capital punishment

An Agenda for Abolition

An essay by
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This is a slightly modified version of the Second Shahid Azmi Memorial Lecture delivered by Yug Mohit Chaudhry on 9th February 2013 in Delhi.

Shahid Azmi Memorial lecture has been instituted by his friends, comrades and students, who want to keep alive the memory and inspiring work of Advocate Shahid Azmi, gunned down in his office on 11th February 2010, at the age of 32. At the time of his murder, Shahid was fighting many terror related cases, including of those falsely accused in the Malegaon blasts and 26/11 Mumbai Terror attack.

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In *Furman v. Georgia* (1972), where the U.S. Supreme Court struck down the death penalty, Justice Marshall said that if citizens were fully informed about how people are sentenced to death, they would find capital punishment shocking, unjust and unacceptable. However, research on the death penalty and public awareness of the exact nature of the death penalty have been the most neglected areas in the abolition campaign in India. The last three challenges to the constitutionality of the death penalty in India were rejected by the Supreme Court, inter alia, on the grounds that there is no empirical data to support the abolitionists' claims. Unfortunately, the situation has not changed at all, and even now there is hardly any research on this subject. Therefore, the highest priority in any abolition campaign is to produce empirical research on the death penalty. That, and doing our utmost to stop each proposed execution and, failing that, to make it as difficult as possible for the state to carry out an execution, adopting all legal, political and social means at our disposal. The death penalty will not be and never has been abolished in one fell swoop. Progress is

going to be slow and incremental, and will depend on how successful we are in convincing the government, the courts, parliament and the people that the death penalty serves no purpose, but in fact degrades us all.

Today, there are various reasons for opposing death penalty. People may feel it is morally wrong to kill, people may feel it is hypocritical to punish a murderer by imitating him, people may feel that there is no evidence that death penalty deters crime any more than life imprisonment does. Another reason to oppose death penalty is that it is irreversible. And there are situations where judgments have proven to be erroneous – they cannot be reversed, nothing that can be done, it is final.

Let us discuss death penalty in the context of three social institutions to make an argument for its abolition. These three institutions are the Police, which are the evidence gathering machinery; the Courts, which adjudicate guilt and pass sentence and determine appropriate sentence; and the Executive, which deals with mercy petitions.

One does not need to stress the point that in India we have a notoriously corrupt, dishonest, and criminalized police force. The evidence that is presented in the court is the evidence that is collected by this police. We are going to adjudicate whether somebody is guilty or not or whether somebody should be sentenced to death or not, on the basis of such evidence, which is collected by the Police force; which itself raises a huge question mark, on whether it is safe actually to have people sentenced to death on the basis of evidence collected by the police force we *know* to be corrupt. Let me give you a few examples about this.

Some years ago in Bombay, a man was convicted and sentenced for the rape and murder of a child. The appeal

was pending in the High Court, and while that appeal was pending, the police officer investigating the case committed suicide, leaving behind a suicide note saying he had falsely implicated this man. Now, the evidence on record did not merit an acquittal, the evidence was very strong. But for the suicide note, which was not even part of the evidence, this man would have gone to the gallows. The Bombay High Court, very unorthodox, took cognizance of the suicide note that was not on record, and acquitted this man. What would have happened if this officer's conscience had not pricked him in this manner?

I will give you some other examples, cases that Shahid was handling which now I am looking into: the 2006 Malegaon bomb blasts. Bombs go off on a holy night, *Badi Raat* or *Shab e Bara'at*, outside the mosque in Malegaon, which is a predominantly Muslim town. Nine boys are arrested, and charged with having executed these bomb blasts. Nine confessions are recorded. Police claims that they seized RDX, explosive material, from their homes. Police also claims that one of these nine boys has agreed, because his conscience is troubling him so much, to become an approver, and to give evidence on behalf of the state, against his colleagues. Charge sheets are filed; sanctions are given. Because of the hue and cry raised in Mumbai, the case is transferred to the CBI. The CBI filed a supplementary charge sheet verifying the investigation done by the Mumbai Police. And then the NIA (National Investigation Agency) which is investigating the Samjhauta Express blasts, arrests Swami Aseemanand, who confesses to having carried out these blasts in Malegaon as well. He says that it was his Right wing Hindu terror group that did these Malegaon blasts. So then what happens to all that evidence, the confessional evidence, the RDX? Where did the RDX come from?

Now, put yourself in the position of a judge, adjudicating a case, and the Police produce RDX in Court, saying it was seized from the house of the accused. The defence lawyer says that evidence has been fabricated. The Judge asks: "Where did the Police get it from?" How do you answer that question? You are at a loss for an answer. The judge is going to believe that evidence, that the RDX was actually seized, because where do people get RDX from otherwise? Normal people don't have RDX. But for Swami Aseemanand's confession coming to light, these nine boys would be facing the gallows. All of them. This is not a stray case.

There were seven train blasts that took place within a space of half an hour in 2006, in Mumbai, on the 11th of July. The Police arrested thirteen boys, members of SIMI (Student Islamic Movement of India), saying they executed these blasts. Their mobile phones were seized at the time of the arrests. In the remand application that the Police filed before the magistrates, in writing, the Police said that these mobile phones have been sent for forensic examination, and the call records have been obtained from the mobile service providers. The call records show, claimed the police that these thirteen boys were in touch with each other, hatching the conspiracy. Further, that they were in touch with Lashkar-e-Toiba in Pakistan; that they were sending young boys to Pakistan for terrorist training. And they said this not once, in the remand applications filed by the Police officers before the magistrate, but umpteen times, week after week – to justify the remand for custody. Hundred and eighty nine people have died in those train blasts, no magistrate or judge will ever give bail, especially not in the case of such statements being made by the police that they have got such forensic evidence. This is pretty

strong evidence that you are in touch with LeT and sending people there for terrorist training.

However, some time later, another branch of the Mumbai Police another set of people, who confessed to having carried out the same bomb blasts in the trains. They had confessions recorded. The government accorded sanction for the prosecution of those persons arrested in the other case of the same crime. Confessions were recorded, charge sheets were filed, and sanction was given by the Police commissioner and by the Government, for the same crime, to different people. When the charge sheet was filed in the SIMI case, the boys asked for copies of the mobile records because the Police had not filed those with the charge sheet. This was very surprising, given the fact that the Police had claimed that the records show that these boys had been in touch with the LeT. Why would they not file those records in the charge sheet? But they did not.

The boys had always held that these records, if produced before the court, would prove their innocence; the fact that they were somewhere else at the time of the blasts. The tower location would clearly establish that they were not at Church Gate Station, as the Police had claimed but elsewhere. One of them was in Bihar, outside Bombay. Some were in North Bombay, at the other end of Church Gate station where the bombs went off. So the boys pleaded that these phone records were crucial for their defence. Six applications were made over a period of six years, by the defence lawyers asking for the copies of these phone records which the Police had in their custody. But the Police consistently refused to give these phone records on the plea that they had not relied on them in the charge sheet so they were not bound to provide them to the accused. But as often happens in terrorism trials – because

there is so much at stake and because such hype surrounds these cases, the judge often just rubberstamps everything the prosecution says – the judge rejected the six applications for those phone records for over six years. The Police persistently refused to provide the records, but said nothing beyond this. Finally we moved the High Court and asked it to give us these records. The High Court found these records to be relevant and directed the Police to give us the records. And then six years later and three months after the last time they said they would not give them, in the High Court for the first time, the Police said they have destroyed the records! Given the fact that the Police claim that some of the accused were still to be apprehended, could they have possibly destroyed these records? Unless of course they showed that the boys that were actually apprehended were innocent, as these boys claimed.

In normal crimes, confessional evidence is considered unworthy of belief, because how can you believe everything a Police officer says. That is the judicial principle on the basis of which confessions are excluded from evidence. But, in serious crimes, confessions are admitted in evidence. This is quite strange. If confessions are not admissible for normal crimes, why should they be admissible for serious crimes where the burden of proof should be that much higher? But they are, under our law, admissible for terrorists, who are tried under these special legislations. So in Malegaon 2006, for example, all the police were ever going to produce as evidence in Court was the nine confessions. Along with of course fabricated RDX explosive discovery reports. No real hard evidence. It doesn't take much to fabricate a confession when the confession is verified by the Police officers themselves.

In the Indira Gandhi's assassination case, Balwant Singh, one of the officers attached to her security had been arrested immediately, illegally, after the assassination. He was however not shown arrested but illegally detained by the Police at the end of Yamuna Velodrome for many days; brutally tortured for that period, before being released. A day or two after he was released, he was shown arrested while alighting from a bus at ISBT, and the police claimed they found a full confession in his pocket which he was carrying around with him – a full confession in letter form, in expanded notation. He was claimed to be carrying around the confession with him. This is Indira Gandhi's assassination case! The trial court believed it, sentenced Balwant Singh to death. The High court believed it and sentenced Balwant Singh to death.

I therefore come back to the question: Is it safe to accept such evidence and sentence people to death, and foreclose the possibility of discovery of error or manipulation at a later date in time?

The second important institution involved in the death penalty is the Judiciary. The judiciary is as fallible, as error prone, as any other institution in India. It comprises the same kind of people that make up other institutions in society. Error is bound to people. And also because the pretext for death penalty, i.e. 'rarest of rare', is inherently so subjective, that there are bound to be varying opinions on the same issue. The Supreme Court has been engaged in soul-searching and they have been admitting again and again, that their own death penalty jurisprudence is

arbitrary, and not at all consistent; that the right to equality before the law has been consistently violated. In *Bachan Singh* (1982) Justice Bhagwati, a former Chief Justice of India, said that the Supreme Court has been awarding death penalties "arbitrarily and freakishly". Was he wrong?

In *Furman v. Georgia*, Justice Stewart held that death sentences and being struck by lightning were cruel and unusual in the same way. One does not know whom it will strike, it cannot be anticipated or guarded against, and if one is struck by it, bad luck. *Harbans Singh*'s case (1982) vividly illustrates this. Three persons with identical roles were sentenced to death for murder, and three different Supreme Court benches pronounced three dramatically different verdicts. Kashmira's death sentence was commuted to life imprisonment, Jeeta's appeal was dismissed and he was hanged, and Harbans was recommended for Presidential clemency though the court had initially dismissed his appeal and review petition.

Examples abound of "a pattern of confusion, contradiction and aberrations" in death-penalty judgements. Identical cases have been treated differently so often as to become a cause of real concern. In these cases, there is little to differentiate those where death is given from those where it is substituted with life imprisonment, except the composition of the bench. While Justices Balakrishnan and Sinha commuted all death sentences for child rape and murder, Justice Pasayat upheld or imposed the death penalty in every such case, even when lower courts had acquitted or commuted. Death sentences become more indefensible when a majority of such cases are assigned to 2 or 3 out of the 14 or so benches of the Supreme Court. This creates a lottery, where the mere presence or absence

of a particular judge gives the convict a significantly better or worse chance of survival statistically, regardless of the evidence. A comparison of 3 judges clarifies the importance of a judge's personal predilections in death-penalty adjudication.

Justice Pasayat's "strike rate" of about 73%, to use a cricketing term from the shorter version of the game, was significantly higher than the collective strike rate (19%) of other judges during his tenure. Thus, a case not allotted to Justice Pasayat's bench was about four times more likely to escape capital punishment. A death-sentence case had an almost equal chance of being heard by Justice Pasayat or Justice Sinha's bench, but the convict's chances of living were almost 100% if his case was allotted to the latter instead of the former. A prisoner's chances of living were better by more than 50% if his case was allotted to Justice Balakrishnan rather than Justice Pasayat's bench. Would a death sentence appellant not be justified in asking, "Am I to live or die on the basis of the constitution of the bench and not the evidence in the case? Is that justice according to law?" Blackshield's study (1972-1976) shows similar if not worse disparities among judges. There can be little doubt that Justice Bhagwati was right when he said "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." This becomes self-evidently true on comparing Justice Krishna Iyer's comments on the sacredness of life, the ever-present possibility of redemption in the worst type of criminal, and the barbarity of the death sentence with the regret expressed by some judges after the *Bachan Singh* judgment "unfortunately" prevented them from passing more death sentences.

The law of death penalty was laid down in India by *Bacchan Singh,* and subsequent judgments are expected to be consistent with *Bacchan Singh*. *Bacchan Singh* held that the judges would have to look at both, the circumstances pertaining to the crime, as well as at the circumstances pertaining to the criminal. However, in cases of heinous crimes as well as cases of terrorism, this judicial caution takes a bit of a backseat and is overwhelmed by the sense of revulsion caused by the crime. A man called Ravji, murdered his family, because he suspected that his wife was unfaithful to him and his children were illegitimate. Now, In this case, if they were to look merely at the circumstances pertaining to the crime, of course they could hang him. But if they were to consider the circumstances pertaining to the individual, or the criminal, then they would have seen a human being with a mental problem, in which case perhaps they would have had leaned towards clemency and commuted the death sentence. But the crime was so gruesome and shocking – they wouldn't allow themselves to do that. So they laid down a law that said that in heinous cases, we need not look at the circumstances pertaining to the criminal, but only the circumstances pertaining to the crime; and they sent Ravji to the gallows.

This new principle of law which ran directly from the principle laid down in *Bacchan Singh*, was then invoked again within a few months, to send Surja Ram to the gallows. And then over the next ten years, it was invoked to send another twelve people to the gallows. A total of about fifteen people were sentenced to death on the basis of this erroneous principle. In 2009, the Supreme Court detected this error and declared *Ravji*'s case, and the 7 other cases that followed as being rendered *per incuriam* literally in error of, or in ignorance of law). Thereafter, two other

benches reiterated these findings. However, by then it was too late for Ravji and another prisoner wrongly sentenced to death for they had already been executed. One of the prisoners was subsequently declared a juvenile, and the death sentences of four others were commuted by the government. Seven prisoners remain on death row despite the Supreme Court having admitted in four different cases that their death sentence judgements were rendered in ignorance.

A campaign was launched pursuant to which fourteen judges of the High Court and the Supreme Court wrote to the President asking him to commute these death sentences. Amongst these was the case of Saibanna. At the advice of the Home Minister, the President has recently rejected Saibanna's mercy petition. Saibanna is now in danger of imminent execution. The decision is still pending on the mercy petitions of the six other prisoners.

Let me tell you a little bit Saibanna's case.

There used to be a provision of law in section 303 of IPC, when a person already serving a sentence of life imprisonment commits a second murder, would necessarily have to be sentenced to death. This was a mandatory death sentence. This provision of law was struck down as unconstitutional in 1983. Twenty years after this provision of law was struck down as unconstitutional and did not exist on the statute book, charges under 303 were framed against Saibanna. He was convicted under non-existing section and sentenced to death on mandatory death sentence which did not exist in law! His lawyer pointed it out to the trial judge that the section under which his client had been sentenced to death did not exist in law. Here, it is

important to know the difference between a mandatory death sentence and a discretionary death sentence: in a discretionary death sentence the accused has the right to be heard and place before the court the circumstances which have a personal significance to him, and which may have intended him to act the way he did. The court considers these while adjudicating on what should be the appropriate sentences in the case, because remember, the Supreme Court has held that circumstances of the crime and the criminal are both to be taken into account. So, this hearing on the point of sentence becomes crucial. It is at this stage the accused.

In Saibanna's case, because the judge proceeded under section 303, where there is mandatory death sentence, there was neither an opportunity for a hearing during the sentence nor an opportunity to bring on record the mitigating circumstances. So Saibanna was convicted. When the matter reached the High Court, the error was compounded because the conviction was upheld under 303. This is now more than 23 years after section 303 was struck off the statute book. The matter then reached the Supreme Court. The Supreme Court holds that the trial court had convicted Saibanna under 302; and that the High Court had upheld the sentences under 302. Further, that since there were no mitigating circumstances on record, the Supreme Court sentenced him to death under 302. Section 302 had never been in the picture in this case – the record is as clear as any thing. How could there have been mitigating circumstances if there was never any hearing on the sentence. Despite the fact that the Supreme Court later declared the case to be *per incuriam* and despite fourteen judges writing to the President, his mercy petition is rejected.

Take the Rajiv Gandhi assassination case now. Twenty-six persons were tried for the assassination of Rajiv Gandhi by the trial court. All 26 sentenced to death, all 26 found guilty. They were convicted under TADA, where there was no appeal to the High Court, because it was conceived as a fast track justice. So the matter goes to the Supreme Court. In Supreme Court, 19 of 26 people sentenced to death were acquitted. Look at the huge difference between the earlier death sentences and subsequent acquittals. There is something drastically wrong with a judiciary system, which can convict and sentence 26 persons to death and then acquit 19 of them after the first appeal. Out of the remaining seven, four are sentenced to death by the Supreme Court. One of them was a boy whose only role as per the Supreme Court judgment is that he procured the 14-volt battery for the people who actually planted the bomb in Dhanu.

I mentioned earlier that under normal law, confessions are not admissible, but that under the special enactment of TADA confessions are admissible as evidence against the accused. In the Rajeev Gandhi assassination case the confession was recorded against these 7 people but what happened was that the Supreme Court accepted the argument that TADA offence did not apply. So the Supreme Court acquitted them of TADA. Now, if TADA is inapplicable, the confession should have been invalidated as well, but Supreme Court said 'No'. The Supreme Court said that *because they were charged with TADA and TADA allowed the confession in establishing guilt, it would not be thrown out*. So tomorrow, what do you do if you want to get a thief convicted, if he cannot otherwise get convicted, charge him under TADA as well as theft. Let him get acquitted under the terrorist offense but be charged and

convicted under theft anyway. This is the logic of the judges.

In addition to being arbitrary, the death penalty is also discriminatory. Justice Krishna observed in *Rajendra Prasad* that the death sentence has a class bias and a colour bar. Of the fourteen prisoners wrongly sentenced to death, 12 were represented on legal aid. Usually, the records in death-penalty cases are voluminous and trials last for 6-9 months. In most places legal-aid lawyers are paid Rs.500-2000 for a death-sentence trial, about the same for High Court proceedings, and Rs. 4000 for a Supreme Court appeal. These fees, stagnant for decades, would not cover conveyance and miscellaneous expenses. Legal-aid rules require senior lawyers be appointed for all possible death-sentence cases, but this is rarely done. Raw inexperienced juniors are roped in for cases that would make seniors baulk. Not surprisingly, appellate courts often remand such cases back to trial courts because the prisoner was not defended in any meaningful way. But more such cases fall through the cracks. It is hardly surprising therefore that most cases of miscarriage of justice, wrongful convictions and executions have been defended at some stage on legal aid. Death-sentence prisoners handicapped by poverty are doomed *ab initio* by a system that pays legal-aid lawyers a pittance for their work.

The Constitution has promised citizens equality before the law and protection from arbitrariness, which means that their cases will be treated like other cases before theirs, regardless of their financial capacity. Courts are required to uphold this promise for it is the bedrock of judicial legitimacy. Since the death penalty cannot be awarded with consistency and fairness it must be abolished, for without

these prerequisites, judicially sanctioned killings are not meaningfully different from vengeful murder.

And now we come to the third part. The manner in which the people are executed. The power of mercy is usually historically given to the sovereign. There is a very good reason to retaining this power. It is a way to correct the error in the judicial administration. It is meant to temper justice with mercy. Justice is employed in the widest sense of the term, to account for those things which law cannot take into account. Therefore it is very necessary to retain this power: to correct judicial error, to temper justice with compassion, and to do justice in the widest sense of the term. This is why all countries have a mercy power. But if you look at the way the mercy power has been used recently it has now become a tool for the government to distract the attention from other pressing issues. You look at the timing of the Kasab execution. Look at the timing of this execution. In 2001, the Parliament was attacked; in 2005 the Supreme Court delivered its judgment; in 2013, Afzal is hanged. Eight years later, suddenly today [9th February]. He has not been hanged due to his role in the Parliament attack, I can tell you that. For eight years they kept his mercy petition pending and today, suddenly, when the BJP has put the Congress government on the back foot on various issues, including national security, crime etc, they execute him. The Parliament session is going to begin now just as it was going to begin when Kasab was hanged.

One must question the manner of this execution. Article 21 of the Constitution is inalienable and applies to every

human being, not only a citizen of India. Article 21 says that *No person shall be deprived of his life or personal liberty except according to procedure established by law.* And that procedure as per Supreme Court has to be fair, just and reasonable. If you are going to take away somebody's life, you have to do it according to the legal procedure. What does the procedure say in the law? The rules of the government on this issue says that when a mercy petition is made, and that this mercy petition is rejected, whoever makes the mercy petition for the prisoner has to be informed about the rejection of the mercy petition. The prisoner and his family have to be informed about the rejection and told in advance about the date of the execution.

In the Kasab case, the day after the mercy petition was rejected by the President, a journalist filed an RTI application and he was informed in writing the day *after* the rejection that the Kasab mercy petition is still pending. What is the need to tell these lies? A government cannot tell lies. What was the need to violate the procedure which was laid down by the government itself? The government was armed with the judicial warrant authorizing the execution of Kasab. What was the need to do it in that manner, away in the darkness like a thief without informing his family? They had his family address. A large number of people wrote mercy petitions for Kasab. They were not informed that his mercy petition had been rejected. The rule says the person must be informed that the mercy petition has been rejected. Why do the rules say that? Because, again, the right to judicial remedy inhere in the person till his last breath and if there has been considerable delay in the rejection of the mercy petition, the Supreme Court says the person has the right to go to the Supreme Court and ask for the commutation of the death sentence.

There are rights available which have to be acted upon, which only can be acted upon by moving to the court. Therefor there is always a small window of time between the rejection of the mercy petition and execution day to enable the convict to resort to the judicial remedy. But neither Kasab nor Afzal Guru were given this opportunity. After Kasab was executed, the Home Minister of the country and the Chief Minister of Maharashtra actually said on record, *we did it silently and secretly because we did not want people to move to court.* The Home Minister reiterated this after Afzal's execution. This is a startling statement in a democracy: the brazen disregard for the rule of law by the country's Home Minister. Are we not becoming a police state? Afzal Guru had a wife, a family not too far away from Delhi: a meeting which was granted to the prisoner by the statute was now denied. That is how now we execute people. They did it with Kasab earlier and did it again with the Afzal Guru.

Recently, to show how much he cares for womens' rights and how tough he is on crime, the present Home Minister, a former sub-inspector of police, has proudly announced that he would never permit the commutation of the death sentence for a rapist. This, apparently, will make the streets safer for women, just as executing Kasab has insulted India from terrorist attacks, and executing Saibanna and Das will prevent people from committing repeat murders. Executions and support for the death penalty are props for politicians to claim that they are tough on crime. Instead of persisting with the more difficult, drawn-out and complex work that is needed to properly protect against future attacks and addresses the causes of crime, this simplistic gesture of the death penalty pursued at great human cost is resorted to as an easy and cheap way of mollifying the public urge that something be done. In fact the death

penalty is a distraction, a red herring, diverting attention from government inaction in the areas that matter most. It exploits the public thirst for blood, feeding the belief that execution will secure closure. But as we know, executing a human being does not secure closure or fix the underlying, persisting problems – it rather conceals them. A state-sanctioned execution has nothing to recommend it except a very base blood lust that we encourage at our peril. Feeding this blood lust by executions and introducing new types of state sanctioned violence like castration can only make us a more violent society, not less. If we have to become a more humane and compassionate society, and leave a better, less blood-thirsty world behind for our children, we have to curb our instinct for bloody retribution.

Judicial errors, fabricated evidence or this kind of executive chicanery. It is a combination of these three that result in the death sentence which is then actually executed. Death sentences, passed in dusty courtrooms after arcane legal arguments inscrutable to laypeople, are executed in utmost secrecy behind high prison walls at the crack of dawn. Though the right of the state to punish by killing is intensely debated, the process which takes prisoners from the dock to the scaffold remains shrouded. Since executions are done in our names, we need to know more about them and make informed choices.

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