

## **New 'principles' for state authorized killings in Asia**

**Basil Fernando and Bijoy Francis**

Prohibition of the death penalty is one of the most prominently debated subjects in the world. In the Asia-Pacific region, Australia, Cambodia, East Timor, Hong Kong, Kiribati, Marshall Islands, Micronesia, New Zealand, Nepal, Palau, Philippines, Samoa, Solomon Islands, Tuvalu and Vanuatu have abolished capital punishment. Out of these countries, Australia, East Timor and New Zealand have ratified the Second Optional Protocol to the International Convention on Civil and Political rights, abolishing the death penalty. Countries like Brunei Darussalam, Burma, Fiji, Laos, Nauru, Papua New Guinea, Sri Lanka and Tonga, though they have not abolished capital punishment, do not execute death sentences. China and Singapore ideologically defend the death sentence as a proper punishment. The rest of the countries execute death sentences in what they call 'extremely grave and in the rarest of rare' crimes.

The stand taken by countries in Asia on the death penalty however, is not an accurate measure of their stance on killing as a way of punishment. In fact, governments of several countries have authorized killing as a punishment on a very large scale. For such executions by state agencies, a prior sentence of death by a court of law is dispensed with. Agencies such as the police, the military, various paramilitary groups or even persons who do not officially belong to any state agency are authorized to carry out executions on behalf of the state.

Under these circumstances, the debate about the death penalty sometimes appears to be irrelevant; despite whatever policy adopted on the death sentence, states kill those considered deserving of death through means other than court verdicts. There is in fact, a new debate occurring, although not in the open. The debate is on which persons the state has the right to kill. Different countries have different views on who can be killed. There seems to be a general consensus that brutal terrorists may be executed by the state agencies, although there is no clear definition as to who might be a brutal terrorist. It appears that state agencies are allowed to decide this on their own, on the basis of facts and criteria known only to them. However, there is usually no written validation of this policy; no head of state will openly admit that such a policy exists.

There appears to be a trend now, to have policies that are not openly articulated or subjected to any legitimate approval. This new kind of policy making is based on the assumption that political wisdom or the wisdom of statecraft requires killing without leaving any traces. The basic premise is that not everything can be done according to the law. Indeed, it may even suggest that it is dangerous to follow the principle that everything should be done according to the law; practical political exigencies require that the law be dispensed with at times and if this position is not adopted, the state may have to face many evil consequences.

State agencies carrying out killings without any court verdicts ordering them is also based on this overall political philosophy doubting the wisdom of the principle that all actions of the state should be carried out within the framework of the law. In the case of terrorism, the argument is that since terrorists operate outside the law, in dealing with them state agencies should also be allowed to operate outside the law.

Another category of persons allowed to be killed by state agencies, who may not be terrorists, are those identified as bad criminal elements. Encounter killings is one manner of approved killings by state agencies without any trial or court verdict. As in the case of terrorists, there is no criteria to judge who is a bad criminal undeserving of the right to a fair trial. Such definitions and decisions are left to the subjective assessment of whichever state agency is carrying out the killings.

The secrecy observed over such killings by state agencies protects higher authorities, including political authorities. They can always deny they had prior knowledge or that they approved any of these killings. If there is a scandal, or, as on some rare occasions, these killings are exposed, then the culpability would be placed entirely in the hands of those who carried out the executions. At this point, such killings would be treated as extrajudicial killings. The point of such punishment is to keep clean the hands of the actual policy makers and others who created the possibility of such executions, and who placed the responsibility of carrying out such executions on the actual executioners. It is therefore crucial that policy makers and other relevant authorities be held equally-if not more-responsible as those carrying out the executions, since executioners would not kill if the policies did not exist.

In talking about these killings outside the framework of legally approved procedures guaranteeing fair trial, we are talking about not a few exceptional cases, but large scale killings.

Despite the large scale of this practice, the international community including the United Nations human rights agencies, have not paid adequate attention to this problem. The international discourse on the death penalty is for the most part limited to the prohibition against the carrying out of the death sentence (which assumes that the right to a fair trial has been respected), or what are called extrajudicial killings, where the killings have been carried out without the apparent approval of the state. What the international community has not paid attention to, is that when the state allows its agents to kill, the liability of such killings is not only on the particular officers, but the political authorities themselves. The discourse on impunity is too often confined to governments not taking actions to bring the killers to justice. Exposing political authorities however, and bringing them to justice, is possible only in the rare instances that international tribunals are established and everyone involved is brought before them. However, politically authorized or approved (directly or tacitly) killings are not infrequent occurrences.

The UN should seriously consider developing means to hold states responsible for tacitly approving killings under the pretext of the elimination of terrorism or the control of grave crimes, or any other pretext. Failure to address this issue not only endangers the lives of many persons, but also undermines the very idea of the rule of law and human rights.

The following 'principles' seem to have emerged in several Asian countries regarding killing outside the legal framework:

1. Killing for the purpose of deterrence is acceptable. Deterrence requires the creation of fear and summary killings have more potential for creating fear than any other kind of punishment. Therefore, the use of this mode of pursuing deterrence is not only deemed acceptable, but unavoidable.

2. The agencies to decide on who is to be killed for the purpose of instilling fear in others may be any agency dealing with security, such as the Ministry of Defense or agencies such as the police, military, paramilitary and intelligence agencies. There is thus no need of prior sanction by way of the person being found guilty after a fair trial by a competent court (virtually like the Cheka in Soviet Russia under Stalin).

3. Suspicion is sufficient grounds for arrest, detention and execution. Strict proof is not necessary, and nor is it possible when the right to fair trial is denied. Subjective judgments are considered valid.

4. It is accepted that there may be a mistake in identifying suspects. In fact, it is inevitable that many initial assessments of suspects may be wrong. This is unavoidable however, in pursuing killings as an effective means of deterrence. This policy is the very opposite of that found in criminal law, according to which it is better to let many go free than to punish one innocent person. In actual practice, large numbers of persons who are killed may be found innocent later.

5. No records need to be kept of the complaints, reasons and details of arrest, the interrogation and the manner and details of the execution. These matters are to be kept top secret and subsequent demands for enquiries are seriously resisted.

6. A comprehensive doctrine of impunity-to enable such killings-is developed and practiced with the approval of the highest political authorities.

Killing outside the legal framework occurs in several ways in Bangladesh. The law enforcement agencies and security forces, including the paramilitary forces and the armed forces, constantly execute crime suspects in the pretext of 'crossfire', 'encounter' or 'gunbattle'. Apart from this pattern of extrajudicial killings, state agents abduct persons from various places, including streets, business centres, shopping malls, and even homes, leading to their disappearance. The number of enforced disappearances is increasing in the country in recent years. In the last few years, there have been many incidents of dead bodies disposed in big rivers, mostly late at night or early in the morning. It is believed that state agents have been committing 'secret killings' after abducting persons, as no initiatives have been taken by the state to either identify the victims or the perpetrators. The country's primitive forensic science examination system barely identifies any victims. This situation leaves the families of missing persons to wait endlessly without knowing the fate of their dear ones, while secret killings and disappearances continue taking place. Complaints of extrajudicial killings are routinely denied registration by the police whenever law-enforcing agents are named as perpetrators. The possibility of obtaining justice for the victims thus remains almost impossible in Bangladesh.

'Encounter killings' by state agencies have been one of the most serious problems in India, with even the country's courts commenting on this at times. An association was recently formed called the Extrajudicial Execution Victim Families' Association, to support those who have lost family members through such killings.

In several instances, it has been revealed that the killings were done on the basis of mistaken identity. Those identified to be killed are usually termed by the police as 'hardened criminals'. The government has given tacit approval for such killings and the proof of this approval is the failure on the part of the authorities to take firm action to stop the practice. Another category of killings by state agencies is in areas such as the northeast, the states of

Chhattisgarh, and Jammu and Kashmir. These include enforced disappearances and killings after arrest.

Recently a case was filed in the Supreme Court, where the petitioners, in (Criminal) Writ Petition 129 of 2012, alleged that between May 1979 and May 2012, 1528 persons were killed through extrajudicial execution in Manipur. The petitioners provided the court with two lists, in which details of 51 cases are provided, indicating that extrajudicial execution is widespread in the state.

While dealing with the case the Court said: "...the present case appears to be one where two persons along with some others were just seized from a hut, taken to a long distance away in a truck and shot there. This type of activity cannot certainly be countenanced by the courts even in the case of disturbed areas. If the police had information that terrorists were gathering at a particular place and if they had surprised them and arrested them, the proper course for them was to deal with them according to law. 'Administrative liquidation' was certainly not a course open to them." The Court was citing from its own jurisprudence, laid down as early as 1997.

That this 'administrative liquidation' continues by the state 16 years later, clearly indicates that the gravity of the problem is not addressed and there are no common efforts, either by the government or the parliament to deal with this issue. International agencies have also not paid adequate attention to this issue.

In Indonesia, individuals at risk of being summarily killed by state agents are those considered to be criminals, suspected of crimes with various degrees of severity. These could range from theft to terrorism, although those who are terrorist suspects are at a higher risk of getting arbitrarily killed. The 88 Detachment-the Indonesian National Police's counter-terrorism unit-is often referred to as 'the death squad', given its notorious track record in executing terrorist suspects during raids.

The killings are typically followed by a police denial on the arbitrariness of their action, and a claim that it was justifiable for the sake of law enforcement. The police would say that the victims were either posing a threat or resisting arrest, so shooting them to death was inevitable. In last year's killing of Papuan pro-independence activist Mako Tabuni for instance, the police claimed that Mako was attempting to take away the police's guns, whereas witnesses testified that Mako was unarmed and did not pose any threat. Despite the discrepancy in the information delivered by the police and the witnesses, finally it was the police's unilateral statement that prevailed. Police action cannot be challenged however, as Indonesia lacks any independent review mechanism to assess the necessity and proportionality of the measures taken by them.

In the Philippines, the death penalty was abolished for the second time in June 2006. Before it was abolished, former President Gloria Macapagal-Arroyo commuted the death sentence of a large number of convicts to life imprisonment. During the same period however, extrajudicial killings by the security forces reached a peak in the country's history. In fact, the total number of victims extrajudicially killed were larger than those recorded during Marcos' period.

The targets of these extrajudicial killings were firstly, human rights and political activists, including those who campaigned for the abolition of the death penalty. While there is no proof that these extrajudicial killings were a 'state policy', the government's failure to stop them has encouraged their perpetuation. Secondly, targets were ordinary persons. There is a systematic practice of extrajudicial killings or 'vigilante style killings', notably of those either involved or suspected of being involved in the illegal drugs trade, as part of normal law enforcement to keep peace and order. These types of 'vigilante-style killings' are common in Davao City, where locals also tolerate public executions. Despite evidence of complicity by local leaders, notably by local politician Rodrigo Duterte, neither he nor those acting on his orders were punished. The Dutertes have retained their strong influence in local politics.

In fact, the Dutertes style of law enforcement had been seen as a 'model' by politicians of other local governments for its maintenance of order, notably in cities of General Santos, Tagum and Digos, in Davao City. When local politicians in these places are asked to comment on 'vigilante killings', they just pay lip service in condemning it. They have not, in fact, taken strong action to prevent the killings and punish those involved.

While it is commendable the death penalty has been abolished in the Philippines, the ongoing phenomenon of extrajudicial killings and 'vigilante killings', where the execution is done outside the law is even more alarming, because law enforcers and the politicians are complicit to it. This widespread and systematic phenomenon of extrajudicial and 'vigilante killings' is even out of the government's control, who has a responsibility to protect its citizens.

In fact, in cases of death penalty, the convicted person had some sort of remedy because the state is expected to observe due process and fair trial before any execution is carried out. But for executions outside the law, the victims of extrajudicial and 'vigilante style killings' are executed without being heard.

In Pakistan, thousands of people are killed by "unknown persons" every year. In Karachi alone, more than 2000 persons were killed during 2012 in this manner. The First Information Report (FIR) filed at the police station always mentions that this person was killed by unknown killers and after that the FIR remains open and anyone can be implicated in the case.

In Balochistan, more than 8000 persons were disappeared, with only some hundred persons recovered; the rest were killed by the state, but the government claims to have no responsibility for the killings. While abducted persons are no longer kept for a long period of time, their tortured and bullet riddled bodies are found on the road side. This practice has become very common in the Sindh and KP provinces. Most of the country's extrajudicial killings are conducted by state intelligence agencies, which always remain invisible and out of reach of the law and courts.

There are more than 8000 persons on death row since September 2009 when the government stopped carrying out executions, but the extremist forces do not allow the government to enact a law against the death penalty. According to Sharia jurisprudence, a society cannot be made pure or righteous without the imposition of strict laws including death sentences, amputations and lynching. Pakistani society draws its religious inspiration from Saudi Arabia's way of governance, where every Friday many persons were executed

without any kind of fair trial. These practices are done in the name of controlling law and order.

In Sri Lanka, since 1971 over 100,000 persons have been killed after arrest. Most of these instances are reported as enforced disappearances. Despite recommendations by various government appointed commissions, no government has taken any serious action regarding deaths caused by way of enforced disappearances. This failure to take action is a clear indication that the policy of arrest and execution has been politically approved, and is also approved by high ranking officers of the police, military and paramilitary organizations. Apart from enforced disappearances, extrajudicial killings also occur by way of 'self defence', in which police or paramilitary groups report that criminals attempted to escape from custody. In recent years, the killing of persons labeled hardened criminals has also become a frequent occurrence. The policy of impunity regarding all such killings prevails and this policy has come under criticism from UN agencies and other international groups. The government however, ignores all such criticism.