killed. The deceased, as would appear from the post-mortem report (Exhibit R 7) had three fractured bones; obviously these could not have been caused by gun fire and could fit into the position that the deceased had sustained injuries on account of torture and was later killed. It has been contended that this position is also suggestive of the fact that the deceased had been taken to the police station, assaulted there and later was shot dead. The bullet injuries are on the upper part of the body - the chest, shoulder, etc - which is indicative of the fact that the intention was to kill.

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

- I. The deceased was not a naxallite but a peasant and a lorry loading worker by occupation.
- II. There was only one criminal case of arson against him pending on the date of occurrence.



- III. He had been taken into police custody from his house in the presence of many witnesses and had been killed in the alleged encounter.
- IV. The Magisterial enquiry was delayed for a long period and was completed only when the Commission decided to include this case within the ambit of enquiry.
- V. Serious attempt was made by the police to keep the witnesses away from the Commission.

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

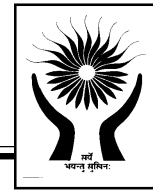
II. Case No.234 (2)/93-94

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

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

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

13. Varikuppala Shankaraiah, was not involved in any naxalite activity nor had he been arrested or even mentioned in any police record. Three years before his death, he shifted from his paternal to the maternal village Inolu in Achampet Mandal with a view to helping his Uncle in the construction of a school building. After the work was over, he stayed on as a mason in the village along with his wife. The deceased was



constructing the house of one Madavath Madhya by June, 1993. In the morning of 5.6.1993, the deceased and his wife, PW 1, left the village to reach the hamlet where they had undertaken work. Around 6 PM, Shantamma came back alone to Inolu and told PW 1 that the deceased had gone to Achampet government hospital to get the treatment of his leg injury. On his return by bus, near the check post outside Achampet, four policemen in plain clothes forced him to get down from the bus. On 6.6.1993 Shantamma and PW 1 made enquiries at Achampet and Amrabad Police Stations, but the police told them that they knew nothing about the arrest of the deceased. The leader of the police party, who participated in the alleged encounter resulting in the death, sent information to the Amrabad Police Station at 7 AM on 6.6.1993 about the occurrence in which the deceased had been killed. There is evidence to show that the wife and the relatives were not informed about the incident and they came to know about it through newspaper and when they went to see the body, they saw several injuries apart from those caused by gun shots. The post-mortem report referred to three contusions, one of which was close to the eye. The post-mortem Doctor, stated that these injuries could have been caused by a blunt weapon. A Magisterial enquiry had been held where PWs 5, 6 and 10 before us had given evidence. The Magisterial Enquiry had not been completed for more than 2 years. The Inspector of Police, RW-1, who led the raiding party, himself became the Investigating Officer. He admitted in cross-examination that the deceased was not wanted in any criminal case by the police. The deceased was wearing a white pant and a pink coloured shirt and not the olive green uniform usually worn by the PWG activists. Pressure had been put on some of the witnesses examined by us in the left over Magisterial enquiry. The evidence of PW 1 clearly indicates that there were 17 policemen and 10 to 12 naxallites in the alleged encounter. The exchange of fire is said to have taken place for half an hour. The distance between the police and the naxallites was about 50 yards and yet there was no injury to the policemen.

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

14. One Badavath Jaitya, son of PW-1 is the deceased, Badavath Jagni, wife of the deceased is PW-2. The deceased is claimed not to be a naxallite but he had been implicated in cases connected with naxallite activities because local landlords had given false information to the police. He had surrendered to the police and Government had given him 12 bicycles to run a cycle taxi shop but he sold the bicycles as he could not run it. His family land was sold and he was making arrangements with the money thus obtained to go to the Gulf countries. From 1989 onwards, the deceased was busy in his efforts for going over to the Gulf countries. He was in Bombay for most of the time and had come to the village only 5 to 6 times in those four years. He was away and did not appear in the pending cases; so non-bailable warrants were taken out. On a joint application of his and his wife, Government had sanctioned a house loan. The deceased had, therefore, come from Bombay to complete the transaction preceding the obtaining of the loan. He was killed within 2 days of his return on 2nd October, 1993. The deceased was taken by four people, who had come on two scooters, to one side of the road and he was directly shot dead. One of these four men went in a vehicle and came back with many policemen in a jeep and a van. When the deceased



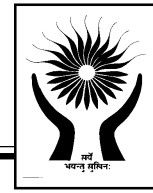
was forcibly taken, no one mentioned that there was a warrant against him to be executed. The records produced by the police before the Commission show that the deceased had surrendered to the police in response to an appeal made by the State Chief Minister to naxallites on 9th August 1989. While he was in jail, he was shown as involved in three cases in all. The Investigating Officer, RW-2, admitted before the Commission that when he proceeded to enquire into the case, no local man supported the police stand.

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

15. On November 1, 1993, Anjaiah belonging to village Kambalapalli of Warrangal District along with Saidulu was going on a motor cycle. By the time they reached the outskirts of Mahabubabad it was around 9 PM. The police party led by the Deputy Superintendent of Police Akula Ramakrishna killed the two persons on the motor cycle in a fake encounter. The police came forward with the story that they received information through VHF set that a police picket at Matpally in Karimnagar district had been blasted by two motorcycle borne extremists and that the Deputy Superintendent of Police, Mahabubabad alerted all the police stations under his jurisdiction and he led a police party to check the vehicular traffic on the outskirts of Mahabubabad and around 9.30 AM they tried to stop a motor cycle coming from Nellikiduru road and the driver and the pillion rider in an attempt to evade the police fell in a ditch, and the pillion rider took position behind the bushes and fired three rounds and in self defence the police party fired 38 rounds and that the motor cycle driver and pillion rider died of gun-shot injuries. PWs 1 and 3 are eye witnesses to the occurrence. Anjaiah was a sympathiser of the CPI(ML) and he was acting as an elderly person in the area, conducting arbitration of disputes and was bringing public issues to the notice of the authorities concerned for solution.

Around 8 PM on November 1, 1993, while he was coming on foot from B.T. road he saw a jeep coming from Mahabubabad with head lights on and a motor-cycle coming from opposite direction. He saw the Head-Constable and Sub-Inspector of Police getting down from the jeep. They caught hold of the motor cycle driver as also the pillion rider and within 5 minutes killed them. The gun shot injuries on Saidulu, one of the deceased, clearly indicate that the shot entered from his backside which fits into the case of the complainant. The distance between the place where the blast had taken place and the place of the incident would be around 300 kms. It is indeed very difficult to cover the same in two and a half hours by motor cycle.

16. In order to appreciate the material placed before the Commission and reach the conclusion as to whether there was a true encounter or a fake one, we shall have to assess the evidence. Broad features have to be looked into and on the analysis of the material before the Commission, it has to be found out whether the stand of the police is correct or not. Mr Sitapati has taken the stand that the allegation of encounter was true and there was no scope to hold that they were fake ones. We have already pointed out the several features relevant to the issue while dealing with the facts of each



case. Prima facie the version of the complainant appears to be nearer truth but we would not like to come to any definite conclusion as the cases have got to be investigated and truth has to be ascertained.

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

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

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

1. "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

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

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



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

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

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

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

24. We would, however, like to mention about the human rights of the innocent citizens and the policemen who fall prey to the illegal activities of the PWG men. Human



rights are universal and every one is entitled to them. In course of arguments we had suggested and we repeat that the PWG should stop their extra-legal activities and show respect for the lives of others and bring themselves into the fold of law and conform to the conduct prescribed.

25. We are conscious of the position that the State of Andhra Pradesh is undergoing severe strain and turmoil on account of the illegal activities of the PWG. Apart from the attacks which police suffer now and then in the hands of the PWG people, the common man, both in urban and non-urban areas is badly affected. He runs the risk of his life; there is no protection to his property and peace and tranquility within the society are totally in the hands of groups of PWG. The hardship of the State, in our view, cannot take away or abridge the guarantee under Article 21 of the Constitution or Article 6 of the Covenant and while enforcing the guarantee and working in favour of its sustenance in full form, we cannot invoke the doctrine of necessity and apply it as a cover against the fundamental right.

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

27. Section 157 (1) requires the officer-in-charge of the police station to apply his mind to the information received and the surrounding circumstances to find out whether there is reason to suspect the commission of a cognizable offence which he is empowered under Section 156 to investigate. He cannot mechanically accept the



information received. When the information received indicates that death was caused in the encounter as a result of the firing by the Police, prima facie the ingredients of Section 299 IPC which defines culpable homicide, are satisfied. This is sufficient to suspect that an offence of culpable homicide has been committed. Thus, Section 157 of the Code is attracted calling for investigation. Any plea like causing of the death in the case does not constitute an offence either because it was done in exercise of the right of private defence or in exercise of the powers of arrest conferred by Section 46 of the Code, can be accepted only after investigating into the facts and circumstances. Section 100 of IPC provides that right of private defence of the body extends to the voluntary causing of death if occasion for exercise of the right falls in any one of the six categories enumerated in that Section. Whether the case falls under any one of the six categories, can only be ascertained by proper investigation. Similarly, when Section 46 (3) of the Code is invoked, it has to be ascertained as to whether the death of the deceased occurred when he forcibly resisted the endeavour of the Police to arrest him and whether the deceased was accused of an offence punishable with death or imprisonment for life. Without proper investigation, the Police officer cannot say that the causing of the death in the encounter was not an offence either because it was done in exercise of the right of private defence or was done in legitimate exercise of the power conferred by Sec. 46 of the Code. One of the deceased persons in these cases, was not at all connected with any criminal case. Hence, Section 46 could not be invoked in that case. Section 174 of the Code says that when the Police officer in charge of the Police station receives information that a person has been killed by another, he shall make an investigation about the apparent cause of death and submit a report to the District or Sub-Divisional Magistrate and also to take steps to arrange for the autopsy of the body. These provisions indicate that unnatural death has to be taken note of seriously by the Police and required them to find out by investigation the real cause of death. The responsibility is greater when it is the Police that are the cause of unnatural death. There is also a general feeling that most of the encounters are fake. It is, therefore, in public interest that the conduct of the Police involved is subjected to proper scrutiny by investigation. To avoid the possibility of bias, the investigation in such cases should be entrusted to an independent agency like the State CID by a general order of the Government. We are, therefore, of the opinion that when information is received in the Police Station about the causing of the death by the Police officer in an encounter, the officer-in-charge of the Police Station must, after recording that information, draw the inference that there is reason to suspect the commission of an offence and proceed to investigate the same as required by Section 157 of the Code. If such a procedure is not required to be followed, it would give licence to the Police to kill with impunity any citizen in the name of an encounter by just stating that he acted in 'the right of private defence' or under Section 46 of the Code. A procedure which brings about such unjust, unfair and unreasonable consequences cannot be countenanced as being within Article 21 of the Constitution.

28. The stand of the Police in these cases is that in the course of the encounters that took place, several persons alleged to be from the PWG, died as a result of the firing by the police without even a simple injury being suffered by the police. On the



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

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

- i) As the information furnished to the Police officers in charge of the respective Police Stations in each of these cases is sufficient to suspect the commission of a cognizable offence, immediate steps be taken to investigate the facts and circumstances leading to the death of the PWGs, in the light of the elucidation made in this order.
- ii) As the Police themselves in the respective cases are involved in perpetrating encounter, it would be appropriate that the cases are made over to some other investigating agency - preferably the State CID. As a lot of time has already been lost, we recommend that the investigation be completed within four months from now. If the investigation results in prosecution, steps for speedy trial be taken. We hope compensation would be awarded in cases ending in conviction and sentence.
- iii) Deceased Shankariah (Case No.234 (3)/93-94/NHRC) admittedly was not involved in any pending criminal case and ending his life through the process of alleged encounter was totally unjustified. So far as he is concerned, we are of the view - learned Advocate General conceded that our view was right - that the State Government should immediately come forward to compen-



sate his widow by payment of compensation of Rs. 1 lakh as done in similar cases and the police involved in killing him should be subjected to investigation and trial depending upon the result of investigation.

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

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

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

Sd/-
(Ranganath Misra)
Chairperson

Sd/-
(M.Fathima Beevi)
Member

Sd/-
(V.S.Malimath)
Member

November 5, 1996

Revised Guidelines/Procedures to be followed in dealing with deaths occurring in encounter deaths

The guidelines issued by the Commission in respect of procedures to be followed by the State Govts. in dealing with deaths occurring in encounters with the police were circulated to all Chief Secretaries of States and Administrators of Union Territories on 29.3.1997.

Subsequently on 2.12.2003, revised guidelines of the Commission have been issued and it was emphasised that the States must send intimation to the Commission of all cases of deaths arising out of police encounters. The Commission also recommended the modified procedure to be followed by State Govts. in all cases of deaths, in the course of police action, and it was made clear that where the police officer belonging to the same police station are members of the encounter party, whose action resulted in deaths, such cases be handed over for investigation to some other independent investigating agency, such as State CBCID, and whenever a specific complaint is made against the police alleging commission of a criminal act on their part, which makes out a cognisable case of culpable homicide, an FIR to this effect must be registered under appropriate sections of the I.P.C. Such case shall invariably be investigated by the State CBCID. A Magisterial Inquiry must invariably be held in all cases of deaths which occur in the course of police action. The next of kin of the deceased must invariably be associated in such inquiry.

All the Chief Ministers and Administrators have been directed to send a six monthly statement of all cases of deaths in police action in the States/ UTs through the Director General of Police to the Commission by the 15th Day of January and July respectively in the proforma devised for the purpose.

Justice A.S. Anand
Chairperson
(Former Chief Justice of India)

2nd December, 2003

Dear Chief Minister,

Death during the course of a police action is always a cause of concern to a civil society. It attracts criticism from all quarters like Media, the general public and the NGO sector.

The police does not have a right to take away the life of a person. If, by his act, the policeman kills a person, he commits an offence of culpable homicide or not amounting to murder, unless it is established that such killing was not an offence under the law. Under the scheme of criminal law prevailing in India, it would not be an offence if the death is caused in exercise of right of private defence. Another provision under which the police officer can justify causing the death of a person, is section 46 of the Criminal Procedure Code. This provision authorizes the police to use reasonable force, even extending up to the causing of death, if found necessary to arrest the person accused of an offence punishable with death or imprisonment for life. Thus, it is evident that death caused in an encounter if not justified would amount to an offence of culpable homicide.

The Commission while dealing with complaint 234 (1 to 6)/ 93-94 and taking note of grave human rights issue involved in alleged encounter deaths, decided to recommend procedure to be followed in the cases of encounter death to all the states. Accordingly, Hon'ble Justice Shri M.N. Venkatachaliah, the then Chairperson NHRC, wrote a letter dated 29/3/1997 to all the Chief Ministers recommending the procedure to be followed by the states in "cases of encounter deaths" (copy enclosed for ready reference).

Experience of the Commission in the past six years in the matters of encounter deaths has not been encouraging. The Commission finds that most of the states are not following the guidelines issued by it in the true spirit. It is of the opinion that in order to bring in transparency and accountability of public servants, the existing guidelines require some modifications.

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

On a careful consideration of the whole matter, the Commission recommends following modified procedure to be followed by the State Governments in all cases of deaths in the course of police action :-

- A. When the police officer in charge of a Police Station receives information about the deaths in an encounter between the Police party and others, he shall enter that information in the appropriate register.
- B. Where the police officers belonging to the same Police Station are members of the encounter party, whose action resulted in deaths, it is desirable that such cases are made over for investigation to some other independent investigating agency, such as State CBCID.
- C. Whenever a specific complaint is made against the police alleging commission of a criminal act on their part, which makes out a cognisable case of culpable homicide, an FIR to this effect must be registered under appropriate sections of the I.P.C. Such case shall invariably be investigated by State CBCID.
- D. A Magisterial Inquiry must invariably be held in all cases of death which occur in the course of police action. The next of kin of the deceased must invariably be associated in such inquiry.
- E. Prompt prosecution and disciplinary action must be initiated against all delinquent officers found guilty in the magisterial enquiry/ police investigation.
- F. Question of granting of compensation to the dependents of the deceased would depend upon the facts and circumstances of each case.
- G. No out-of-turn promotion or instant gallantry rewards shall be bestowed on the concerned officers soon after the occurrence. It must be ensured at all costs that such rewards are given/ recommended only when the gallantry of the concerned officer is established beyond doubt.
- H. A six monthly statement of all cases of deaths in police action in the State shall be sent by the Director General of Police to the Commission, so as to reach its office by the 15th day of January and July respectively. The statement may be sent in the following format along with post-mortem reports and inquest reports, wherever available and also the inquiry reports:-
 - 1. Date and place of occurrence
 - 2. Police Station, District.
 - 3. Circumstances leading to deaths:

- i. Self defence in encounter
 - ii. In the course of dispersal of unlawful assembly
 - iii. In the course of effecting arrest.
4. Brief facts of the incident
5. Criminal Case No.
6. Investigating Agency
7. Findings of the magisterial Inquiry/enquiry by Senior Officers:
 - a. disclosing in particular names and designation of police officials, if found responsible for the death; and
 - b. whether use of force was justified and action taken was lawful.

It is requested that the concerned authorities of the State are given appropriate instructions in this regard so that these guidelines are adhered to both in letter and in spirit.

With regards,

Yours sincerely,

Sd/
(A.S. Anand)

To
All Chief Ministers of States/UTs