

The Curious Case of Hanging Afzal Guru

Payal Lamba¹

Akansha Seth²

Abstract

February 9, 2013 echoes a myriad of voices- those that arose in jubilation over a terrorist's hanging; those that resounded the final rendering of the proverbial 'delayed justice' and the few that arose in the Kashmir valley and found resonance throughout the country, erupting against an apparent fallacy of the criminal justice system. These voices exclaimed that irrespective of the substance, criminal procedure had erred in essence. Whether or not these concerns are valid they go on to strengthen the case against Afzal Guru's hanging and if they have even a sliver of veracity, the entire criminal justice system and a public with an 'opinion' can do absolutely nothing to make amends because the noose has already tightened itself around the neck of the accused. Neither do the authors attempt to make an argument against the concept of death penalty nor pass a verdict on Afzal's guilt or otherwise. The criminal justice system has been instituted to punish the wrongdoers to guard the interests of the other citizens but being an 'allegedly' accused-centric criminal justice system, the rights and dignity of the accused and the due process of law should be the focal point of any trial and pursuant discourse.

Key Words: death penalty, accused, delayed justice, rarest of the rare , execution

Introduction

The curious case of Afzal Guru has given rise to issues which lie more in the domain of jurisprudence than a purely legal one. The discussions on the nexus of terrorism and capital punishment have been recently revived by contemporary research exploration and scholarship. The curious aspect of this study is how this intersection is dictated by the interplay of the socio-political relations among and within states.

This essay presumes the morality and jurisprudential and legal validity and correctness of death penalty and doesn't aim to initiate another *abolitionist vs. retentionist debate*. Working on the premise that death penalty is, in substance, correct, the authors enter debates based on whether or not what happened in the case of *State (N.C.T. of Delhi) v Navjot Sandhu @ Afsan Guru*³ was in keeping with due process and in furtherance of the rule of law, therefore.

¹ 4th year, Amity Law School, Delhi . affiliated to Guru Gobind Singh Indraprastha University, Dwarka New Delhi.

² 3rd year, National Law University, Delhi.

³ (2005)11SCC 600.

The Deterrence Rhetoric

It is generally perceived that by awarding the most stringent punishment for the heinous crimes, at least to a certain extent, future crimes may be deterred. A simplistic yet rational argument in support of deterrence is that many accused perpetrators fight strenuously to avoid execution; few volunteer for it. That potential perpetrators view execution as worse than life imprisonment and this confirms why the existence of the death penalty would deter at least a few.⁴ Although there is no data to support that death penalty deters future terrorist activities but it is seen that the accused often plead guilty so that they get life imprisonment.⁵ Like India, there are several other countries which have reserved death penalty as punishment for “terrorist offences”.⁶ Uganda, for instance, imposes mandatory death penalty for terrorists.⁷

There is, thus, a strong case for ensuring convictions and awarding them the death penalty; the delay aspect being a different debate altogether, excluded from the scope of this essay.⁸

With Afzal’s execution the message has gone loud and clear that people waging a war against the state will be dealt with harshly.⁹

Guru’s execution took 11 long years, yet ‘justice’ has been done. In a moment of rare unity the major political parties, the Congress, the BJP and the CPM came together as one to celebrate the victory of the Rule of Law.¹⁰ There is so sameness of kind between death and remaining alive even under the most miserable conditions, and consequently there is no equality between the crime and the retribution unless the criminal is judicially condemned and put to death.¹¹

Being a substantively celebrated judgment, easing public conscience, Afzal Guru’s hanging raises procedural questions which may burden the popular consciousness.

⁴Capital Punishment and the Deterrence of Crime, Written Testimony for the House Judiciary Committee, Subcommittee on Crime, Terrorism, and Homeland Security, Hearing on H.R. 2934, the “Terrorist Penalties Enhancement Act of 2003,” April 21, 2004 Joanna M. Shepherd Emory University School of Law Clemson University Department of Economics, available at <http://www.judiciary.house.gov/legacy/shepherd042104.pdf>. (last accessed 15th August, 2013).

⁵A. Vaidyanathan, *Commute death sentence to life: Kasab tells Supreme Court*, available at <http://www.ndtv.com/article/india/commute-death-sentence-to-life-kasab-tells-supreme-court-176170> (last accessed 15th August, 2013).

⁶ International Commission against the Death Penalty, *The death penalty and the “most serious crimes” A country-by-country overview of the death penalty in law and practice in retentionist states* (January 2013), available at http://www.icomdp.org/cms/wp-content/uploads/2013/02/Most-serious-crimes_final_6Feb2013.pdf (last accessed 10th August, 2013).

⁷Patterns of Global Terrorism 2003, United States – Department of State (April 2004), available at <http://www.state.gov/documents/organization/31912.pdf> (last accessed 12th August, 2013).

⁸ R Jagannath, *For terrorists like Kasab is death penalty justified*, available at <http://www.firstpost.com/india/in-kasab-type-terrorism-cases-death-should-be-mandatory-531493.html>. (last accessed 12th August, 2013)

⁹ Sunjoy Hans, *Right Decision*, India First, 16th February 2013, Vol 8, Issue 24.

¹⁰ Arundhati Roy, ‘Perfect Day for Democracy’, available at <http://www.thehindu.com/opinion/lead/a-perfect-day-for-democracy/article4397705.ece>. (last accessed 12th August, 2013).

¹¹ Murphy, J G Cruel and unusual punishments. In *Retribution, Justice and Therapy*, 22. Dordrecht, The Netherlands: D. Reidel 1979.

The Dominance of Public Opinion

We may draw from the denunciation theory¹² propounded by the French sociologist, Emile Durkheim that *death penalty serves to express society's condemnation depending on the relative seriousness of the crime*¹³. Some crimes outrage public morality and the society insists on adequate punishment, irrespective of whether it is a deterrent or not.¹⁴

It is pertinent to note to what extent the collective consciousness of a society and public opinion dictate the administration of criminal justice.

Sonia Jabbar in a Hindustan Times article voices it aptly- "The courts had a choice of sentencing Afzal under either of the two conspiracy laws but chose the harsher (Sec. 120B read with sec. 302 IPC), not merely because it was the only appropriate punishment deserved by him but because it believed that only the death sentence could satisfy the moral standards laid down by the Indian public"¹⁵ This excerpt from the judgment¹⁶ goes on narrate the same story. "*The incident, which resulted in heavy casualties, had shaken the entire nation and the collective conscience of the society will only be satisfied if the capital punishment is awarded to the offender.*"¹⁷

Years ago, in the utopian case of the Speluncean explorers, documented by the Harvard Law Review, this is what was said of public opinion: "*public opinion is emotional and capricious; it is based on half-truths and listens to witnesses who are not subject to cross-examination. All of the safeguards of trial go for naught if a mass opinion formed outside this framework is allowed to have any influence on judicial decision.*"¹⁸

Applying the 'Rarest Of Rare' Doctrine

Afzal Guru was, in 2002, sentenced to death by the Trial Court and in 2003 Delhi High Court upheld the death sentence. Later in 2005, the Apex court confirmed the death sentence.¹⁹ His sentence was confirmed by all the levels of judicial hierarchy. India strictly follows the 'rarest of the rare doctrine' as laid down in Bachan Singh v. State of Punjab²⁰. After all, suspected Indian Mujahideen (IM) terrorist Shahzad Ahmad, convicted in the 2008 Batla House encounter case, was sentenced to life imprisonment by a Delhi court, which said the case does not fall under the rarest of rare category warranting death penalty.²¹

¹² Frederick M Lawrence, Punishing Hate: Bias Crimes under American Law, Harvard University Press, 2007, p 163.

¹³ Thomas Michael McDonnell, The United States, International Law and the Struggle Against Terrorism, Routledge Research in Terrorism and the Law, 2010, USA and Canada.

¹⁴ *Furman v Georgia*, 408 U.S. 238, 453 (1972) (Powell, J., dissenting) (quoting Lord Justice Denning, Minutes of Evidence, *Royal Commission on Capital Punishment*, 207 (1949-1953)).

¹⁵ Sonia Jabbar, 'Hang the Truth', Hindustan Times, 17th October 2006, New Delhi.

¹⁶ See supra note 1.

¹⁷ *Ibid.*

¹⁸ The Case of The Speluncean Explorers, 62 Harv. L. Rev. 616 1948-1949.

¹⁹ Afzal Guru: A chronology of events available at <http://www.thehindu.com/news/national/afzal-guru-a-chronology-of-events/article4396402.ece>. (last accessed 2nd August, 2013).

²⁰ AIR 1980 SC 898.

²¹ "Ruminating on the facts of the case and also the circumstances of the convict, I find mitigating circumstances more than aggravating ones and hence the case in hand is not a 'rarest of the rare case', which warrants death penalty upon the convict," the judge said.

Also see *2008 Batla House encounter: Shazad Ahmad gets life term*, available at

http://zeenews.india.com/news/delhi/2008-batla-house-encounter-shazad-ahmad-gets-life-term_865382.html,

However, a popular criticism of the 'rarest of rare' test remains the oft iterated fact that the background of the offender and the possibility of his reformation or rehabilitation is seldom accounted for.²² And in the case of terrorist attacks, the nose tightens even quicker and this factor becomes increasingly infinitesimal. Also, the balancing of the aggravating and mitigating circumstances is a rarely performed exercise in such cases.²³

The Alleged Substantive Inaccuracies

Afzal Guru in his clemency petition to the then President of India, A P J Abdul Kalam had stated that the all crucial witnesses in the case have not been cross examined and a close reading of the court records clarifies and establishes this. This is a gross violation of all standards of fair trial.²⁴ Even though, Afzal was accused of a 'terrorist offence' that doesn't take away his right to fair trial which is a constitutionally guaranteed right.²⁵ In *Nirmal Singh Kahlon v. State of Punjab*²⁶ the court has held that right to fair trial includes fair investigation. Further, the Supreme Court upheld the death penalty given by the high court and the trial court on the basis of evidence which was circumstantial.²⁷

At the trial stage, Afzal wrote to the judge requesting a competent senior advocate and suggested four names. The judge appointed a lawyer for Afzal, who later withdrew and the court appointed the lawyer to assist the court(as against defending Afzal). Afzal's trial then proceeded without a defence lawyer.²⁸

The Supreme Court in para 25 of the judgment has admitted to the fact that it is doubtful whether Afzal Guru was part of a terrorist organisation²⁹.

Colin Gonsalves was Afzal's defence lawyer in the High court. An excerpt from his essay: "*Since he had no defence lawyer, many prosecution witnesses testifying directly against Afzal were discharged without effective and competent cross-examination. No cross-examination was done on the manner of the identification of the accused, alleged purchases of chemicals or the pointing out memos.*"³⁰

also see *Pak terrorist-turned-author gets life imprisonment for Modinagar bus blast case of 1996*, available at <http://indiatoday.intoday.in/story/modinagar-bus-blast-case-1996-pak-terrorist-turned-author-gets-life-imprisonment/1/262340.html>, also see *Five JeM Terrorists get Life Imprisonment*, available at <http://www.indianexpress.com/news/five-jem-terrorists-get-life-imprisonment/734171/>. (last accessed 19th August, 2013).

²² Dr. S. Muralidhar, *Hang Them Now, Hang Them Not: India's Travails With The Death Penalty*, 40 *Journal of the Indian Law Institute* (1998), p 143.

²³ *Ibid.*

²⁴ *The Afzal Petition – A Quest for Justice*, PROMILLA & CO., PUBLISHERS in association with BIBLIOPHILE SOUTH ASIA, New Delhi . (2007)

²⁵ Article 21 of the Constitution of India.

²⁶ AIR 2009 SC 984.

²⁷ *Supra* note 1.

²⁸ Colin Gonsalves, "In Defence of Afzal", *Combat Law*, Vol 5 Issue 5, Nov-Dec 2006.

²⁹ The conviction under Section 2 of Prevention of Terrorist Activities Act (POTA) is set aside. The conviction under Section 3 (5) of POTA is also set aside because there is no evidence, once the confessional statement is excluded. Incidentally, we may mention that even going by the confessional statement, it is doubtful whether the membership of a terrorist gang or organisation is established." (Para 250) ; *supra* note 1.

³⁰ *Supra* note 4.

It was amply clear that there was no direct evidence against him, his conviction being purely based on circumstantial evidence. In the case of *Nalini v State*³¹, Justice Wadhwa stated that:

“The well known rule governing circumstantial evidence is that each and every incriminating circumstance must be clearly established by reliable evidence and the circumstances proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn and no other hypothesis against the guilt is possible, further in another case SC stated that observed that Court should not allow the suspicion to take the place of legal proof”.³²

Facing Double Trial- Trial by Media

The subject of ‘Trial by Media’ is discussed by civil rights activists, constitutional lawyers, judges and academics almost every day in recent times.³³ Innocents may be condemned for no reason or those who are guilty may not get a fair trial or may get a higher sentence after trial than they deserved as there appears to be very little restraint in the media in so far as the administration of criminal justice is concerned.³⁴

The High Court in this case observed that: “*It has indeed become a disturbing feature that the accused persons are brazenly paraded before the press and are exposed to public glare in cases where test identification parade arise, weakening the impact of identification.*”

What is fundamentally disturbing is the Fact that Custody is given by the Court.”

Afzal had been handcuffed in the office of the special cell and before the commencement of his trial, the police called in the media and held a ‘press conference’ to broadcast a nationwide ‘confession’ on primetime television which, though inadmissible in evidence had a huge impact in the country and a fair trial thereafter became impossible.³⁵

An excerpt from Afzal’s clemency petition to the president is as follows³⁶: “*I told the media whatever ACP Rajbir asked me to tell them except for implicating Geelani. They wanted me to say he was the mastermind that he was somehow linked to Al Qaeda but I refused to do this. ACP Rajbir shouted at me and told me that I had been told not to say anything positive about Geelani. One of the journalists present at the time, Shams Tahir Khan testified to this fact when he was called as a Defence witness for Geelani. Even now when my petition is pending before you I am being tried by the media. The officers of the Special Cell knew that they had conducted an unfair and unjust trial and that is why the DCP Ashok Chand denied on oath that he had any knowledge of the media conference.*”

The Supreme Court observed in para 176³⁷ of the case: “The police officials in their over-zealousness arranged a media interview which has evoked serious comments from the counsel about the manner in which publicity was sought to be given thereby.

³¹ 1999CriLJ3124.

³² *Tanibeert Pankaj Kumar* 1997CriLJ2535, see also *V C Shukla v State* (1980)2SCC665, *Mohammad Yusuf Momin v State of Maharashtra* 1971CriLJ793, *Esher Singh v State of A P*, (2004)11SCC585 .

³³ Law Commission of India, 200th report on Free Speech And Fair Trial Under Criminal Procedure Code, 1973, August 2006; F No 6(3)/124/2006-LC(LS).

³⁴ *Ibid.*

³⁵ Colin Gonsalves, “In Defence of Afzal”, *Combat Law*, Vol 5 Issue 5, Nov-Dec 2006.

³⁶ Excerpt from Afzal Guru’s clemency petition before Dr. A.P.J. Abdul Kalam; “An Application under Article 72 of the Constitution of India for grant of pardon/remission of death sentence of Mohammad Afzal”, *The Afzal Petition: Quest for Justice*; 1st edn 2007, p 24.

³⁷ *Supra* note 1.

Incidentally, we may mention that PW 60 the DCP, who was supervising the investigation, surprisingly expressed his ignorance about the media interview.”

A Hushed Affair: the ‘secrecy’ shrouding the Execution

Afzal Guru’s execution took place secretly, thus leading to a public eruption on the issue.³⁸ Some countries carry out executions in secret or there is simply no record keeping. For example, executions in Iraq have never been officially reported³⁹, the underlying reason is to ensure that there’s no hurdle in carrying out execution due to public outburst. The government’s aim was to avoid social unrest and in lieu of that it traded off the right of a family to perform the last rites of their loved one. At least on humanitarian grounds, the family should have been allowed to speak to Afzal Guru or meet him and find out if he had any last wishes.⁴⁰ The government, however claims that they had sent a letter through speed post two days prior to the execution. Also, the government has refused to hand over the body to his family. The President’s Secretariat suddenly decided to discontinue furnishing on its website information on the status of mercy petitions before the President.⁴¹ A hanging when executed in secrecy becomes an extrajudicial execution in which the MHA, the President and other constitutional authorities are complicit.⁴²

Conclusion

Any discourse on the constitutionality or the jurisprudential validity of Afzal Guru’s hanging now is merely civil society introspection on the ethics and procedural aspects of death penalty. It highlights the importance of dissent in a democracy and reinforces the questions of the rights and dignity of the accused.

“Whatever he may be guilty of, Afzal has not been accused of being either a direct participant or a major conspirator in the 2001 attack on Parliament. Yet prominent individuals whose complicity in that crime is far more direct and more clearly established than Afzal’s remain unpunished, and indeed have yet to be brought before a court of law.”⁴³

A man has been hanged and maybe rightly so. The curious case of Afzal Guru, remains, in his death, more than it was in his life, a glaring issue, stirring the ‘collective consciousness’ of a people.

³⁸ Ashok Mitra, “The Hangman’s Call”, The Telegraph, February 22, 2013, New Delhi.

³⁹ “Death Penalty To Execute One Terrorist Is To Reward Terrorism”, (Session 8.1, Criminal Law, LAWASIA 2005 Conference, 22 March 2005) available at <http://www.nswccl.org.au/docs/pdf/speech%20glynn%202005.pdf>.

⁴⁰ Ashish Mukherjee, “Afzal Guru’s family counters Govt, Says Not Informed About Execution”, available at <http://www.ndtv.com/article/india/afzal-guru-s-family-counters-govt-says-not-informed-about-execution-328869> (last accessed 10th August, 2013).

⁴¹ V. Venkatesan, “Hanged by Stealth”, Frontline, March 8, 2013, Vol 30, No 4.

⁴² *Ibid.*

⁴³ Mike Marqusee, “The State and the Right to Life”, The Hindu, 11th February, 2007 New Delhi.

Bibliography

- Death Penalty to Execute One Terrorist is to Reward Terrorism.(Session 8.1, Criminal Law, LAWASIA 2005 Conference, 22 March 2005) available at <http://www.nswccl.org.au/docs/pdf/speech%20glynn%202005.pdf>.
- 95 Dick. L. Rev. 739 (1990-91) Time Has Come For A Terrorist Death Penalty Law, The; Specter. Arlen.
- Afzal Guru: A chronology of events, available at <http://www.thehindu.com/news/national/afzal-guru-a-chronology-of-events/article4396402.ece>.
- Bakshi P.M., The Constitution Of India, 9th ed. 2009, Universal Law Publishing Co. Ltd., New Delhi.
- Banerjee Sumanta, Of Criminals, Martyrs and Innocents available at <http://www.jstor.org/discover/10.2307/4419020?uid=3738256&uid=2&uid=4&sid=21102570303917>
- Bhargava Rajeev and Acharya Ashok, (eds.), Political Theory: An Introduction, 1st ed. 2008, Pearson Education, New Delhi.
- Capital Punishment and the Deterrence of Crime , Written Testimony for the House Judiciary Committee, Subcommittee on Crime, Terrorism, and Homeland Security, Hearing on H.R. 2934, the “Terrorist Penalties Enhancement Act of 2003,” April 21, 2004 Joanna M. Shepherd Emory University School of Law Clemson University Department of Economics, available at <http://www.judiciary.house.gov/legacy/shepherd042104.pdf>
- Centre For Regional Security, South Asia Plus, April- June 2013, Vol. 3 No. 2.
- Dr. Muralidhar S., Hang Them Now, Hang Them Not: India's Travails With The Death Penalty, 40 Journal of the Indian Law Institute (1998), p. 143.
- Dr. Puniyani Ram’, Hanging of Conscience: Case of Afzal Guru’. Available at <http://www.countercurrents.org/puniyani260213.htm>
- Five JeM Terrorists get Life Imprisonment, Indian Express , available at <http://www.indianexpress.com/news/five-jem-terrorists-get-lifeimprisonment/734171/>.
- Furman v. Georgia, 408 U.S. 238, 453 (1972) (Powell, J., dissenting) (quoting Lord Justice Denning, Minutes of Evidence, *Royal Commission on Capital Punishment*, 207 (1949-1953).
- Garner Bryan A., Black’s Law Dictionary, 9th ed. 2009, Thomson Reuters, U.S.A.
- Georgie Ann Weatherby, Peter Cangany, “Public Opinion’s Affect on Capital Punishment in the United States” Journal Of Criminology And Criminal Justice Research And Education, Volume 3, Issue 1, 2012
- Gonsalves Colin, “In Defence of Afzal”, Combat Law, Vol 5 Issue 5, Nov-Dec 2006.
- Heywood Andrew, Key Concepts In Politics, 1st ed. 2000, Macmillan Press Ltd., Delhi.
- International Commission against the Death Penalty, *The death penalty and the “most serious crimes” A country-by-country overview of the death penalty in law and practice in retentionist states*(January 2013), available at http://www.icomdp.org/cms/wp-content/uploads/2013/02/Most-serious-crimes_final_6Feb2013.pdf
- Jagannath R., *For terrorists like Kasab is death penalty justified*, available at <http://www.firstpost.com/india/in-kasab-type-terrorism-cases-death-should-be-mandatory-531493.html>
- Law Commission of India, 200th report on FREE SPEECH AND FAIR TRIAL UNDER CRIMINAL PROCEDURE CODE, 1973, August 2006; F.No.6(3)/124/2006-LC(LS).
- Lawrence M Frederick, Punishing Hate: Bias Crimes under American Law, Harvard University Press, 2007, p. 163.
- Marqusee Mike, “The State and the Right to Life”, The Hindu, 11.02.2007, New Delhi.
- McDonnell Michael Thomas, The United States, International Law , and the Struggle Against Terrorism, Routledge Research in Terrorism and the Law.2010. USA and Canada.
- Mitra Ashok, “The Hangman’s Call”, The Telegraph, February 22, 2013, The Telegraph, Pvt. Ltd., New Delhi.

- Morris Lauren & Naidoo Vinay “Public Opinion And The Death Penalty: The Route To Abolition When The Road Is Blocked”.
- Marqusee, Mike. ‘The State and the Right to Life’, The Hindu, 11th February, 2007.
- Mukherjee, Ashish, ‘ Afzal Guru's family counters Govt’, says not informed about execution, available at <http://www.ndtv.com/article/india/afzal-guru-s-family-counters-govt-says-not-informed-about-execution-328869>.
- Murphy, J.G. 1979. Cruel and unusual punishments. In *Retribution, Justice and Therapy*, 22. Dordrecht, The Netherlands: D. Reidel.
- Patterns of Global Terrorism 2003 , United States – Department of State (April 2004), available at <http://www.state.gov/documents/organization/31912.pdf>.
- Pak terrorist-turned-author gets life imprisonment for Modinagar bus blast case of 1996, India Today, April 15, 2013.
- Prabhakar Apurva, “Why Must Death Penalty Continue To Exist?” *International Journal of Humanities and Social Science Invention* ISSN (Online): 2319 – 7722, ISSN (Print): 2319 – 7714.
- Ramanathan Usha, The Disturbing Truth about an Execution, The Hindu, 13 March 2013.
- Roy Arundhati, ‘Perfect Day for Democracy’ The Hindu , February 11, 2013.
- Sonia Jabbar, ‘Hang the Truth’, Hindustan Times, October 17 , 2006.
- The Afzal Petition – A Quest for Justice , PROMILLA & CO., PUBLISHERS in association with BIBLIOPHILE SOUTH ASIA, New Delhi . (2007)
- The Case of The Speluncean Explorers, 62 Harv. L. Rev. 616 1948-1949.
- The Code of Criminal Procedure, 1973 Universal Law Publishers, New Delhi.
- Vaidyanathan A., *Commute death sentence to life: Kasab tells Supreme Court*, available at <http://www.ndtv.com/article/india/commute-death-sentence-to-life-kasab-tells-supreme-court-176170>.
- Venkatesan V., ‘Hanged by Stealth’, Frontline, March 8, 2013, Vol 30, No. 4.
- 2008 Batla House encounter: Shazad Ahmad gets life term*, Zee news July 30, 2013, available at http://zeenews.india.com/news/delhi/2008-batla-house-encounter-shazad-ahmad-gets-life-term_865382.html.