Lynching, not murder

Suspicion that the Ansari case is being diluted underscores need for anti-lynching law

The decision of the Jharkhand police that the killing of Tabrez Ansari, 24, in June did not amount to murder is quite debatable. They have chosen to charge the 11 men arrested for his lynching with culpable homicide that does not amount to murder. To the layman, it would seem strange that those who labelled Ansari a thief, tied him to a pole and assaulted him for hours at night, are not going to be prosecuted for murder. It is not clear if the police are going to include accounts that claim he was forced to chant 'Jai Shri Ram'. This aspect may help establish a clear sectarian motive on the part of the crowd to turn into a lynch mob and attack him. It is known that it was only the arrival of the police that ended the assault on him. That the police have chosen to prosecute them for culpable homicide shows that the causal link between the assault on his person and his death has been established. It is true that the line between culpable homicide and murder is thin. It is the courts that usually assess the circumstances in which a homicide took place and decide whether it amounted to murder or not. Murder is punishable under Section 302 with death or life imprisonment, while forms of culpable homicide attract either a life term or 10 years in prison under Section 304 of the IPC.

The official explanation for concluding that it was not murder is unconvincing. The two-pronged argument is that the medical report gave the cause of death as 'cardiac arrest due to stress', and the fact that the victim did not die immediately, but succumbed some days later. The police also say a second opinion from forensic experts was that the death was caused due to a combination of heart attack and the injuries he suffered. It is quite obvious that merely attributing death to a heart attack is meaningless without referring to the trauma caused by the physical assault. It may not make a legal difference to the prosecution whether the accused are given a life term for murder or mere culpable homicide not amounting to murder. However, invoking only the offence of culpable homicide not amounting to murder may make it easier for the defence to claim that their offence lacked premeditation or intention. Instead, they could claim that they were deprived of their self-control by the "provocation" given by the victim. The narrative in recent lynching incidents that it was the victim who was at fault may come in for needless reiteration unless the prosecution resolutely makes a case of murder. The suspicion that the charge is being diluted underscores the need for a special anti-lynching law. Such a law could cover acts of group violence, whether spontaneous or planned, so that those who join lynch mobs do not gain from any ambiguity about their intentions.

Brexit brinkmanship

Boris Johnson is firm on leaving by October 31, but a last-minute breakthrough looks remote

The recently enacted law to stop Britain from leaving the European Union (EU) without an agreement has brought little certainty that a cliff-edge exit will be avoided. Despite failing to block that legislation and twice losing his bid to hold a general election, Prime Minister Boris Johnson is defiant that the country must leave on October 31. His refusal to seek a further three-month extension from the EU has raised concerns that the government could be held in contempt of parliament. With other hardline eurosceptics, Mr. Johnson has long resisted calls to take no deal off the table, adamant that without such a threat, the government could not strike a bargain in its EU negotiations. Opposition parties and several rebel Tories have stressed the fact that the 2016 referendum merely asked Britons whether they would stay in, or leave the bloc. Moreover, as the agreement still on the table has been rejected repeatedly by Conservative MPs, it was the entire legislature's responsibility to determine the precise terms of the historic exit. With the many controversial manoeuvres thwarted, the government has been forced to renew its efforts to find fresh terms to reach an agreement with Brussels. Ahead of a meeting with his Irish counterpart on Monday, Mr. Johnson proposed aligning Northern Ireland with the EU single market solely for agricultural products. Dublin has said that the idea could not go far since agribusiness forms a small proportion of its trade with Belfast. There is also a move to bring Northern Ireland under the regulatory framework of the EU single market, mooted in 2017 by the EU. This was rejected subsequently by the Democratic Unionist Party (DUP) and Theresa May as potentially detrimental to the U.K.'s sovereignty, unity and integrity. Such an arrangement would entail erecting border checkpoints between Northern Ireland and Britain.

The alternative is the now famous Irish backstop, which would keep the U.K. in an EU Customs union, but strip London of room to make trade deals with third countries. That has already been voted down thrice by Parliament under Ms. May and dismissed by Mr. Johnson and other eurosceptics. But the DUP's support has little relevance to the Conservative government, which is already without a majority after Mr. Johnson sacked 21 MPs for backing the 'stop no deal' legislation. There is speculation that the government could revive the proposal on retaining only Northern Ireland's status, notwithstanding Mr. Johnson's assurances to the DUP leader. The latter option affords the only chance there is of an agreement at the October summit of EU leaders and Britain leaving with a deal at the end of the month. Should an accord with the bloc prove elusive, Mr. Johnson is under legal obligation to seek an extension. But he and his advisers are believed to be exploring options that will spare him from making another request.

The absentee constitutional court

Unlike in 1976, the judiciary has not upheld the suspension of civil rights — instead, it has ducked, evaded and adjourned

GAUTAM BHATIA

'Ultimately, the object of depriving a few of their liberty for a temporary period has to be to give to many the perennial fruits of freedom.' It was with these words that the Supreme Court held that the fundamental rights to life and liberty stood suspended during Indira Gandhi's Emergency. The court's verdict – popularly known as the habeas corpus judgment – was based upon the principle of 'executive supremacy'. This principle holds that in 'times of peril', civil liberties must be subordinated to the interests of the state. What are these 'times of peril'? The government will decide. Whose rights will be curtailed, and how? The government will decide. When will freedoms be restored? The government will decide. The judiciary, held the Supreme Court, was to 'act on the presumption that powers [of preventive detention] are not being abused'.

The hollowness of the Supreme Court's position was soon revealed. After the end of the Emergency, the government's excesses – committed under cover of the habeas corpus judgment – came to light. These included the torture and murder of dissidents. The episode was a stark reminder of one basic principle: absolute power corrupts absolutely. Our republican Constitution is, therefore, based upon a system of checks and balances, where even the government must always be held accountable for its actions. When these actions infringe fundamental rights, accountability must be sought in a court of law.

The habeas corpus judgment betrayed that principle. It has been condemned as the darkest hour in the Supreme Court's history. In 2017, a chastened court formally overruled it, stating that it should be 'buried ten fathom deep with no chance of resurrection'. In its place, the court erected the principle of proportionality: if the state wants to infringe peoples' rights in service of a larger goal, then it must demonstrate that the measures it is adopting bear some rational relationship with the goal. More importantly, it must show that rights are being infringed to the minimum possible extent. And the constitutionality of the state's actions is to be tested by the courts, keeping in mind Justice H.R. Khanna's famous dissenting opinion in the habeas corpus case: that the 'greatest danger to liberty lies in insidious encroachment by men of zeal, well-meaning but lacking in due deference for the rule of law'.

Habeas corpus in 2019

From August 5, 2019, the State of Jammu and Kashmir (J&K) has been placed under a 'communications lockdown'. In addition, political leaders along with an unknown number of other individuals have been detained. These moves followed the Centre's decision to downgrade J&K's 'special status' under Article 370 of the Constitution, and eventually convert it into two separate Union Territories.

Both moves violate crucial fundamental rights. A communications shutdown violates the freedom of speech and expression, prevents those outside the State from being in touch with their families, provides cover for civil rights violations that cannot come to light, and finally, in this day and age, damages an entire infrastructure, of health, food, and transport, causing real suffering. Detention self-evidently violates personal liberty. And over the last

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37 days, government officials have justified both moves. In Brussels, External Affairs Minister S. Jaishankar asked: 'How do I cut off communication between the terrorists and their masters on the one hand, but keep the Internet open for other people?' More recently, National Security Adviser Ajit Doval said that political leaders would remain in custody until 'the environment is created for democracy to function', and refused to say how long this would last.

Mr. Jaishankar's argument was vehemently opposed. A few days earlier, rights experts from the United Nations had called the communication lockdown a form of "collective punishment", where, under the guise of 'prevention', an entire population's rights were taken away for the actions of a few. Collective punishment is an inherently disproportionate infringement of fundamental rights. Others pointed at the irrationality of the justification: if the mere threat of terrorism or violence is the ground for cutting off communication, then the lockdown ought to be extended to the entire country.

Additionally, recent scholarship has shown that there is no evidence that communication lockdowns contain violence; if anything, the available evidence points the other way. And Mr. Doval's argument was nothing but a reiteration of the principle of executive supremacy – that the government would decide when to detain, whom to detain, and for how long to detain, based upon its assessment of when a region was 'ready' for democracy.

The silence of the courts

If Mr. Jaishankar and Mr. Doval's arguments are taken as the official justifications for the lockdown and the detentions, then it should be clear that there are some serious doubts about whether the constitutional requirement of proportionality is fulfilled. But even as the argument has raged in the public sphere – in newspapers, through interviews, and in the halls of the United Nations (the criticism by UN High Commissioner for Human Rights Michelle Bachelet being the latest) – there is one place where it has been conspicuously absent: the courts.

Unlike the Emergency, the courts have not upheld the government's actions – so far. What they have done is dodged, ducked, evaded, and adjourned. Political leader Shah Faesal's petition challenging his detention has been twice adjourned by the Delhi High Court (one time because the government lawyer was not present). At the time of writing, it has been over two weeks since the petition was filed.

Meanwhile, things have not fared any better at the Supreme Court. Petitions challenging the lockdown have also been repeatedly adjourned (the first time with the court remarking that the government should be 'given some time' – a striking echo of the habeas corpus case). By the next date of hearing (September 16), the lockdown would have been in place for more than 40 days. But perhaps, most grotesquely, the court has engaged in a bizarre perversion of the right to habeas corpus: when petitions challenging detentions came up before the bench of the Chief Justice of India, and hearings take place, instead of calling upon the government to justify itself, the bench has 'authorised' the petitioners to go to Kashmir and 'meet' the individuals who were (allegedly) under detention.

But under our constitutional scheme, no citizen needs a certificate of permission from a court to travel through the country. And under cover of granting this 'permission', the court has refused to pronounce on the validity of the detentions themselves: it has sought to fashion ad hoc compromises in individual cases, without discharging its constitutional obligation to adjudicate the legality of the lockdown and the detentions. And so, through this judicial evasion, the status quo continues.

Unchallenged executive writ

Thus, by not ruling upon the cases before it, in effect, the courts have allowed the infringements of civil liberties to continue. And they have done so in a particularly insidious manner: by exempting the government from its constitutional obligation to explain itself, and by exempting themselves from their obligation to hold the government to account. This is nothing other than executive supremacy by stealth: at the time at which the judiciary is most needed to defend civil liberties, it has simply vacated the field, absented itself, and chosen to walk away.

In the 19th century, the Russian playwright Alexander Pushkin wrote 'Boris Godunov', a timeless tragedy about power and tyranny. Its last line is a stage direction, upon the investiture of a new tsar before the public: "The people are silent." This is in stark contrast with lines uttered by Lord Atkin, a great English judge: "Amid the clash of arms, the laws are not silent." In India, in 2019, the people of Jammu and Kashmir have been silenced. But the Supreme Court has elected to silence itself. Amid the clash of arms, that is a tragedy in its own right.

Gautam Bhatia is a Delhi-based lawyer

Striking a blow for investigative credibility

Probe agencies should be given more freedom to be professional without diluting the controls already in place

R.K. RAGHAVAN

These are hugely contentious times for India's criminal justice system. With sensational criminal cases, many of them involving celebrities, controversy erupts almost every day.

The courtroom presents an interesting picture. The judiciary stands apart, enjoying a certain insularity. It has the advantage of being required not to be overly communicative, which enables it to stay away from direct confrontation with others. Next are the prosecutors and investigators who plough a lonely furrow with none to support them; it is about the issue of trust. As for the defence team, a few articulate private lawyers hired by some influential accused persons seem to enjoy an immunity that encourages them to go overboard, often bordering on contempt, both within and outside court. In their perception, the prosecution team is somehow trying to fix the accused. .

In all this, investigators have no mechanism to air their grievances, and are made to bear the cross when things go wrong. In sum, the prosecution lawyers and investigating officers are pitted in an unequal battle against the defence. I perceive here a certain lack of appreciation for the hard work put in by the former. Most of them try in earnest to place the correct facts before the judge.

In such a backdrop, it is refreshing to note a bench of the Supreme Court, of Justice R. Banumathi and Justice A.S. Bopanna, observing recently that probe agencies such as the Enforcement Directorate and the Central Bureau of Investigation (CBI) needed a free hand to conduct their investigations. This was in response to a demand made by certain defence lawyers, that courts, even at the pre-trial stage, should be in a position to scrutinise every piece of evidence collected by the agencies before passing any orders, including those related to the granting of bail.

The top court's positive observations permitting a certain latitude to an investigating officer are based on an anxiety that investigators should not be pressured to compromise on the confidentiality of evidence they have gathered during the process of data collection. In my view, the top court's stand is sensible and reasonable. Investigators are sure to breathe more easy now while discharging their duties, instead of being wary of being bamboozled either by the court or the defence.

These are changed times

I can only reflect on goings-on in the CBI some two decades ago. Back then in the early 1980s and 1990s, arrests were rare. But now, given the sheer volume and complexity of investigative processes, especially those linked to multi-

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layered economic crime, on the one hand, and pressure from the public and the executive on the other, the pressure that the CBI should produce instant results is telling. As a result, the spotlight is solely on the agencies.

The essence of the charge against the CBI – some recent cases are examples – is that it has been selective in its targets, pursuing a campaign of vendetta at the behest of its political masters. It is strange that critics do not dispute the fundamental facts on which a case has been built against the accused. They harp only on alleged procedural irregularities. The fact is that the latter can be blamed only if during a trial the court finds malicious prosecution actuated by personal motives. During an ongoing investigation, the issue of establishing malice does not normally arise.

Recent events have flagged two main issues in court: the right of an accused to get bail and the need for custodial interrogation by probe agencies. Although the maxim that 'bail is the rule, and jail is an exception' has held sway since the times of the noted jurist, Justice V.R. Krishna Iyer, and the courts have been generally liberal in granting bail (this includes pre-arrest or the so-called 'anticipatory bail'), the growing volume of crime and the dexterity of many offenders have induced a certain change in judicial thinking. Courts at all levels now believe that granting bail cannot be a routine and mechanical process, and that certain cases deserve an application of mind while ordering bail. This slight shift in stance has led to lengthy hearings before a bail application is disposed of. It has rightly invited adverse comments that while the application of an ordinary offender is summarily rejected, the rich and the famous are able to persuade judges to devote several sittings to decide the fate of their bail application.

In fairness to courts, however, they now demand and peruse prosecution documents to satisfy themselves that no injustice has been done to a bail applicant. When this is the case, neither the prosecution nor those accused can complain of judicial caprice or arbitrariness in the matter.

Custodial interrogation

There is also controversy over the need for custodial interrogation of an accused person. The complexity of present day crime and the ease with which the many details of a crime can be hidden enhance the need for custodial examination. While courts are convinced of its utility, nevertheless, they are circumspect and sparing in granting such custody. Investigators have been pilloried over this because of possible misuse in questioning under controlled conditions. Custodial questioning is with a view to getting details which have not been obtained earlier under routine examination. It would not be fair to say that such custody is sought only to humiliate an accused person. Police custody casts a serious responsibility on the investigating officer. Any pressure tactics or attempted physical violence (the usual thing in the past) on the person in custody is fraught with serious consequences as far as the investigator is concerned. This must amplify the fact that a request for custodial interrogation is made after due evaluation of the pros and cons. When there are reasonable guarantees, including accountability to the judiciary for civilised treatment of an accused in police custody, I wonder why there is a hue and cry when an accused person is required to be held in police custody for a few days.

Criminal law and its contours are evolving. It is easy to criticise and accuse police agencies charged with efficient solving of crime with arbitrariness. They are carrying out an extremely difficult job under "pressure cooker conditions". The attempt should not be to choke them. Rather, the accent should be on allowing them more freedom to be professional without diluting the controls that are already in place.

R.K. Raghavan is a former CBI Director

LETTERS TO THE EDITOR

Letters emailed to letters@thehindu.co.in must carry the full postal address and the full name or the name with initials.

Towards dystopia?

Any attempt to impose a fascist or totalitarian system of government begins with the regime's firm control on a country's media. It is the case of a blackout in Kashmir but even in the rest of the country, an attempt to subjugate media is being actively carried out by the dispensation and its supporters. A paper like *The Hindu* was abused on social media for its Rafale revelations. The ruling party never condemned such acts by its supporters. At the end of the day, more than the publishers being denied the right to publish, it is the readers who are deprived of their right to know the facts (Editorial page, "The drumbeaters of dystopia," Sept. 11).

A.G. RAJMOHAN,
Anantapur, Andhra Pradesh

■ Both the willingness of major sections of the Indian media to toe the line of the establishment and the government's arm-twisting in the form of threats to ban advertisements have been completely exposed. In their scramble to promote the government's misadventures, news outlets have acted as cheerleaders on various issues – be it demonetisation or the abrogation of Kashmir's special status. On its part, the government, through its PR outreach, has made the vast majority believe that nothing can go wrong as far as its leader is concerned; as a corollary, any criticism of the leader is treated as an affront to the entire nation. Instead of holding a mirror to the establishment, the fourth estate has been trying to press the point that a leadership that attempts the 'unimaginable' and 'unthinkable' is always right.

G.B. SIVANANDAM,
Coimbatore

Minister's remarks

The Finance Minister is right when she says that millennials have started to rely more on ride-hailing services like Ola and Uber. However, pointing the finger at such preferences for the fall in automobile sales is a stretch too far (News page, "Millennial mindset is a factor," Sept. 11). The government cannot wish away the fact that demonetisation and faulty implementation of the Goods and Services Tax are to blame for the downturn. Many small businesses have had to close shop due to the complex methodology involved in filing GST returns. Low organisational turnovers are a factor in there being no major job creation in the last 3-4 years. The government received a renewed mandate this year not by virtue of its performance but because of a lack of viable alternatives. Now, to further divert attention from the economic slowdown, it is investing political capital in moves like the Article 370 dilution and the National Register of Citizens in Assam.

G. SHANKAR,
Chennai

An opaque move

A transfer of a High Court Judge has to be for very strong reasons that are well-documented and can be verified, because such a move impinges upon the public's confidence in the rule of law. The decision-making authority needs to demonstrate how the interests of justice will be better-served by such a move. Some reports in the press suggest that the punctuality of Justice V.K. Tahilramani was an issue. This is unconvincing; even if true, a transfer for such a flimsy reason appears disproportionate. If there is something else that bothered the collegium, it should have been stated. It is unfortunate that the apex court, which demands transparency in all actions of the government and public administration, chose to remain opaque.

R.V. EASWAR,
New Delhi

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