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"Forty-Eight Hours": A Home Minister Murders the Constitution with Express Delivery of Death

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The rush and secrecy with which Afzal Guru's execution was carried out under the orders of Union Home Minister Sushil Kumar Shinde post the presidential rejection of his clemency petition, is an affront to civilised values enshrined in the Constitution. Considering the circumstances of Afzal Guru's conviction and execution, could it be said that he simply was a man who had to be eliminated, since he had too much knowledge of the dimensions of India's two-decade long dirty war in Kashmir?

Basking in the euphoria orchestrated by a doting media after the execution of Ajmal Kasab last November, Union Home Minister Sushil Kumar Shinde made a promise that strangely escaped deeper scrutiny, despite its ominous ring. There would be no undue delay in determining the fate of Afzal Guru, he said: indeed, he would not delay matters beyond forty-eight hours, once the President of India decided on the mercy petition filed for the sole death row convict in the December 2001 attack on India's parliament.

Shinde is given to frequently indecorous public utterances, especially when facing a scrum of media persons eager to get the sound-bite that will sell. But when his verbal impetuosity is seen to foretell an unseemly – and grossly illegitimate -- rush of administrative actions, his occupancy of high office should be seen as a clear menace to all civilised values.

A minister serving a republican order is not obliged to promise express delivery on a sentence of death. The "forty-eight hours" promise Shinde extended could be viewed as part of the toxic political competition underway between the ruling party and the main opposition, which has flourished on a loudly proclaimed identity of Muslim baiting. Once the battle of the bites is over, it would seem that the procedures established by law would regain primacy.

That was clearly not the case with Afzal Guru's secret execution on the morning of February 9. The condemned man was himself informed about the rejection of his mercy petition the previous evening. Guru's family came to know of his execution well after the event, through breathless news anchors revelling in the sensation of the moment.

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Official briefings soon followed, with Shinde laying out the timeline for Guru's march to the gallows. President Pranab Mukherjee, said the Home Minister, had soon after assuming office, referred back all mercy petitions inherited from his predecessor. Shinde's precise words are key here: "I examined the file carefully and recommended to the President on January 21 for rejection of Afzal Guru's petition". The President's formal rejection was conveyed on February 3 and the order for executing the convicted man issued the following day.

The rejection of Guru's petition in other words, was not a collective decision of the cabinet, but one arrived at by Shinde, exactly two months from the day he made his infamous promise of express delivery. He proved true to his word: indeed, it took him merely twenty-four hours to order an execution that an earlier President had refused to sanction, on account of the deep moral ambiguities involved. In the six days before the execution, the procedures mandated by law were carried out, with seeming intent to minimise the possibility of even the slightest reprieve for the condemned man.

Practices in place in India's prisons, famously characterised in 1980 by Justice V.R. Krishna Iyer as "melting pots of tension and anxiety" that "rob a man of his individual identity and dignity", are a mixed bag. In the matter of *Ramamurthy versus State of Karnataka*, the Supreme Court took note of the abuses and wide divergences in penal practices and directed the Home Ministry to evolve a Model Prison Manual that could be implemented through the country. In 2003, the Bureau of Police Research and Development, an office under the Home Ministry, came out with a *Model Prison Manual for the Superintendence and Management of Prisons in India*. The procedures it lays down before a death sentence is executed are unambiguous: "On receipt from the Government of the final confirmation and the date of execution of the prisoner sentenced to death:- (i) the prisoner and his relatives will be informed about the date of execution by the Superintendent, and (ii) The prisoner's will may be prepared in accordance with his wish".

These basic norms were egregiously breached in Guru's last hours. With the execution already scheduled for the morning of February 9, he was told of the fate that awaited on the evening prior. His family was sent an intimation by the "speed post" facility – ostensibly on the evening of February 7, which of course, left Delhi the following day and reached Guru's family two days after his execution. It was in every manner, par performance for the Indian postal system, suggesting a deliberate design to prevent the family from taking the final judicial recourse available prior to an execution.

Questioned about the serial violation of procedure in Guru's case, Shinde was transparent about his intent. He insisted in brazen contradiction of facts, that all norms had been followed, before offering the alibi that "police and intelligence work cannot all be done out in the open". That would make it virtually impossible to "run" the country. The precedent he clearly wanted to avoid was of the convicts in the Rajiv Gandhi assassination, who had secured a stay on execution even after their mercy petitions were turned down, on the

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grounds of undue delay in deciding the matter. Whatever the merit of that plea, it gained them a reprieve from execution, now extending into its second year.

There is a degree of support today for a hardheaded approach to terrorism, which seeks to eliminate all scope for dilatory manoeuvres after a final decision on clemency has been taken. In terrorist crimes that cause deep trauma, a lower threshold of tolerance for judicial delays, it is argued, would be eminently in the national interest.

Presidential Powers and Clemency

This argument quickly mutates into an apologia for lawlessness. The presidential power to grant clemency does not stem from any kind of superior wisdom that the office confers, or a higher quality of grace. It is a power to be exercised with due regard for constitutional values and the principles of fairness and equity.

From the Supreme Court ruling in Kehar Singh versus Union of India, 1988, we learn that the power to grant clemency under article 72 of the Constitution, "falls squarely within the judicial domain and can be examined by the court by way of judicial review". The Supreme Court in dealing with Kehar Singh's case was more concerned with the President not exercising the power in its full amplitude, because the incumbent in office then chose to submit to the judicial reasoning that had guided the trial and appeals process. Kehar Singh's son then filed a review petition arguing that the President, in declining clemency on the grounds that he could not possibly abridge a verdict confirmed by the highest court in the land, was effectively negating his own powers. The Supreme Court held then, that the President's executive power could be exercised autonomously. Yet, the function of determining whether the power is exercised in accordance with the Constitution or is "vitiated by self-denial on an erroneous appreciation of the full amplitude of the scope of the power is a matter for the court."

The point is subtle but important. The judiciary could review an exercise of presidential power to ensure that it conforms to basic constitutional norms. It could not however, examine the merits of a presidential decision, except within the "strict limitations" defined by a Constitution Bench, in the case of Maru Ram versus Union of India in 1981. In turn, the latter ruling, where Justice Krishna Iyer wrote the majority opinion, lays down the norm that the President's actions under article 72 must necessarily be undertaken on the advice of the Union Cabinet. And the scope for judicial review is confined to ascertaining that there is a "fair exercise" of this power. The motivations that were listed as possible vitiating elements in the exercise of the power were "political vendetta (and) party favouritism". Identifying the thin line between executive privilege and the judicial authority to scrutinise its exercise, the bench observed: "While constitutional power is beyond challenge, its actual exercise may still be vulnerable".

Working within these principles, the court in the matter of Kehar Singh, directed that his mercy petition be submitted afresh for proper consideration. It is another matter that the

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President turned it down even at the second instance, paving the way to the gallows for a man whose involvement in the Indira Gandhi assassination was at best, remote and incidental. It was many years later, with restitution being impossible, that Y.V. Chandrachud, a former Chief Justice of India admitted to a sense of gnawing remorse at Kehar Singh's wrongful execution and indeed, disavowed the death penalty entirely as a tool of criminal justice.

The power of judicial review over presidential power was reaffirmed in S.R. Bommai versus Union of India, 1994, when the Supreme Court held the principle valid despite "the seemingly absolute nature of the power conferred by Article 72 upon the President".

Shinde's unseemly stratagem to corner the glory of the hangman dishonours his office and the Constitution he is committed to serve. Affording Guru one final opportunity to approach the courts for a stay on execution may have made little material difference to his ultimate fate. It is impossible to say, though from this Government's crass and cynical point of view, there was an undoubted risk that a further appeal could potentially have fed into a new mood of introspection within the judicial fraternity about the place of capital punishment in a civilised order. Typical of this new mood has been the finding of the Supreme Court in Sangeet versus State of Haryana, 2012, where it held that a number of capital sentences handed down over the years and confirmed at the highest level of judicial appeal, had been inattentive to basic principles.

The *Sangeet* judgment could be read as a transparent admission of failure to evolve just and reasonable norms for the imposition of death as final arbiter. And this comes over three decades since Bachan Singh versus State of Punjab, laid down the orthodoxy that holds the field: that death would be decreed only in the "rarest of rare" cases. In identifying the cases that would rise to this standard, the Supreme Court specified that due attention be paid to both the crime and the criminal.

Sangeet describes a number of instances where the "rarest of rare" norm has been capriciously interpreted by the very judicial forum that laid it down. Indeed, in a number of recent cases, Supreme Court judges have confirmed death as the appropriate – and immediate -- destination for the criminal, merely on the basis of their own revulsion at the nature of the crime. The dilemma that Justice P.N. Bhagwati identified in his famous dissent in *Bachan Singh*, in other words, continues to haunt the judiciary:

> The views of judges as to what may be regarded as special reasons are bound to differ … depending upon .. value system and social philosophy, with the result that whether a person shall live or die depends very much upon the composition of the Bench which tries his case and this renders the imposition of death penalty arbitrary and capricious.

In August 2005, the Supreme Court determined that Afzal Guru's crime had shocked the "collective conscience" of the nation, making it absolutely imperative that his life should be

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“extinguished”. It paid no more than cursory attention to the character of the ostensible criminal, identifying him, rightly, as a former militant in the cause of Kashmir’s independence. It completely ignored the circumstance that he had since his very brief engagement with the armed struggle, surrendered to Indian security forces and been subjected to incessant harassment, arbitrary arrest and frequent torture, as he sought to make a fresh start. Most crucially, the trial process just buried his very credible testimony that he had been compelled by identified members of the security establishment in Kashmir, to escort an individual to Delhi, who was subsequently found to have been involved in the attack on the parliament compound. Perhaps the final verdict on the tragedy of Afzal Guru, is that he simply was the man who had to be eliminated, since he had too much knowledge of the dimensions of India’s two-decade long dirty war in Kashmir.