

The Politicisation of Criminal Justice

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Afzal Guru masterminded the attack on Parliament in 2001, which left nine security and parliament staff dead, with five attackers also being killed. He was arrested and tried for his crimes, sentenced to death by the Sessions Court and his conviction and sentence were upheld by the Delhi High Court and the Supreme Court. For several years after sentencing Afzal Guru's fate hung in the balance because his mercy petition to the President remained pending. Government obviously hesitated to take a decision lest it trigger a violent reaction in the Kashmir Valley. All sorts of excuses were trotted out for the delay, including examination of the case by the NCT of Delhi Government, Home Ministry, Law Ministry, the President and so on. In 2009, the then Home Minister, P. Chidambaram, said publicly that there were a number of such petitions in the queue and Afzal Guru would have to await his turn. Even at a railway booking office a queue moves on as tickets are issued. In the MHA booking office obviously no tickets were being issued as the clerks either slept or dithered and the queue remained static.

In India all systems are selective in operation. At Tirumala-Tirupati there is a queue of devotees, but VIPs jump the queue. In crime, too, there seems to be a similar procedure, because suddenly Ajmal Kasab came on the scene and though he was at the bottom of the queue he was made to jump it and was hung before any one else. May be because he was a foreigner, a Pakistani, a different queue was formed for him as there is for foreigners at immigration counters. But surprise of surprises, the next was Afzal Guru, who happens to be Indian despite separatist efforts by the Hurriyat and its Indian quisling supporters to change the status of Kashmir. How has this happened and how does this reconcile with Chidambaram's averment in 2009? The Congress spokesman, Abhishek Manu Singhvi, fields all questions on this by blaming BJP (NDA) for not hanging Afzal Guru when it was in power. Perhaps he has forgotten that by the time NDA demitted power in mid-2004 the entire legal process in the Afzal Guru case had not been exhausted. In any case BJP has been consistent in its demand that the sentence be carried out, not because Afzal Guru was Muslim but because the attack on Parliament was a vile crime. In Indian law murder is the worst offence that can be committed because it deprives a person of his life and this is irreversible. Therefore, under section 302 IPC a person who commits a murder faces only one of two sentences, death or imprisonment for life. Under section 109 IPC if a person abets an offence he would be liable to the same penalty as is provided in the main offence. If the offence is of murder then the abettor is liable to the same penalty of death or imprisonment for life as the person actually commits the offence. Under section 120B IPC if a person is part of a criminal conspiracy to commit an offence and that offence is punishable with death or imprisonment for life, then the conspirator is liable to the same penalty as the main offender. Under section 34 IPC if there is a common intention to commit an offence, then every person who does a criminal act in furtherance of the common intention is liable to the same penalty as if the act was done by him alone. Afzal Guru was part of a conspiracy to attack Parliament, which amounts to an offence under sections 121 and 121A IPC. Afzal Guru was part of a conspiracy, both to commit murder and to wage war against the Government of India and joined with others in the common intention of attacking parliamentarians and murdering them. Once the offence had been proved in a fair trial there is no other sentence which could be awarded to him than death because this case went beyond the rarest of rare cases and jeopardised

the governance itself. Suppose the conspiracy had been successful and several hundreds of parliamentarians had been killed would the President have had any other option but to declare a state of Emergency under Article 352 of the Constitution, thus temporarily establishing authoritarian rule in the country in order to tide over the crisis?

The seriousness of the offence is such that for BJP to demand that the sentence of death be carried out without any delay is fully justified. If anything, it is the UPA government headed by the Congress Party, which could be accused of playing politics by delaying the decision on the mercy petition of Afzal Guru. Chapters XXVII and XXVIII, Cr.P.C. give trial courts the exclusive right to deliver judgement in a criminal trial and to the High Court to confirm a death sentence. There is provision of appeal, remission and review, but that is all within the judicial system. Sections 432 and 435, Cr.P.C. give the State Governments and Central Government the power to suspend, remit or commute the sentence of a person convicted of an offence. In this, however, the opinion of the presiding judge of the court which convicted the offender should be sought, which means that the right of suspension, remission or commutation of sentence given to the appropriate government by Chapter. XXXII, Part E has to be exercised judiciously. Government cannot be capricious in this behalf. In addition to the provisions of the Code of Criminal Procedure we have Article 72 of the Constitution in which the President has the power to grant pardon and to suspend, remit or commute a sentence in certain cases. These relate to punishment awarded by a court martial, by a court in a case under a law relating to a matter to which the executive power of the Union extends and in all cases where the sentence is death. Under Article 161 the Governor of a State has similar powers in a matter to which the executive power of the State extends. Let it be clearly understood that this power, whether under the Code of Criminal Procedure or under the Constitution, would be in exercise of an executive function and not a judicial function, despite the fact that the power has to be exercised judiciously.

The scheme of the Indian Constitution clearly divides the State into three separate but equal constituents, the Executive, the Legislature and the Judiciary. Undoubtedly the Constitution also provides for the points of contact between the three organs of the State, but essentially the investigation of criminal offences is an executive function performed by the Police. The trial, conviction or acquittal which follow investigation are purely judicial functions. Chapter II, Cr.P.C. constitutes criminal courts in which under the High Court there are the courts of session and the courts of Judicial Magistrates. In addition there are the courts of Executive Magistrates. Under Chapter III, Cr. P.C. a court of session can try any class of cases and pass any sentence, including death, subject to confirmation of a death sentence by the High Court. A Judicial Magistrate, First Class can try a case and award a sentence of upto three years of imprisonment, with a Chief Judicial Magistrate or a Chief Metropolitan Magistrate having the power to pass a sentence upto seven years of imprisonment. No executive authority has the power to try cases which fall within the jurisdiction of the Judiciary. Functions exercisable by an Executive Magistrate are generally confined to administrative or executive matters, except in certain States and Union Territories in which the Act makes a special provision. In the normal course of things it is for a judge or magistrate to decide whether the prosecution has succeeded in proving its case beyond any reasonable doubt, that the accused has not been able to counter this and that on the basis of evidence the accused should be convicted and sentenced. In this the executive has no role to play and certainly the provisions of Cr.P.C. and the Constitution about remission, etc., of sentences have to be read in the context of the role of the judiciary in determining the guilt or otherwise of a person accused of a crime. I am prepared to concede, though reluctantly, that there may be some rare circumstances which could not be taken into

consideration in a judicial trial but which may, at some later stage, merit an executive decision about holding a person prisoner or not, but that has to be truly rare, exceptional and based on arguments and evidence which both are irrefutable. A person convicted of a heinous offence and given the death penalty may have a commutation of sentence if, for example, government is contemplating legislation on the abolition of death penalty itself. Sometimes the relations between two sovereign States may call for reconsideration of a sentence awarded to a convicted person. Such instances, however, would be extraordinary and certainly the exercise of executive power in this behalf cannot be done in order to negate or reverse a judicial decision. Normally the decisions of the courts have to be considered as final and the executive should have nothing whatsoever to do with the quantum of punishment awarded by a court.

Neither the Code of Criminal Procedure nor the Constitution lay down any time limit for processing of a mercy petition. In fact under Chapter XXXII of Cr.P.C. the execution of a sentence is, in the case of sentence of death, the responsibility of the Court of Session which will issue a warrant of execution after all due process of law has been exhausted by the accused and the sentence is confirmed by the High Court and, if there is an appeal, by the Supreme Court. If there is levy of fine the court may issue a warrant to the Collector of the district, who will then be authorised to recover the fine as an arrear of land revenue. Under section 425 Cr.P.C. for every other sentence the warrant of execution will be issued by the judge or magistrate who passed the sentence. A convicted person may make an application under section 432 Cr.P.C. to the appropriate government for suspension or remission of sentence and the government will then by general rules or special orders deal with the matter. One presumes that a similar procedure would apply in the case of exercise the power by the President under Article 72 of the Constitution and by the Governor under Article 161. Unfortunately at present there is no legal provision about the time limit within which any application made in this behalf may be disposed of, which is why government takes its own sweet time in deciding such matters. In the absence of general or special orders, or rules framed in this behalf, government can and does act arbitrarily in deciding such matters. This has been evidenced in the case of all those persons who face the death penalty, which has not been executed as yet. The entire process of trial is judicial and is prescribed by law. Should not a post trial power also be governed by law? Can a judicial process be reversed or adversely affected by executive action or lack thereof? These are very important questions of law and must be answered, perhaps by the Supreme Court.

The Eight Amendment of the Constitution of the United States reads as follows:- “ Excessive bail shall not be required, nor excessive fine imposed, nor cruel and unusual punishment inflicted”. This means that the medieval punishments of being sawn in half, impalement, being hung, drawn and quartered or being crushed beneath the foot of an elephant cannot be given in the United States. In India Article 21 of the Constitution which guarantees life and liberty except through due process of law can also be read as the equivalent of the Eighth Amendment of the American Constitution. The Preamble of the Constitution which calls upon our republic to secure for all citizen fraternity assuring the dignity of the individual also rules out all cruel or unusual punishment. But cruelty need not be only physical, because mental cruelty can sometimes be more harsh than the purely physical. Imagine how a person sentenced to death must feel when he is awaiting execution of sentence. Every day when he wakes up he must wonder whether he will see another day and in such conditions he must die a little every day. It is unfair to keep a person hanging under the sword of execution. Let the judicial process be totally fair, as it is in India, let the courts be extremely conservative in awarding the death penalty, but once it is awarded let the process of appeal be fast and if an executive decision is for

commutation or pardon, let that come within the shortest time possible after the judicial process if completed. I see no reason why it should take more than three months for the President or Governor to receive the advice of the Council of Ministers and to take a decision in the matter. If a man is to die let him die quickly, if he is to live let this be communicated quickly. It is my submission that any delay in this matter is tantamount to cruelty. If a convicted criminal has the right to dignity as an individual he should not be mentally tortured when awaiting execution.

It is alleged and widely believed that Afzal Guru's execution was delayed partly because there was fear of reaction in the Kashmir Valley, but partly because the ruling party was playing politics on whether Afzal Guru should live or die and what should be the appropriate time for taking a decision in this behalf. There is a school of thought that till the Congress Party saw the emerging and looming shadow of a revitalised BJP, which was demanding swift justice, it did not act. Perhaps the unfortunate remarks of the Home Minister about saffron terror caused some tremors in the Congress because it feared that this could have an electoral backlash because Hindus would be annoyed at such a tactless remark. Perhaps the ruling party thought that its anti terrorism credentials were under threat and that it should show itself as a strong party by executing Ajmal Kasab and Afzal Guru. This has only raised further questions about why the assassins of Rajiv Gandhi and of Beant Singh have not been executed. My unhappiness about this whole episode is that Afzal Guru was a living human being and entitled to the dignity which the Preamble predicates. He did a criminal act of which he was found guilty and for which he has paid the ultimate price. The tragedy is that people feel that he was made a pawn on the chess board of politics as played by the Congress Party. No one, not even the worst of convicted criminals, can have his life depending upon what suits a party in power at a particular time. His conviction was justified, as was his death. What is not justified was the manner in which the execution was decided on, not because of his guilt but because it suited government to take action. This has left a dirty taste in one's mouth.
