

HUMAN RIGHTS VIS-À-VIS INORDINATE DELAY IN DISPOSAL OF MERCY PETITION

Dr. Naresh Kumar Vats¹

ABSTRACT ON

The clemency power is vested in the highest authority by way of prerogative. The power is exercised by the authority in its discretion. But the discretion is not absolute, but subject to certain restriction, and when the authority passes a clemency order arbitrarily without observing the restrictions, then the order passed by the authority will be set aside by the courts. Where the executive authority in exercise of the pardoning power has failed to apply its mind or did not applied its mind to the material placed before it, than the order passed by the President or as the case may be by the Governor would be quashed and set aside by the courts. Hence where the order is passed by the authority without application of mind to the material facts that the convicts had already undergone the imprisonment of 14 years, and passed the order rejecting to exercise of the power to remit their sentence that order will stand vitiated. Where the President or the Governor as the case may be while granting or refusing pardon grants or refuses it malafidely, then the order passed by the President or the Governor would be set aside by the court. The malafide exercise of the power would mean to the exceeding of the authority which is vested in it by the law and thereby would be ultravires, and hence in such a situation the court would strike down the order passed in the malafidely.

In India it is fairly settled that the exercise or the non-exercise of the pardon by the President or the Governor, as the case may be, is not immune from judicial review. Limited judicial review is available in certain cases as the Punjab High court in *Hukum Singh v. State* has held the malafide exercise of the prerogative of pardon by the Governor in exercise of his power under Article 161 of the Constitution of India to be ultravires. Therefore, the researcher wants to lay down the guidelines for deciding the mercy petitions.

These unmindful acts either because of political pressure or undue favour to the death-row prisoners is contrary to the constitutional remedies and on the other hands these forces even pressurize the constitutional heads to prolong their decisions on mercy petition.

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INTRODUCTION

India is a Sovereign Republic where in many respects the power of pardon and reprieves conferred under the Indian Constitution by Article 72 on the President and Article 161 on the Governor of a State, is very similar to the power of the President of the United States of America in granting pardon and reprieves. The wording of the corresponding article is also similar and in such a case, the decisions of the Supreme Court of America are useful in the decision of this point³ in India. Clemency powers vested with the sovereign used to be exercised both in England and India. This was different from the executive power reflected in the statutory provisions. The clemency power or pardoning power of the British Monarch was delegated to the Governor General in Council in India. This power came to be incorporated in our Constitution. Thus, at the time of the enactment of the Constitution, we have had the statutory power as well as the delegated clemency power, claimed in Articles 72 and 161 of the Constitution. The Supreme Court has succinctly brought out the superiority of the constitutional power of pardon over the

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³. *Re Channugadu*, AIR 1954 Madras 911.

statutory powers, which cover almost the same area. In *Maru Ram v. Union of India*⁴, the court said:⁵

“We cannot agree that the power, which is the creature of the Code, can be equated with a high prerogative vested by the Constitution in the highest functionaries of the Union and the states. The source is different; the strength is different, although the stream may be flowing along with the same bed. We see the two powers as far as from being identical, and obviously, the constitutional and cannot suffer the vicissitudes of simple legislative process”⁶

PARDONING PROVISION UNDER THE INDIAN PENAL CODE 1860

Section 54 of the Indian Penal Code 1860 reads as: ‘in every case in which sentence of death shall have been passed the appropriate Government may without the consent of the offender, commute punishment for any other punishment provided by the Indian Penal Code’

Section 55 of the Indian Penal Code 1860 reads as: ‘In every case in which sentence of imprisonment for life shall have been passed the appropriate Government may without the consent of the offender, commute the punishment for imprisonment of either description for a term not exceeding fourteen years’.

Section 54 of the Indian Penal Code 1860 empowers the appropriate Government *i.e.* the Central Government in the case of an offence committed in the Union Territories, and State Government in case of an offence committed in the States, to commute *i.e.* to change a punishment to one of a different type than the originally awarded the sentence of death to any other punishment provided under the Code. The powers vested under Section 55 can be exercised by the Government on its own initiative with no prayer to that effect by the accused in

⁴. AIR 1980 SC 2147; In fact, prior to this decision Justice Krishna Iyer had a different perception about clemency power. Dismissing a petition seeking intervention with a delayed mercy petition he observed in *Krishna Goudv. State of A.P.*, (1976) 1 SCC 157 at 159, thus: “As judges, we cannot rewrite the law whatever our views of urgent reforms, as citizens may be and the sentence of death having been awarded by the Court the judicial frontiers have been crossed and however, regrettable irrevocable taking of human life by the state coercive apparatus may be our sympathies have no rural relevance”.

Indeed, irrespective of the nature of the power, Justice Krishna Iyer asserted the supremacy of judicial review of exercise of even this power, thus: “We must however sound a note of caution. Absolute, arbitrary, law-onto-oneself, malafide execution of public power, if gruesomely established, the Supreme Court may not be silent or impotent”. (At p. 161, para. 9); Also see K.N. Chandrasekharan Pillai, *Judiciary’s Tussle with Clemency Power*, NUALS Law Journal, Vol. (I) (2007), pp. 1-8.

⁵. K.N. Chandrasekharan Pillai, *Judiciary’s Tussle with Clemency Power*, NUALS Law Journal, Vol. (I) (2007), pp. 3-4.

⁶. *Maru Ram – Id.* at p.2169; Also see K.N. Chandrasekharan Pillai, *Judiciary’s Tussle with Clemency Power*, NUALS Law Journal, Vol. (I) (2007), p. 4.

question. The framers of the Code explained the object of such a provision in the following words: 'It is evidently fit that the Government should be empowered to commute the sentence of death for any other punishment provided by the Code. Many circumstances of which the executive authorities ought to be accurately informed, but which more often be unknown to the ablest judges, may, at particular times render it highly inconvenient to carry a sentence into effect'⁷,

In fact the provisions under sections 54 and 55 of Indian Penal Code have become redundant in view of the similar provisions contained under section 432 to 434 of the Code of Criminal Procedure 1973 which empowers to the appropriate Government (Central or State) to commute or remit or to suspend the sentence passed by the courts⁸.

It is important to note that the matter of commutation falls beyond the jurisdiction of the courts since the prerogatives of the executive to alter the sentence once it is accorded by the court of law. Thus, it is only the Government concerned that it is competent to commute the sentence of death under section 54 of the IPC read with Section 433 of Cr. P.C. 1973

Thus, the aforesaid provisions exhaust the powers of the President, the Governor and the appropriate Government in the matter of exercise of clemency in regard to the convicted person.

Restriction on powers of remission or commutation in certain cases under section 433A Cr. P.C. – Notwithstanding anything contained in Section 432, where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishments provided by laws or where a sentence of death imposed on a person has been commuted under Section 433 into one of imprisonment for life, such person shall not be released from prison unless he had served at least fourteen years of imprisonment”.

At the time of enactment of our Constitution the power of commutation/remission and suspension was thus located in the predecessor provisions, signifying that while sentencing is to be done by the courts, execution is to be done by the executive. In other words, the treatment of the prisoners in the jail was to be looked after the executive government, and the judiciary had no role in jail administration.

HUMAN RIGHTS AND INORDINATE DELAY IN DISPOSAL

⁷. *Law Commission of India*, 2nd Report Note A p. 95.

⁸. *Sambhaji Krishna v. State of Maharashtra*, (1974) 1 SCC 196.

The Supreme Court of India through Chief Justice Sathasivam decided that 15 convicts, who had been awarded death sentences by the courts and who death sentence was confirmed by the President, should not be hanged on the grounds of “inordinate and unexplained...agonizing delay”, and mental illness and psychological stresses on the convicts. On the basis, 02 convicts were found to be mentally ill. Thirteen (13) were given life, where mercy petition decisions were delayed by 6 ½ to 12 years. Four (04) convicts who escaped “death row” included Veerappan aids who had been in prison for 20 years, with mercy pleas delayed for nine (09) years.

These deaths penalty, the mercy petition, the power to pardon, court review are four inextricably linked stages followed in death cases as step-by-step safeguards to decide between life and death. There is little point in getting into Hamletian dilemmas, where “in that sleep of death...with dreams may come when we have shuffled off this mortal coil?” Individuals cannot take a life. What are responsibilities of the state when it takes a life?

BRUTAL INCIDENTS

Holding that delay in deciding mercy pleas or insanity/mental illness like schizophrenia could be grounds for commuting death sentences, the Supreme Court Tuesday commuted sentences of 15 death row convicts to life imprisonment. Thirteen (13) of these were on account of delay in deciding mercy petitions and two due to mental illness of the convicts.

In another landmark decision that will ensure that there was no repeat of the controversy over hanging of parliament attack convict Afzal Guru, the court said that there has to be 14 days gap between the communication of the mercy petition's rejection to the convict and his family members and actual execution of the death sentence.

It also held that there cannot be any distinction whether a person on death row was convicted for terror or other charges in entertaining their petition challenging the rejection of their mercy pleas on grounds of inordinate, unexplained and unreasonable delay by the president. The right to seek mercy under article 72/161 of the constitution is a constitutional right and not a mere prerogative at the discretion or whims of the executive, it said.

Every constitutional duty must be fulfilled with due care and diligence "otherwise judicial interference is the command of the Constitution for upholding its values", said a bench of Chief Justice P Sathasivam, Justice Ranjan Gogoi and Justice Shiva Kirti Singh. "Considering the high status of office, the constitutional framers did not stipulate any outer time limit for

disposing the mercy petitions under the said articles, which means it should be decided within reasonable time," said Chief Justice Sathasivam speaking for the bench.

The court said that like the death sentence is passed lawfully, the execution of the sentence must also be in consonance with the constitutional mandate."However, when the delay caused in disposing off the mercy petitions is seen to be unreasonable, unexplained and exorbitant, it is the duty of this court to step in and consider this aspect."

Clarifying the scope of its power of judicial review, it said that when the judiciary interferes in such matters, it does not really interfere with the power exercised under article 72/161 but only to uphold the de facto constitutional protection provided to every convict including death convicts.

The court held that there could be no distinction whether a person on death row was convicted under the Indian Penal Code or anti-terror laws.

We are of the view that unexplained delay is one of the grounds for commutation of sentence of death into life imprisonment and the said supervening circumstance is applicable to all types of cases including the offences under (now lapsed) TADA (Terrorist and Disruptive Activities Act). "The only aspect the courts have to satisfy is that the delay must be unreasonable and unexplained or inordinate at the hands of the executive," the court said, while disagreeing with its earlier judgment in Devender Pal Singh Bhullar case where it had said that the grounds of inordinate delay in deciding the mercy petition would not be applicable in the case of persons convicted under TADA.

The court said it is "necessary that a minimum period of 14 days be stipulated between the receipt of communication of the rejection of the mercy petition and the scheduled date of execution".

"Without sufficient notice of the scheduled date of execution, the prisoner's right to avail of judicial remedies will be thwarted," it said, adding these 14 days are necessary for the prisoner to "prepare himself mentally for execution, to make his peace with god, prepare his will and settle other earthly affairs..." and to have a "last and final meeting with his family members".

It said it was the obligation of the jail superintendent to ensure that the convict's family members are informed about the rejection of the mercy petition in time so that they can make travel arrangements in cases where they live at distant places.

Those whose death sentences were commuted are Suresh, Ramji, Bilavendran, Simon, Ganaprakasam, Madiah, Praveen Kumar, Gurmeet Singh, Sonia, Sanjeev, Sundar Singh, Jafar Ali, MaganLalBerala, Shivu and Jadeswamy.⁹

The facts in some case are brutal. Suresh and Ramji who had wiped out Suresh's brother's family, had been in prison for 17 years, with mercy pleas delayed by 12 years. Parveen killed 04 of a family, and has been in the jail for almost 16 years, with mercy plea delayed by 9 ½ years. Gurmeet had murdered 13 of a family, has been in prison for 26 years, and the mercy delayed almost 08 years. Sonia and Sanjeev killed six of a family, had 12 years in prison, with mercy plea delayed by 6 years. Jafar Ali killed his wife and five daughters, and has been in jail for 11.5 years, with his mercy plea delayed by 09 years. Shiva and Jadeswamy raped and murdered a murdered a minor, and have been in jail for 12 years, awaiting mercy for 6 ½ years.

These facts provoke two opposing view. One view is that these killers have no right to live. The other is that these prisoners are driven out of their mind, with the solitary cell's imaginary clock going "ticktock-tick-tock" day after. Awaiting death is surely agonized by the death clock. Lets us revisit the "bad man" theory that prisoners are bad people who when in prison should have no rights at all popular in US in the 19th century, this was blown to smithereens by the venerable Justice Krishna Iyer in the late 70s to culminate in the settled view: "Prison walls do not keep out fundamental rights." Krishna Iyer also gave us the dictum: "Bail not jail." The Supreme Court has intuitively adopted the 'bad man' theory in bail case. On January 24, 2013, I heard a Supreme Court bench saying: "You have spent 11 months in jail, spend another for five to six years for bail." This digression illustrates an attitude that prisoners deserve no latitude because they are evil.¹⁰ The Supreme Court's recent judgment could be the first step towards abolition of capital punishment.

DISCRETIONARY STAGES

The death penalty cases present four discretionary stages: **Stage I:** Sentence after trial. The Supreme Court, by majority, decided in Bachan (1980) that death penalty was constitutionally permissible. In later cases, it invoked the "rarest of rare" formula. It was never clear what this

⁹<http://www.dnaindia.com/india/report-mercy-plea-disposal-delay-ground-for-commuting-death-sentence-supreme-court-1954771>, Mercy plea disposal delay ground for commuting death sentence: Supreme Court- Tuesday, 21 January 2014 - 9:49pm IST | Place: New Delhi | Agency: IANS

¹⁰<http://indiatoday.intoday.in/story/death-penalty-mercy-petition-power-to-pardon-court-review-death-cases/1/339988.html>

meant: gravity of crime's viciousness or just desert. Blackshield and Amnesty show lack of consistent application by the Supreme Court. In Gudda's case (2012) Justice Dattu, perplexed by the formula, made clear "tooth-for-tooth" revenge was not the right way. "Rarest of rare" is an unworkable formula applied capriciously by even the Supreme Court. But more importantly, Justice Dattu said revenge based 'tooth-for-tooth' was barbaric.

Stage II: The mercy petition. Here the President (or Governor) can only reduce, not increase the punishment. In Kehar (1989), the Court said that the President cannot follow the Court's judgment like a parrot. So, the power is to reduce sentence by taking a wider view. It's the ultimate mercy.

Stage III: Delay in (a) courts and (b) pardon petitions. (A) Court delays, with some inconsistency, have always been regarded as bad, and cruel. How much delay? Vatheeswaran (1983) maximised the delay at two years and found disagreement in Sher Singh (1983). Accused-induced delays were also factorised. Time was not the only factor. (B) For pardoning delays, there is no self-induced delay. Mercy petition delays are intolerable. For example Madhu Mehta (1989; eight years) or Shivaji (1991; four years). In Kehar, the court reminded the executive that a pardon is not a "private act of grace" but a public decision for deciding whether "public welfare... (is) better served by inflicting less than what the judgment fixed."

True, the victim family's rights are also to be balanced (Bengal case -2010) but that is not all. Justice Dattu rejected "tooth-for-tooth." Krishna Iyer reminded us of the "brooding horror of haunting the prisoner in the condemned cell for years."

State IV: Judicial review: Those who argue that court's policy should be "hands off", should recall Satpal (2000) where Haryana's Governor pardoned a BJP politician for political reasons. If there is a review of irresponsible pardon, there must be review for irresponsible rejections.

Chief Justice Sathasivam's latest judgment errs on the side of wisdom preserving judicial review and focusing on the prisoner's mental state. His guidelines make solitary confinement before execution unconstitutional; provide legal aid; and stipulate minimum 14 days before execution; factorises mental health; demands transparency; and mandates meeting with relatives. But will the mercy petitions be now decided in a hurry and narrow the scope of Court review?

Probably. We can't have it both ways, but the latest judgments are steps towards disciplining capital punishment and abolishing it altogether.¹¹

Few can understand the relevance of the January 21st Supreme Court (SC) verdict on death row convicts better than Arulselvi. The 40-year-old assistant professor at Tamil Nadu's Annamalai University is the younger sister of Arivu, who, with two others, faces capital punishment in the Rajiv Gandhi assassination case. The SC verdict will have a direct bearing on Arivu's case as the group has been seeking to commute the death penalty served to them because of a delay in the disposal of their mercy petitions.

Hailed as a landmark judgment in capital punishment jurisprudence, the SC commuted the death sentences of 15 convicts on the grounds of delay in the disposal of their mercy petitions by the President, and set out guidelines to protect the rights of condemned prisoners. The SC verdict will also impact the case of Devender Pal Singh Bhullar, convicted in a 1993 bomb blast case in Delhi, in which nine people were killed. "The verdict has given us a ray of hope. I am sure that while hearing the writ petition for my brother, the SC will consider the January 21 verdict," said Arulselvi.

The pendency or the time lapse between the SC pronouncing capital punishment and the President deciding on the mercy petition has been 14 years in the case of Perarivalan, Murugan and Santhan. It has been about 11 years in Bhullar's case.

Based on the court order, it is appropriate to say that in every case where there is inexplicable and excessive delay in deciding the mercy petition, the death sentence has to be commuted," said senior advocate YugMohit Chaudhry, who represented the 15 death row convicts whose sentences were commuted by the Apex Court.

Every death row sentence in India has to be confirmed by a high court. If the matter is filed before the SC and it upholds the order, a review petition can be filed. If the review petition also confirms capital punishment, the convict has the option of filing a curative petition before the SC. Filing a mercy petition before the governor or the president is the next stage.

According to the Asian Centre for Human Rights, a Delhi-based NGO, approximately 18 mercy petitions filed before the President between 1999 and 2011 have remained pending for

¹¹<http://indiatoday.intoday.in/story/death-penalty-mercy-petition-power-to-pardon-court-review-death-cases/1/339988.html>

between one to 13 years. Over 300 mercy petitions were filed before the President between 1950 and 2009. Of these, 214 were accepted and the death sentences commuted.

Since assuming office in July 2012, President Pranab Mukherjee has rejected 13 mercy petitions involving 19 death row convicts. The fulcrum of the SC verdict is that undue, inordinate and unreasonable delay in the execution of a death sentence amounts to torture, which violates Article 21 and so qualifies as grounds for the commutation of the sentence. The court ruled that even death-row prisoners are entitled to fundamental rights until their last breath. “Just as the death sentence is passed lawfully, the execution of the sentence must also be in consonance with the constitutional mandate and not in violation of the constitutional principles,” observed the court.

Human rights lawyer Colin Gonsalves says there is a flip side to the judgment. “We hope that post this verdict, there are no delays in the disposal of mercy petitions. But this also means that we are entering a dangerous territory where petitions may be decided upon in haste which may result in more executions,” he said.

In case of inordinate delays in deciding the petition, the death sentence will have to be commuted irrespective of the nature of the crime.

“The verdict cleared the confusion on whether the nature of the crime should be a consideration,” said DrAnupSurendranath, Director of the Death Penalty Research Project at the National Law University, Delhi.

The SC court guidelines regarding the treatment of death row convicts, part of the January 21 order, will impact the fate of more than 400 death row convicts across the country. However, this can happen only if prison authorities and state bodies implement the directives properly.

“State-based legal aid groups and civil society will have to be proactive to ensure that the court directives are implemented,” said Surendranath.

Meanwhile, the debate on abolishing capital punishment continues. “This judgment may be a victory from the legal point of view, but the real victory will be when the state decides to abolish capital punishment,” said Colin Gonsalves.

Now the question arises in this paper is, “What about the life of people after being convicted of death penalty?”

This question deals with the issue that what becomes the mental state of the people after convicted of death penalty. How they live their remaining life and what emotional and physical trauma they go through. The long delays before the death row and the torture in the jails, day to day trials, harassments and the acquisition on daily basis. They suffer through all this knowing the truth in their mind that one day they are going to be executed and will never be able to see their families and loved ones. Those who are wrongly convicted are at major risks, they face all the troubles for no guilt or crime. Also, the chance of the accused to suffer from depression or certain psychological diseases increases. Execution of death penalty after pronouncement or commutation of death sentence to life imprisonment after reasonable period become human right of person to live life as decided. This practice of inordinate delay in execution or commutation lead to mental suffering of the accused and is violation of human rights.

CONCLUSION AND SUGGESTIONS

It is submitted on the interpretation of the above decided cases as Justice Krishna Iyer stated that Supreme Court is bent on abolition of capital punishment. On the other hand it cannot be ruled out that delaying the execution of death sentences are directly or indirectly influenced either by the government or sectarian pressure. Deriving from *State of T.N. v.Nalini*¹², on former Prime Minister Rajiv Gandhi assassination, hanging of parliament attack convict Afzal Guru, Devender Pal Singh Bhullar in seeing this trends of commuting the death penalty to life imprisonment from the above incidents that either the ruling parties or religious groups ready to press the Government.

Every constitutional duty must be fulfilled with due care and diligence "otherwise judicial interference is the command of the Constitution for upholding its values. These unmindful acts either because of political pressure or undue favour to the death-row prisoners is contrary to the constitutional remedies and on the other hands these forces even pressurize the constitutional heads to prolong their decisions on mercy petition.

However, considering the high status of office, the constitutional framers did not stipulate any outer time limit for disposing the mercy petitions, which means it should be decided within reasonable time. The court said that like the death sentence is passed lawfully, the execution of the sentence must also be in consonance with the constitutional mandate. Where the delay caused

¹²AIR 1999 SC 2640

in disposing the mercy petitions is seen to be unreasonable, unexplained and exorbitant, it is the duty of this court to step in and consider this aspect.

The Constitutional power of commutation/remission and suspension are vested in the predecessor provisions, signifying that while sentencing is to be done by the courts, execution is to be done by the executive.

Now, if we want to reform a man we cannot reform a man who is already hanged. That is not a possible, we are not punishing the man, we are punishing the whole family i.e. the widow who remains punished, the children who become orphans are punished. Therefore, must we commit the crime? My only object is not to continue committing the crime and go on adding suffering to suffering for humanity, but try our best to reform the individual.

SUGGESTIONS

1 The treatment of the prisoners in the jail to be looked after by the executive government, and the judiciary has no role in jail administration. It is affirmed that unexplained delay be made the ground for commutation of sentence of death into life imprisonment.

2 The courts must satisfy that the delay must be unreasonable and unexplained or inordinate at the hands of the executive. However, as the court disagree with its earlier judgment in *Devender Pal Singh Bhullar* case where it had said that the grounds of inordinate delay in deciding the mercy petition would not be applicable in the case of persons convicted under TADA.

3 Delay of a decade after the imposition of death penalty makes punishment itself a crime. Highlighting the long delay circumstances in *Gayasi Ram* case reveal a ghastly state of insensitivity on the part of the highest level of the executive. The gross culpability of the top Executive in the *Gayasi Ram* Case, where a man has been darkly pining away and perishing minute by minute in the death row.

4 Judicial wisdom has often emphasized that long delay in the execution of death sentence, with the concomitant of the direct misery for the prisoner in the solitary cell is sufficient ground for giving the lesser sentence and a portion for commuting death sentence into life imprisonment.

5 Making his case in favour of abolition of death penalty Justice Krishna Iyer made the following observation: "An increasing number of advanced countries have totally abandoned the death sentence and even the Supreme Court of India, lexically bound by the penal text, has

indicated that while capital sentence is not unconstitutional its application must be rigorously restricted to the rarest of rare cases.

6 An inordinate and unexplained agonizing delay, and mental illness and psychological stresses on the convicts more than three (03) years in capital punishment after confirmation by Supreme Court maybe commuted to Life Imprisonment.

*****END*****