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## 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 arrested and tried for his crimes, sentenced to death by the Sessions Court and his conviction and sentence were upheld by the Delhi Supreme Court. For several years after sentencing Afzal Guru's fate hung in the balance because his mercy petition to the President Government obviously hesitated to take a decision lest it trigger a violent reaction in the Kashmir Valley. All sorts of excuses were trotted including examination of the case by the NCT of Delhi Government, Home Ministry, Law Ministry, the President and so on. In 2009, the then P. Chidambaram, said publicly that there were a number of such petitions in the queue and Afzal Guru would have to await his turn. In the MHA booking office a queue moves on as tickets are issued. In the MHA booking office obviously no tickets were being issued as the clock 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, 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 hang 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 counters. But surprise of surprises, the next was Afzal Guru, who happens to be Indian despite separatist efforts by the Hurriyat and its supporters to change the status of Kashmir. How has this happened and how does this reconcile with Chidambaram's averment in 2009? A spokesman, Abhishek Manu Singhvi, fields all questions on this by blaming BJP (NDA) for not hanging Afzal Guru when it was in power. It was forgotten that by the time NDA demitted power in mid-2004 the entire legal process in the Afzal Guru case had not been exhausted. It 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 heinous 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. 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 is an abettor 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 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 120A 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 to have the common intention of attacking parliamentarians and murdering them. Once the offence had been proved in a fair trial there is no sentence to be awarded to him other than death because this case went beyond the rarest of rare cases and jeopardised the governance itself. Suppose the mercy petition had been successful and several hundreds of parliamentarians had been killed would the President have had any other option but to declare 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. The UPA government headed by the Congress Party, which could be accused of playing politics by delaying the decision on the mercy petition, should have acted differently. Chapters XXVII and XXVIII, Cr.P.C. give trial courts the exclusive right to deliver judgment in a criminal trial and to the High Court the right of appeal. There is provision of appeal, remission and review, but that is all within the judicial system. Sections 432 and 435, Cr.P.C. give Governments and Central Government the power to suspend, remit or commute the sentence of a person convicted of an offence. In the opinion of the presiding judge of the court which convicted the offender should be sought, which means that the right of suspension, commutation or remission of sentence given to the appropriate government by Chapter XXXII, Part E has to be exercised judiciously. Government cannot act 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 is empowered to grant pardon and to suspend, remit or commute a sentence in certain cases. These relate to punishment awarded by a court martial, to a sentence awarded 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

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 under the Code of Criminal Procedure or under the Constitution, would be in exercise of an executive function and not a judicial function 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. Undoubtedly the Constitution also provides for the points of contact between the three organs of the State, but essentially the offences is an executive function performed by the Police. The trial, conviction or acquittal which follows investigation are purely judicial. II, Cr.P.C. constitutes criminal courts in which under the High Court there are the courts of session and the courts of Judicial Magistrate 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 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 imprisonment, with a Chief Judicial Magistrate or a Chief Metropolitan Magistrate having the power to pass a sentence upto seven years. executive authority has the power to try cases which fall within the jurisdiction of the Judiciary. Functions exercisable by an Executive generally confined to administrative or executive matters, except in certain States and Union Territories in which the Act makes a special

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 doubt that the accused has not been able to counter this and that on the basis of evidence the accused should be convicted and sentence. 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 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 rarely may be some rare circumstances which could not be taken into consideration in a judicial trial but which may, at some later stage, decision about holding a person prisoner or not, but that has to be truly rare, exceptional and based on arguments and evidence which is. A person convicted of a heinous offence and given the death penalty may have a commutation of sentence if, for example, government legislation on the abolition of death penalty itself. Sometimes the relations between two sovereign States may call for reconsideration of sentence to a convicted person. Such instances, however, would be extraordinary and certainly the exercise of executive power in this behalf cannot negate or reverse a judicial decision. Normally the decisions of the courts have to be considered as final and the executive should do 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 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 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, the 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 from land revenue. Under section 425 Cr.P.C. for every other sentence the warrant of execution will be issued by the judge or magistrate. sentence. A convicted person may make an application under section 432 Cr.P.C. to the appropriate government for suspension or remission and the government will then by general rules or special orders deal with the matter. One presumes that a similar procedure would also be exercised 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. government takes its own sweet time in deciding such matters. In the absence of general or special orders, or rules framed in this behalf, and does act arbitrarily in deciding such matters. This has been evidenced in the case of all those persons who face the death penalty, who have 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 it be reversed or adversely affected by executive action or lack thereof? These are very important questions of law and must be answered 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 and unusual punishment inflicted". This means that the medieval punishments of being sawn in half, impalement, being hung, drawn and crushed beneath the foot of an elephant cannot be given in the United States. In India Article 21 of the Constitution which guarantees life through due process of law can also be read as the equivalent of the Eighth Amendment of the American Constitution. The Preamble 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. cruelty need not be only physical, because mental cruelty can sometimes be more harsh than the purely physical. Imagine how a person 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 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, 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 appeal is granted for commutation or pardon, let that come within the shortest time possible after the judicial process is completed. There is no reason for 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. 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 saying that 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, 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. There is a school of thought that till the Congress Party saw the emerging and looming shadow of a revitalised BJP, which was demanding that it should not act. Perhaps the unfortunate remarks of the Home Minister about saffron terror caused some tremors in the Congress because it feared it would have an electoral backlash because Hindus would be annoyed at such a tactless remark. Perhaps the ruling party thought that its anti-terror policies 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

why the assassins of Rajiv Gandhi and of Beant Singh have not been executed. My unhappiness about this whole episode is that Afza 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 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 the worst of convicted criminals, can have his life depending upon what suits a party in power at a particular time. His conviction was just 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. This has left a dirty taste in one's mouth.

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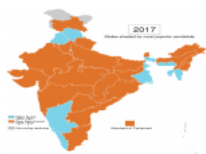
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