

Voices against Death Penalty for Mohammed Afzal

Saturday 14 October 2006, by [BHATTACHARJEA Ajit](#), [BIDWAI Praful](#), [CPI \(ML\) Liberation](#), [PUNIYANI Ram](#), [RAINA Badri](#), [SIMEON Dilip](#) (Date first published: 14 October 2006).

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Democracy Demands: Justice for Afzal, Repeal of AFSPA

From *ML Update*, A CPI(ML) Weekly News Magazine

Vol.9 No.41 10-16 OCT 2006

Editorial

The whole of Kashmir is demanding in one voice justice for Afzal Guru. And for once the voice of Kashmir is resonating quite audibly in different corners of the country including the capital city of Delhi. Revolutionary and democratic forces all over India are at one with the people of Kashmir in their common call for review and revocation of the death sentence awarded to Afzal Guru in connection with the December 2001 attack on Parliament.

There are good reasons as to why the demand for clemency for Afzal has become a popular democratic cry beyond the Kashmir valley. While the entire country condemned the attack on Parliament, the case built up by the state and its investigation and prosecution agencies has since been exposed to be full of gaping holes. Attempts made by the Delhi Police to secure conviction of Delhi University Lecturer SAR Geelani in the same case have already been judicially rebuffed. Legal experts have pointed out many loose ends in the whole case and Afzal Guru and his wife Tabassum have complained about custodial torture and denial of their right to get a lawyer of their choice to defend Afzal.

Soon after Tabassum met the President and sought his intervention to stay the death sentence, Advani and Rajnath Singh rushed to Rashtrapati Bhawan to warn him against granting Presidential pardon to Afzal. This is the party which when it was in power had released key terror suspects from jail and sent its senior leader and External Affairs minister in Vajpayee's cabinet to Kandahar to hand them over to an international terrorist organisation to meet the demands of plane hijackers. It finds nothing wrong in giving in to hijackers' demands and striking deals with terrorist organisations when it is in power; it rubbishes the Constitution and the Supreme Court in the name of 'faith', and equally characteristically it feels unnerved by the voice of democracy and reason. Once again the

BJP has exposed how utterly it despises and fears democracy.

The death sentence for Afzal on rather shaky grounds and insufficient and doubtful evidence is reflective of the typically dubious and biased manner in which the state has been dealing with terrorism, throwing every notion of human rights and democracy to the winds and often harassing and persecuting entire communities – religious and national minorities – in the name of tackling terrorism. This has been exposed time and again in Kashmir, Punjab and the North-East and now Muslims all over the country are complaining of this vicious bias on the part of the Indian state. Sonia Gandhi and Manmohan Singh had to admit as much in their recent speeches at the Nainital conclave of Chief Ministers of Congress-ruled states. Even as the Congress Chief Minister of Jammu and Kashmir, Gulam Nabi Azad has been compelled to reflect the sentiment of the people of his state to demand clemency for Afzal, the Congress continues to follow in the footsteps of the BJP and turn a deaf ear to the voices of reason and justice.

The anti-democratic attitude of the Congress gets further exposed on the issue of the draconian Armed Forces Special Powers Act. The Act that gives a virtual licence to the Army to kill and rape at will and shields the Army from the long arms of law that grip every common citizen in the country has always been resented by the people as the biggest serial killer of liberty, democracy and dignity of the people. The people of Manipur, the state that has suffered the longest spell of the Act and consequently the bitterest taste of its draconian and barbaric potential, have time and again risen in heroic revolt against this killer Act. Manipur's spirit of protest and resistance has found its most determined champion in Sharmila Chanu who has been on a fast for the past six years demanding scrapping of the AFSPA. While she holds the state guilty of murdering liberty and justice and waging war on the people, the 'rule of law' in the country accuses her of attempting suicide! After her recent release from judicial custody in Imphal when she travelled to Delhi, an unnerved UPA government promptly put her back into judicial custody and transferred her to the All India Institute of Medical Sciences. But the government refuses to answer her simple straightforward demand: repeal the AFSPA.

In 2004 when the whole of Manipur was aflame with the fire of people's resistance after the rape and murder of Manorama, Manmohan Singh had visited Imphal and a commission was set up to probe the AFSPA 'controversy'. The report of the commission headed by former Justice BP Jeevan Reddy has been lying with Manmohan Singh's government since June 2005. The government has refused to make the report public, let alone implement its unambiguous recommendation to repeal the Act which the Commission has found to have become "a symbol of oppression, an object of hate and an instrument of discrimination and high-handedness."

When Manmohan Singh goes abroad he pushes speeches and treaties down the throat of Indians that glorify our former colonial masters and current imperialist bosses and bring only shame, humiliation and insecurity to the country. When he visits Imphal and Vidarbha, he sheds crocodile tears and gives empty assurances that are never fulfilled. Thus the Reddy Commission report has been gathering dust and in Maharashtra farmers have been left 'free' to hang themselves right within the premises of the state Assembly. This politics of murder and falsehood cannot go on forever. This government must be made to understand that Tabassum and Sharmila are not alone; their cry for justice is a cry of millions in the country. If this cry is ignored, the people's verdict will soon be out against the killer and liar government. And nobody will be able to hush it up.

CPI (ML) Demands Review and Revocation of Death Sentence Against Mohammad Afzal

CPI(ML) has expressed solidarity with the range of individual citizens and democratic groups demanding that the death sentence against Mohammad Afzal be reviewed and revoked.

The Supreme Court has failed to find any evidence linking Afzal with any banned organisation, and

has also held that there is no direct evidence against Afzal. Further, Afzal and his wife Tabassum have declared that Afzal was tortured in custody, denied a lawyer of his own choice, and effectively denied a fair trial.

Afzal's own claim that he acted under duress and torture on part of the STF deserves further investigation, since it is likely to unravel the facts about the real perpetrators of the attack on Parliament. The role of the investigative agencies in the Parliament attack case was shown to be shoddy at best and biased and illegal at worst. The way in which these agencies tried to frame an innocent DU teacher, who was subsequently acquitted, is still fresh in public memory. Indian people deserve to know the true facts about who is responsible for the attack on Parliament; the hanging of a man without giving him a chance to defend himself will only serve to stall any thorough and impartial investigation.

The hanging of Maqbul Bhatt in the 1980s sparked off a long phase of unrest and insurgency in Kashmir. If Mohammad Afzal is hanged after being denied a just and fair trial, it will irrevocably jeopardise all efforts to forge peace in Kashmir. The death sentence against Afzal has already sparked off mass outrage in Kashmir. In the interests of Indian democracy and justice, it is imperative that the death sentence against Mohammad Afzal be revoked.

All the following articles have been circulated by South Asia Citizens Wire | October 6-14, 2006 | Dispatch No. 2301.

Why Afzal Must Not Be Executed

Tehelka, Oct 14 , 2006

Hanging him would be poor statecraft. What's worse, the sentence is legally flawed

by Praful Bidwai

*** *Bidwai is a senior Delhi-based journalist***

The "black warrant" issued to Mohammed Afzal for his involvement in the 2001 Parliament attack has triggered widespread popular protests in Kashmir and revulsion among the country's liberals. Jammu and Kashmir's ruling coalition and chief minister, indeed all parties barring the BJP, have called for clemency for Afzal. The issue has precipitated a national-level polarisation between the opponents and supporters of Afzal's execution.

The second camp holds the strangest of bedfellows: on the one hand, Hindutva ultra-nationalists, for whom counter-terrorism is a stick to beat Muslims with, and on the other,

rabid Islamist-separatists like Syed Ali Shah Geelani, who want a “martyr” to their anti-India cause.

Among their opponents are those who believe that hanging Afzal will have terrible political consequences, much graver than the execution of Maqbool Butt in 1984, which was among the factors which greatly increased Kashmiri popular alienation from India and eventually precipitated the azaadi movement. The timing of the execution, on the last Friday of Ramzan, and at a delicate political juncture, couldn't have been more disastrous.

The political argument cannot be lightly dismissed. Yet, there are three other, weightier, arguments too.

First and foremost is the moral case against the death penalty per se - far and away the most powerful argument. It holds that no individual or institution has the right to take the life of a human being. That violates the fundamental human compact on which any society aspiring to be civilised is based. Irrespective of their causes or consequences, there are some things that you simply don't do. Killing another person, except in self-defence, is one. A legitimate State is duty-bound to defend life, not cause death.

Afzal was guilty not of murder, but of conspiracy to commit murder. He was tried under POTA which punishes the second with life imprisonment, the first with death. Yet, the courts sentenced Afzal under a much harsher law.

Capital punishment is always unacceptable, however heinous the crime. It is a crude form of retribution, in which bloodthirst and revenge masquerade as righteousness - without remedying or redeeming the original crime. The death penalty brutalises society and gives legitimacy to barbaric revenge.

It's a proven fact that the best judicial systems can go wrong by holding an innocent person guilty. They're intrinsically fallible. Capital punishment leaves no room for correction. Death is final, irreversible.

In the United States, over 500 people have been

executed since the death penalty was reinstated in 1976. But more than 120 condemned prisoners were released because they had been wrongfully convicted. Last year, the only woman ever sent to the electric chair in Georgia was granted pardon - 60 years too late. She was a Black maid who killed a White man who held her in slavery and threatened her life.

Capital punishment is typically awarded to the poor, illiterate and otherwise underprivileged people who find it hard to defend themselves. Former Chief Justice PN Bhagwati, no less, called it a sentence quintessentially targeted at the poor.

The death penalty isn't a deterrent. In Canada, the homicide rate per 100,000 people fell from 3.09 in 1975, a year before abolition of the death penalty, to 1.73 in 2003. In 2000, The New York Times found that over two decades, the homicide rate in states with the death penalty was 48 to 101 percent higher than in non-death penalty states. In India, the state of Travancore recorded fewer murders after abolition. The US homicide rate is four times higher than in abolitionist Europe.

Death is probably even less of a deterrent for terrorists driven by extremist or deeply irrational ideologies.

The second, jurisprudential argument pertains to one of the central doctrines under which numerous death sentences have been pronounced in India (and elsewhere): waging war against the State. This is a modern version of lese majeste, or affront to the Sovereign or Crown who claims divine authority.

This early medieval doctrine has an obnoxious theological origin: treason not only offends social mores; it's a crime against God's arrangements on earth. Like an unpardonable sin against God, it "cannot be expiated", but must be axiomatically punished by death.

Such reasoning should be abhorrent to any civilised conscience. In India, a worthy sentiment is gathering in favour of abrogating Section 377 of the Indian Penal Code, which criminalises homosexuality because it's held to be "against the order of nature". Lese majeste is

its analogue.

The third argument is a legal one. The punishment awarded to Afzal is grossly disproportionate. Afzal was guilty not of murder, but of conspiracy to commit murder. He was tried under pota, which makes a clear distinction between terrorist acts causing death, and conspiracy in causing them. It punishes the second with life imprisonment, the first with death.

Yet, the courts sentenced Afzal under a much harsher law (Section 302 of IPC, etc). But draconian punishment shouldn't be applied under a general criminal law when a terrorism-specific law is in existence.

Even in the Gandhiji assassination case, the courts didn't interpret Section 302 as applying to conspirators. Gopal Godse, who was deeply involved in the conspiracy, was not executed; his brother was.

An element of anti-terrorist zeal is evident in the simplistic manner in which our courts have dealt with complex issues of differential culpability, especially after Indira Gandhi's assassination. Kehar Singh was executed although he did not kill her.

The evidence of conspiracy against Afzal hinges on his own testimony - he confessed that he brought one of the five men involved in the Parliament attack of 2001 from Srinagar to Delhi and helped him buy a used car - and on the recovery of explosives from his house, and most crucially, on records of cellphone calls to the five.

But the evidence is open to doubt. The explosives recovery record is not watertight. The police couldn't explain why they broke into his house during his absence while he was in jail - when the landlord had the key.

The cellphone record traced several calls from the five men to number 98114-89429. The police allegedly impounded the instrument from Afzal while arresting him in Srinagar. The instrument had no sim card. So the only identity mark was its imei number, unique to each instrument.

There are only two ways to find this tell-tale number: open the instrument, or dial a code and have the number displayed. But the officer who wrote the recovery memo said on oath that he neither opened nor operated the instrument. Besides, the testimonies regarding the date of purchase of the phone with a new sim card (December 4) and its first recorded operation (November 6) don't match.

The conclusion is plain: there's a large grey area in the evidence, which calls for leniency in determining Afzal's guilt and punishment. The courts took the opposite view. This grave flaw must be corrected.

Afzal's death sentence violates the Supreme Court's own guidelines, which say that capital punishment should be awarded in "the rarest of rare cases" - when a murder is conducted in an extremely brutal, grotesque, diabolical and revolting manner or is targeted at a specific community or caste. In the Machhi Singh case, the court stipulated five considerations: motive, socially abhorrent nature of the crime (e.g. targeting dalits or minorities), magnitude, and the victim's personality. These don't collectively apply to Afzal.

Yet another factor speaks in Afzal's favour. He is a surrendered militant, who induced two others to give up militancy, but was harassed by the Special Task Force and subjected to extortion. It was an stf officer, Tariq, who asked Afzal to bring Mohammed to Delhi. In the murky world of Kashmir's insurgency-counter-insurgency, it's hard to pinpoint crime and complicity. By all indications, Afzal got embittered by the stf's misdemeanour, extortion and criminality.

Afzal is by no means beyond the pale of reform. President Kalam should act sagaciously and commute his sentence. It's his constitutional and moral duty to prevent miscarriage of justice and apply a humane touch.

Appeal for Presidential Pardon for Mohd Afzal Guru

Sat, 7 Oct 2006

Dilip Simeon

From: Dilip Simeon

To: "DR APJ ABDUL KALAM"

Subject: Appeal for Presidential Pardon for Mohd Afzal Guru

Dear Mr President

This is an appeal for a presidential pardon to Mohammad Afzal Guru, sentenced to death in connection with the attack on the Indian parliament in New Delhi. May I remind you that five terrorists were killed while carrying out the attack. Even according to the prosecution, Afzal Guru was accused of being a facilitator and not someone directly involved in the attack. Three others accused in the case have either been acquitted or had their sentences revoked on account of faulty evidence.

Mohammad Afzal Guru was the most under-privileged of the accused and did not have adequate legal counsel, having to make do with a court-appointed lawyer. I request Your Excellency to ponder that rich and privileged persons repeatedly get away with murder in our country and the mass carnages of 1984 and 2002 have seen repeated miscarriages of justice, with barely a handful of sentences obtained, and ample evidence of police complicity in criminal acts.

In such a situation, Your Excellency it would be a grave miscarriage of justice to hang a man who was not even accused of killing anyone. Such an action would be pandering to blood-lust and primitive feelings of revenge, motives that are completely out of place in a constitutional system working under the rule of law. It would be disproportionate according to the Supreme Court's understanding that death be awarded only in the 'rarest of rare' cases.

I would add Your Excellency, that for the State to kill someone in revenge is a barbarous practice in any event, and that it is not sufficient to argue that the needs of justice require an eye to be taken for an eye. I know that certain other countries do believe this, and that militants of various kinds resort to the heinous practice of political murder. But the wrong-doing of others is no justification for the Indian Union to continue with such a cruel practice. It must rather, set an example in the

exercise of restraint and compassion, by which alone the rising tide of political violence may be contained.

Your Excellency, I repeat my appeal to you to consider favourably the mercy petition on behalf of Mohammad Afzal Guru and set aside the sentence of death passed on him

With respectful regards

Dilip Simeon

Senior Research Fellow

Nehru Memorial Museum and Library

New Delhi

Dated October 7, 2006

Should Mohammad Afzal Guru be hanged?

Issues in Secular Politics, October 2006 I

by Ram Puniyani

CRIME AND PUNISHMENT

Should Mohammad Afzal Guru be hanged?

As per the Supreme Court has given the judgment, Mohammad Afzal Guru is to be hanged to death on 20th October 2006. Guru was one of the accused in the case of assault on the Parliament on 13 December 2001, in which, many a security personnel were killed. Guru was not found to be to be part of any terrorist outfit, nor did he play any direct role in the same. In the trial which took place the provisions of International Covenant on Civil and Political Rights had not been respected. Supreme court noted that there is no direct evidence of his involvement. The evidence was mainly circumstantial. All three courts including Supreme Court have acquitted him of the charges under POTA of belonging to either a terrorist organization or a terrorist gang.

Court also noted that the evidence was fabricated. Most importantly he was not given any worthwhile legal assistance to defend him during interrogation. When Ram Jethmalani offered to be

his lawyer the Hindutva goons attacked his office. One also recalls here that the lawyers offering to hold the brief of accused in 11 July 2006 Mumbai blasts were also threatened by Hindutva outfit, a real case of cowardly display of pseudo patriotism . At best Guru was facilitator in the crime and not a part of directly perpetrating the crime. Supreme Court notes, that "The incident, which resulted in heavy casualties, had shaken the entire nation and the collective conscience of the society will only be satisfied if capital punishment is awarded to the offender." So does it mean that the punishment is being given to assuage the collective national conscience? One must add what is presented as this conscience is the consciousness of the section of dominant middle classes.

Many a Human rights activist of repute sat on a dharna demanding the commutation of the death sentence, to life imprisonment. They issued appeals to the same effect and also have floated the petitions for clemency. Not to be left behind another section of activists have floated counter petitions demanding nothing short of death penalty for this terrorist. In various talk shows the angry audience is hooting down those talking of the facts of the case and asking for leniency in the light of the holes in the story built by the police authorities. There are two major questions involved in the case. One, that death penalty should be given in the rarest of rare cases, and two when world over the brutal capital punishment is being done away with, should we stick to it. The other peripheral issues which are trying to undermine the basic issues are the hysterical nationalism of Hindu right and sections of society who cannot think that the crime of those accused of acts of terror also needs to be proved before they are punished, and that the punishment has to be commensurate with the crime. For them once Supreme Court has ruled the doors for clemency are closed.

The base on which Supreme Court has given the judgment has been built by the police with methods which are questionable, which have also been reprimanded by the court in this case. The argument on the other side is that if Guru is not hanged it will be an insult to those who have

laid their lives for defending the parliament. The other question, which has got mixed up this, is the fate of peace process, which is going on in Kashmir and South Asia as a whole. In the visual media debates, one can see the hysterical nationalism oozing from every pore of Hindu right wing and some others. Some Muslim spokespersons of this or the other party are finding this as the best opportunity to wear their patriotism on their sleeves by taking blinded firm positions against any consideration of clemency. This became most obvious when Mukhtar Abbas Naqvi of BJP went to the extent of denying that Bhagat Singhs kin can ever make a clemency petition in this case, to the loud applause of the studio audience. As matter of fact the appeal by Bhagat Singhs kin Prof Jagmohan Singh and Anand Patwardhan, the noted documentary film maker and rights activist, had issued the appeal carried by the media. It is unlikely that the BJP spokesperson would have missed it; any way some times even ignorance is bliss to pursue once political assertions! The response of letter writers in the newspaper columns is no different. Most of them demanding the blood of this 'terrorist'! Nothing else can reflect the state of social common sense in the society. By now communal violence has become passé in the society. It is justified to the extent that those involved in this are neither punished nor even looked down upon. On the other hand any body remotely linked to acts of terror can be hanged without any pangs of conscience, communal patriotism at its worst is on display.

While Supreme Court deserves all the respect, one has to see that the primary investigation done by the police, whatever its flaws, forms the base of the judgment. When that investigation has holes should it be accepted as it is presented? When the primary culprits are either dead or some of them absconding, can 'the whole truth be out'? Or is it that somebody has anyway to be punished to quench the thirst for revenge, and who better than the one who has a Muslim name and happens to be from Kashmir. Kashmir has been reduced to 'our' real estate, where we are putting lakhs of our army to deal with couple of thousand of militants! Surely if there is one Indian soldier for every seventh Kashmiri, no wonder Kashmiris will see it as an occupation army. After having

said that the punishment being meted out to Guru is not commensurate with the crime done by him, one will also endorse that the very notion of capital punishment is nothing but barbarism, and it does not become dignified if it is given to a terrorist. Many of those otherwise swearing by non violence are so communalized at core that they are at the forefront of some or other moves demanding the hanging of Guru.

One can understand that for RSS and its affiliates this is the golden opportunity to display their patriotism, partly also to wash the sin of accompanying the terrorists to Kandhar by one of their ministers. One can also understand the success of RSS in communalizing the social thinking to the extent that now truth and humane values have ceased to matter in the face of communal thinking. Justice is being converted into revenge and punishment is meant to further communalize the society rather than a means of reform, rather than being an occasion to introspect as to why such crimes are going on. Surely no one is born a terrorist and no one likes to resort to these means by choice. What are the deeper circumstances due to which these acts of violence are taking place needs to be given a thought. One understands that terrorism is a mere symptom of the underlying disease, which has roots in injustices somewhere. One understands the terrorism cannot be finished by killing the terrorists. For that the underlying causes have to be addressed.

The double standards of our society and legal system are becoming glaringly apparent. The perpetrators of communal violence not only get away with their crimes but also some times they get promotions, as in the case of Ramdeo Tyagi of Maharashtra. Hundreds of police officials who have been named in the inquiry commission reports are enjoying the 'fruits' of their crimes of omission and commission. Thackeray and Modi who have been the main architects of Mumbai and Gujarat riots respectively, could not even be touched by the long arm of law. On the contrary they landed up increasing their political clout after presiding over these genocides. While the perpetrators of Mumbai riots are having a gala time the culprits of subsequent bomb blasts are being meted out the punishments due to them. The

general impression is gaining ground in the society that by now there are two legal systems in the society. One for the followers of Hindu communalism, where killer of Pastor Stains, Dara Singh, is spared the noose and is hailed as Hindu Dharma Rakshak (protector of Hindu faith), the perpetrators of communal violence who get away with ease. The other one is for those who belong to minorities. In their case even the remotest association with the terror attacks is ground enough for hanging or the severest possible punishment.

In Kashmir, Indian army is seen as the occupation army, thousands of innocents have been tortured by this army, Chittsingpura is just a tip of iceberg. The hanging of Maqbool Bhat in 1984 did give a feeling of alienation and later a boost to militancy. Who do we blame for that? Those calling for a hangman for Guru surely are bent upon repeating the process. Nation can watch the hanging of those who have not committed the crime of such a severe proportion, but while hanging them what processes will be unleashed need to be seen overcoming the communal myopia. We must distinguish between the hysterical nationalism of the likes of those demanding the hanging and the humane nationalism wanting to call for reconsideration of the punishment meted out, to sooth the feverish pitch of communalized sections of society. This hanging will surely reinforce the perception of two sets of legal norms which are prevalent in the country.

Capital Punishment: The Afzal Guroo Case

ZNet - October 11, 2006

by Badri Raina

In recent weeks, the Indian public mind (often cutely managed by a savvy media world), has been much drawn towards two happenings.

One of these concerns the propagation of "Gandhigiri" (a rather unfortunate analogue of "Chamchagiri" or sycophancy, and "Dadagiri" or ganglordism) by a Bollywood film wherein Gandhi's preferred methods of non- violence are sought to be made applicable to everyday life.

Interestingly, some polls have it that this film has done more to popularize Gandhi than anything that has been done hitherto. Some thought that.

The other happening relates to the confirmation of the death sentence on Afzal Guroo who was one of the accused in the Parliament attack case (December 13, 2001).

Amazingly, many of the very same social groups who are taken in by the Gandhian approach to problems-as depicted in the film-are also the ones hot for Afzal's death by hanging. Altogether a rather gruesome contradiction. One would think you can either have Gandhi or you can have hanging.

Here is what Gandhi had to say on the subject of capital punishment: "I cannot in all conscience agree to anyone being sent to the gallows. God alone can take life because He alone gives it."

Given the high regard in which the Supreme Court of India is held for its competence and probity, few ought to question the determination of guilt it has made in the case of Afzal Guroo. After all, it is to that competence and probity that S.A.R. Geelani owes both his life and his freedom, having been earlier sentenced to death by the trial court in the very same criminal case.

Gandhi's allusion to "conscience" here does, however, seem to rebuke a phrase in the text of the judgement delivered by the Honourable Court upholding the death sentence. The Honourable Court has averred that only the death sentence would satisfy the "collective conscience" of the country in the matter. One must ask as to which order of conscience ought to have taken precedence in the matter of sentencing-one that abhors taking life or one that seeks it to propitiate popular sentiment. In that conundrum, we stand with the Mahatma.

As we also know, Gandhi's rejoinder to the Code of Hammurabi ("eye for an eye, tooth for a tooth") was a witty and telling one: eye for an eye and surely one day it would be a blind world!

Staying with Gandhi for a minute, perhaps his most discomfiting moment in relation to capital punishment was to come when the revolutionaries,

Bhagat Singh, Sukh Dev and Rajguru were sentenced by the British to be hung.

The question has often been asked did Gandhi do all he could to seek their reprieve from King George, with whom he was then preparing to share the first Round Table conference. No easy answers here, although Gandhi did point out to the colonial government that the sentence was not an "irreversible" one. He was on several occasions to plead that there is little he could do. What, however, is on record in the matter is the following statement from Gandhi:

"The government certainly had the right to hang these men. However, there are some rights which do credit to those who possess them only if they are enjoyed in name only."

(Collected Works, Ahmedabad, Navjivan, Vol.45, pp.359-61, Gujarati)

The direction from "Gandhigiri", then, is explicit enough: you may have the right to sentence Afzal Guroo to death, but it would do you credit not to exercise that right.

The problem may be that India's highly meritorious forward classes are as severely brutalized by events as any in America. Thus a certain tribalism seems to have overtaken their view of things. It remains a thought, nonetheless, that the "eye for an eye, tooth for a tooth" dictum does not obtain in most crimes committed. For example, no country yet has a law that decrees that an arsonist must be punished by an official bonfire of all his belonging, nor a rapist be punished by being required to offer his womenfolk for retaliatory rape (except in some tribal communities). The instinct, therefore, to seek death for murder seems to answer to some residual animality wholly repugnant to civilized life.

The most forcefully telling indictment of the practice of capital punishment that I know of is that of Albert Camus:

"What is capital punishment if not the most premeditated of murders to which no criminal act, no matter how calculate, can be compare

(cited in Wolfe Burton H. Pileup on Death Row, N.Y. Doubleday&Co.,Inc. 1973, p.419).

Clearly, as Michael Radelet points out, " a civilized society must be based on values and principles that are higher than those it condemns." (Facing the Death Penalty:Essays on Cruel and Unusual Punishment, N.Y., 1989)

It must have been on the basis of such an understanding of civilized life that the Hammurabi Code was opposed by Voltaire, Diderot, Thomas Paine, Adam Smith, and David Hume. Quite some gathering there, wouldn't you say? Immanuel Kant was to put that opposition on the clearly articulated anti-utilitarian perception/conviction that "people are valuable in themselves, regardless of whether they are useful, or loved, or valued by others." (cited in MacKinnon, Barbara, Ethics: Theory and Contemporary Issues, 2nd ed., N.Y. Wadsworth Pub., Co., 1998).

MacKinnon makes the further excellent observation that "using the concern for life that usually promotes it to make a case for ending life is inherently contradictory"(p.133). But, when the blood is screaming, especially among the socially endowed, who cares for contradictions. Nonetheless, since capital punishment has indeed been abolished in many countries, the case for pushing the argument remains a strong one. It may perhaps be a useful reminder to the Hindutva lobby here in India that among those honourable countries is one named Nepal! Three cheers for Nepal.

As part of that case-building, it must be repeatedly underlined that the utilitarian argument-quite apart from the philosophical/humanist one-remains flawed and fallacious.

For example, the death penalty has nowhere deterred the crime of murder. In 1989, Senator Edward Kennedy stated before the House Judiciary Committee:

"Not one of those countries (western democracies) has capital punishment for peacetime crimes, yet everyone of them has a murder rate less than half of the United States." Likewise, FBI statistics for 1976-1987 state: "In the twelve states where executions take place the murder rate is exactly twice the murder rate of the thirteen states

without the death penalty."

(source: The Information Series on Current Topics: Capital Punishment, Cruel and Unusual? Wylie:Information Plus, 1998.)

I have on purpose adduced above instances from the United States of America, since our own endowed social groups are rather more prone to acknowledging the truth of anything if it has a US of A label on it. This is a bit sad, because our own Fali Nariman, Shanti Bushan, justice Bhagwati and others have made telling critiques of the logic of capital punishment.

Even when the injunction about the "rarest of rare" cases is accepted for argument, does the case of Afzal Guroo meet that requirement? Here is a clue from what Shanti Bushan has to say:

"Merely because someone colludes with the actual perpetrators does not mean he/she gets death penalty. The role of conspirators needs to be assessed. Hundreds were killed in Gujarat after Godhra. Does it mean there would be death penalty for all of them?"

Let us recall, for example, that in the Gandhi assassination case, Nathuram Godse who pulled the trigger received the death sentence, but his brother, who was intimately part of the conspiracy, did not. Afzal Guroo was neither a chief plotter nor a participant in the actual attack on December 13; if provenly anything, he was a sympathetic, small-time facilitator, although guilty nonetheless. Remembering that he seemed not to have received the benefit of legal representation through the trial, one must ask whether the death sentence fits the merits of his case. This speculation independent of the fact that we regard capital punishment for any offence as deeply offensive to the very *raison d'être* of human existence.

Speaking of which, let us not forget the other troublesome question, that of human error. Michael Radelet counted, since the turn of the century, 343 cases "in which a defendant facing a possible death penalty was wrongfully convicted. Of these, 137 were sentenced to death, and 25 were actually executed"(Ibid.,). Closer at home, Nariman and Bhagwati have persuasively pointed out that the executed Kehar Singh (Indira Gandhi

murder case) may actually have been innocent.

As the government of India mulls over the mercy petition submitted by Afzal Guroo's family, they would do well to keep all of those things in mind. Most of all, they should remember that in the very same case, as stated earlier, S.A.R.Geelani was pronounced guilty and sentenced to death, only to be subsequently exonerated from all culpability. To return to America: it should be recalled that just recently one to the 9/11 attackers, Zachariah Mossaveih, was not given the death penalty just on the basis that his childhood was too abused to render him wholly responsible. No insanity, mind you, just childhood abuse. This is when he was otherwise found guilty in the first degree.

As to "collective conscience," it can work at dangerous cross purposes among different sections of the population, and in different regions of India. If politics are to be a consideration, the largest and the most fruitful view must necessarily be taken of the matter. Such a course would not be out of sync with what far-sighted rulers have done repeatedly in history.

Intelligent design?

Hindustan Times, October 13, 2006

by Ajit Bhattacharjea

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October 12, 2006

Four Octobers ago, a well-known Kashmiri journalist, Iftikhar Gilani, was in Tihar jail facing indefinite incarceration on concocted charges. He had been jailed after a cursory trial on June 9, 2002 and was abruptly released after seven months when the charges were withdrawn. Gilani had a rough time, but was relatively fortunate. As chief of bureau of the Kashmir Times in Delhi, he had many journalist friends and others who campaigned for his release. The charge against him under the Official Secrets Act was found to be fabricated.

The primary evidence produced by the police was a document on the hard disk of Gilani's computer with details of the number of Indian security forces in Kashmir. But this was not secret information. It was, as he pleaded, a paper by one Nazir Kamal already published in the journal of the Pakistan Institute of Strategic Studies, Islamabad Papers, and taken from their website. Offers to demonstrate this by securing other copies of the paper or contacting the website were ignored. Gilani's copy was doctored to make it appear secret. These and other details of the frantic efforts of the prosecution, and the officials behind it, to frame Gilani are detailed in his book, *My Days in Prison*. Fortunately, the patent failure of justice became impossible to justify and he was released on January 13, 2003. But for the influential friends who pursued his case, he may still have been in jail. The maximum sentence prescribed for an offence under the Official Secrets Act is 14 years.

I recall Gilani's case because *My Days in Prison* indicates why the sentencing of Mohammad Afzal Guru to death by hanging has evoked passion and disbelief in the Valley. It documents the devious lengths to which investigative agencies are willing to go to be seen as saviours of the nation. Kashmir is familiar with stories of people being framed, of militants claimed killed by the security forces turning out to be innocent civilians, of young men disappearing without trace. Suspicions are reinforced when it is found that in Delhi, intelligence agencies are not above fabricating or distorting evidence to get credit for catching persons painted as threats to national security. In Afzal and Gilani's cases, evidence of fabrication surfaced during hearings.

With stories concerning national security certain to get headlines, intelligence agencies try to exploit mediapersons to substantiate their charges and embarrass the defence. Hints are dropped about activities that further damage the suspect's reputation or weaken his case. In the Gilani case, a newspaper reported that he had confessed his guilt, which he had not. In the Guru case, his counsel was quoted as suggesting that he preferred death by lethal injection to hanging, an implicit admission of guilt. He denied admitting any such preference.

Intelligence personnel are keen on publicity. Arrangements to be filmed or photographed with a 'catch' are part of the routine; presumably with an eye on a reward.

Gilani's account of his ordeal is detailed and credible. It contains names and designations. A copy of Afzal's letter to his lawyer from jail has been circulated. It makes more painful reading, with descriptions of torture and extortion, but does not have the imprimatur of a published document. Even so, Afzal's account of inadequate facilities for defence, the circumstantial nature of the evidence and other trial inadequacies seem sufficient to provide the scintilla of doubt about his guilt required to merit presidential clemency. It will be too late to make amends if evidence to the contrary is found after he has been hanged.

Justice must be seen to have been done especially in a case involving an attack on Parliament House. The Supreme Court did not find any evidence in the charge that Guru was a member of a terrorist gang or organisation. He was not directly involved in the attack or the planning, which was masterminded by three persons in Pakistan. Even if guilty as a conspirator, the view taken by the court raises more questions than it answers. The following is an extract from the judgment: "The incident which resulted in heavy casualties, has shaken the entire nation and the collective conscience of the society will be satisfied if the capital punishment is awarded to the offender. The challenge to the unity, integrity and sovereignty of India by these acts of terrorists and conspirators can only be compensated by giving the maximum punishment to the person who is proved to be a conspirator in this treacherous act. The appellant, who is a surrendered militant and who was bent upon repeating the acts of treason against the nation, is a menace to the society [and] should become extinct. Accordingly, we uphold the death sentence."