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THE MUMBAI ATTACKS

Does Amir Kasab deserve a free and fair trial?

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The trial of Ajmal Amir Kasab, the lone terrorist captured alive during the November 2008 Mumbai terror attacks, has begun after a series of delays that stemmed from the continuing debate on Kasab's right to a fair trial.

THE TRIAL of Ajmal Amir Kasab, the lone surviving terrorist involved in the November 2008 attacks in Mumbai in India, has become embroiled in a series of controversies and legal impasse. Since his capture, there has been a nation-wide debate as to whether Kasab deserves a fair trial or even a trial in the first place. The lawyers willing to defend Kasab, including those appointed by the court, have faced much anger, protest, and even intimidation from the members of the public.

However, such emotional outbursts should not be stretched to undermine the criminal justice system in a country. India must ensure that Kasab gets a free and fair trial. A fair trial is the only way to ensure transparency, which will uphold the highest traditions of justice. It is also in the interest of the country as India gets the opportunity to vindicate its claim of involvement of elements across its borders in the attacks.

No trial for Kasab

In November 2008, ten militants attacked several targets in Mumbai in a siege that lasted over 60 hours and killed 185 people, including 26 foreigners. Kasab, being the only perpetrator captured alive, became an integral clue in the investigation of the attacks. His testimony, documented in the official police reports, outlined the involvement of militant group Lashkar-e-Toiba (LeT), and delved into the details of the planning and execution of the attacks.

Claiming that he is a Pakistani citizen, Kasab requested the High Commission of Pakistan in India to provide legal aid, a request that was not accepted. Under the Indian judicial system, as in many other countries, if the accused is unable to procure a legal counsel on his own, the court is required to appoint an advocate to represent him. During the remand proceedings, the court appointed Dinesh

Mota to represent Kasab. Fearing public protest and outcry, Dinesh Mota withdrew from the case even at the risk of losing his licence to practice.

In December 2008, when advocate Mukesh Deshmukh offered to represent Kasab, workers from the Shiv Sena – a Hindu rightwing organisation- attacked his residence, forcing him to back out. Anjali Waghmare, the court-appointed advocate was also similarly intimidated. As Waghmare was removed due to a potential conflict of interest, the court then appointed Abbas Kazmi as Kasab’s counsel. Although the trial has now begun, emotions continue to run high, which may lead to further delays and disruptions.

Unlike in previous incidents, the November 2008 attacks in Mumbai have incited a significant amount of anger all over India. The modus operandi involving a 60-hour long battle during which the whole nation was traumatised, fuelled anger and hatred towards the perpetrators, buttressed by photographs of Kasab shooting indiscriminately at the railway terminal. Some in the public demand that Kasab’s crime was far too heinous to deserve a fair trial and that he should instead be “hung in public”.

Right to Defence

Although the anger and hatred towards Kasab is understandable, India, like any other civilised country has a functional judicial system in place, and it is expected that due process is maintained in the administration of justice. Under Article 22 (1) of the Indian Constitution, no person arrested in India shall be detained in custody without being informed of the grounds of his arrest, nor shall he be denied the right to consult and be defended by a legal practitioner. This provision has been reiterated in the national legal aid scheme.

Article 22 (3) of the Constitution says that clause 1 of the article does not apply to “enemy aliens”. Opponents of Kasab’s trial, therefore, argue that he does not require legal representation, or even a systematic trial. However, as India and Pakistan were not at war at the time of the attacks, Kasab cannot be classified as an “enemy alien”. Moreover, Article 21 of the Indian Constitution guarantees the right to life and personal liberty even to “non-citizens”.

Miscarriage of Justice

In a democratic country with an independent judiciary, denial of a fair trial even for a hardcore militant would result in miscarriage of justice. The militants who attacked the city behaved in a lawless manner. This does not mean that the victimised country and its institutions must behave in the same manner, which is what a denial of due process would mean. It must be understood that a fair trial does not decriminalise the serious offence that Kasab is accused off, but is an illustration of the correct establishment of internationally-accepted principles of natural justice.

The protestors also miss the point that it is absolutely necessary that Kasab gets a free and fair trial. In the absence of defence, the trial of the criminal would be one-sided leading to a denial of justice. As pointed out by the Chief Justice of the Supreme Court of India, if Kasab goes unrepresented in the trial, then the entire justice delivery system would be vitiated. This could provide Kasab with an opportunity to contest an adverse verdict on grounds of inadequate legalese and increase the likelihood of his acquittal by the higher courts on that ground.

Vindicating Cross-border Implications

The “evidences” that the Indian investigators have obtained from Kasab form the basis not only of the charges against him, but also of India’s claims of involvement of elements from Pakistan in the attacks. Perhaps for the first time, New Delhi has the opportunity to substantiate the cross-border implications of terrorist attacks. Even though India has provided documents evidencing the

involvement of Pakistani citizens in the attacks, there is still an air of palpable deniability about the same across the border. If the trial is not seen to be fair, it would enable the skeptics to reinforce their claim that the whole Kasab issue is nothing but India's smear campaign against Pakistan.

Kasab's statements, recorded by the investigators, need to pass the judicial scrutiny in order to be acceptable. Already, there are indications that Kasab is likely to retract his statements and claim that these were obtained under duress. It is now left to the court to determine the probatory value of these statements. That is possible only when due process is observed during the trial. Failure to do so would subvert justice and undermine India's diplomatic offensive against the "sponsors of terrorism".

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