

The Status of Mercy Petitions in India: An Executive Summary



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Abstract

The first and therefore the foremost question relevant within the Indian Context is "Can Death Sentence Be Executed in India in Reality". To our dismay, it's quite problem a minimum of procedurally to execute death sentence in India. The perception of death sentence has been a subject matter of dialogue for long amount of time in and across the global world. Majority opinion of public is that death penalty must be abolished as it violates the Human Rights at large. Trendy jurists' area unit of the opinion that if killing is wrong, nothing will build it right either the legal or social sanction. If it is wrong for a man to kill another man, so it is even for the State to do. It is debated that death penalty has had no visible effect as a deterrent and has utterly failed to reduce the number of murders, which, accordingly, makes the inflection of capital punishment completely useless. The defendant in India underneath the safeguards of the Indian Criminal Justice system has ton of choices to delay his execution once the apex court finds him guilty of offence, particularly Review Petition, Curative Petition, Mercy Petition at the same time to Governor and therefore the President then delay in disposing Mercy petition also gives him ground to commute his sentence.

Keywords: Mercy Petition, Commute, Pardon, Executive, President, Ministry, Recommendations, Government, Judgments, Rejected, Justified.

Introduction

If we simply use the term "mercy" to refer to certain of the demands of justice (e.g., the demand for individuation), then mercy ceases to be an autonomous virtue and instead becomes part of ... justice. It thus becomes obligatory, and all the talk about gifts, act of grace, supererogation, and compassion becomes quite beside the point. If, on the other hand, mercy is totally different from justice and actually requires (or permits) that justice sometimes be set aside, it then counsel's injustice. In shorts, mercy is either a vice (injustice) or redundant part of justice.

- Jeffrie G. Murphy

The power to grant pardon, as envisaged in Articles 72 and 161 of Indian Constitution can do its aim and object only if they'reprovides a sort of check out misuse of this extraordinary power within the161 is to produce an individual's bit to the judicial method. If this human touch isn't exercised properly, the terribly purpose of mercy provisions. This paper tries to create a comparative analysis ofnature and scope of pardoning power in India and abroad and criticallyexamines theory and follow of the pardoning powers in India.The powers of the Executive, the scope of review and different factors influencing the commutation of sentence are mentioned.

Under Article 72 of the Constitution, the President of India is empowered to grant pardon¹ and the Governor of a State is provided more or less similar power under Article 161 of the Constitution.However, the Supreme Court in a number of judgments held that the President exercises his powers with the aid and advice of the Council of Ministers as per Article 53 of the Constitution.² Therefore, the President can act only on the aid and

advice of the Council of Ministers and not empowered to have independent views of his/ her own. As the Ministry of Home Affairs or the State Home Departments are entrusted with maintenance of law and order, internal security, crime control etc and act as the nodal Ministry/Department to advice on mercy petitions, it can be safely concluded that the prosecutor is the grantor of mercy to the death row convicts. The Supreme Court in a number of decisions including in the landmark ruling in Shatrughan Chauhan also held that death row convicts can approach the Courts even after the mercy petitions are rejected by the President for commutation of the death sentence to life imprisonment if the mercy petitions are rejected without considering the supervening events. In Shatrughan Chauhan, the Supreme Court held:

"244. It is well established that exercising of power under Articles 72/161 by the President or the Governor is a constitutional obligation and not a mere prerogative. Considering the high status of office, the Constitution Framers did not stipulate any outer time-limit for disposing of the mercy petitions under the said Articles, which means it should be decided within reasonable time. However, when the delay caused in disposing of 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. Right to seek for mercy under Articles 72/161 of the Constitution is a constitutional right and not at the discretion or whims of the executive. Every constitutional duty must be fulfilled with due care and diligence; otherwise judicial interference is the command of the Constitution for upholding its values."

The Law Commission of India in its "Report No.262: The Death Penalty" of 31.08.2015 recommended that "the death penalty be abolished for all crimes other than terrorism related offences and waging war".³ Even if the recommendations of the Law Commission of India were to be implemented in to, death penalty shall still remain in the statute books in India for offences related to terrorism and waging war and hence granting mercy to death row convicts will continue to haunt the President of India. The President exercises his/her powers with the aid and advice of the Council of Ministers as per Article 53 of the Constitution of India. The functions of the President are largely ceremonial. The President's critical role usually comes to play in the case of a hung parliament, imposition of state of emergency and with respect to signing of certain controversial bills/ordinances. In the last two decades the President's role on all these issues has seldom been questioned. It can, therefore, be safely stated that the President's most controversial decisions have been with respect to the mercy petitions of the death row convicts filed under Article 72 of the Constitution of India. That there are no accurate records of the mercy petitions considered since India's independence shows the callousness of the Government of India on the question of life and death and the respect for human dignity. In 2013, the Government of India informed the Supreme Court that over 300 mercy

petitions were filed before the President by convicts on death row between 1950 and 2009.⁴ The Government of India was obviously unaware that it had earlier informed the Rajya Sabha, upper house of Indian Parliament, on 29.11.2006 that 1,261 mercy petitions were disposed of by the President between 1965 and 2006 alone⁵ other studies indicated that about 3,796 mercy petitions were filed with the President between 1947 and 1964.⁶ Information collated by Asian Centre for Human Rights (ACHR) shows that since India's independence, a total of 5,106 mercy petitions were filed by death row convicts from 1947 to 2015 (as on 05.08.2015). Of these, 3,534 mercy petitions or 69% were rejected while death sentences in 1,572 mercy petitions or 31% were commuted to life imprisonment. The Supreme Court in a number of judgments including in the Shatrughan Chauhan v. Union of India⁷ held that "exercising of power under Articles 72/161 by the President or the Governor is a constitutional obligation and not a mere prerogative. ... Right to seek for mercy under Articles 72/161 of the Constitution is a constitutional right and not at the discretion or whims of the executive. Every constitutional duty must be fulfilled with due care and diligence". The Government of India has issued instructions for dealing with mercy petitions and adopted broad guidelines for granting mercy. The Supreme Court in a number of judgments has held that the decisions of the President on mercy petitions did not meet the test of due care and diligence with respect to compliance with the instructions for dealing with mercy petitions and guidelines for granting mercy.

The instructions for dealing with mercy petitions are routinely violated.

Rule I of the instructions provides for "submission of a mercy petition for mercy within seven days after an exclusive of the day on which the Superintendent of Jail informs him of the dismissal by the Supreme Court of his appeal". Considering that majority of the death row convicts are poor and illiterate and held in solitary confinement, most of them are unlikely to be able to collate all the necessary documents before filing mercy petitions. There is no provision for providing legal aid to death row convicts to prepare the mercy petitions. Consequently, mercy petitions filed fail to reflect the grounds which ought to be considered for granting clemency and the condemned prisoners depend on the predilections of injudicious officials of the Ministry of Home Affairs (MHA). One week time to file mercy petition as provided in Rule I is inherently against the death row convicts.

Rule V of the instructions states that "in all cases in which a petition for mercy from a convict under sentence of death is to be forwarded to the concerned authorities, as expeditiously as possible, along with the records of the case and his or its observations in respect of any of the grounds urged in the petition". However, mercy petitions are often forwarded without all the records, in piecemeal or one by one. In fact, mercy petitions of Suresh and Ramji⁸ of Uttar Pradesh and Praveen Kumar of Karnataka were rejected without considering the trial court

judgments which are the basic documents to assess mercy petitions. There have been cases of suppression of facts from the President by the Ministry of Home Affairs. The note dated 30.09.2005 prepared by then President A.P.J. Abdul Kalam in which he recommended to commute the death sentence of Mahendra Nath Das of Assam to life imprisonment was not provided to his successor, President Ms. Pratibha Devisingh Patil who actually went on to reject the mercy petition of Mahendra Nath Das.⁹ The opinion of the prison authorities that death row convicts Manganlal Barela of Madhya Pradesh and Sundar Singh of Uttarakhand were mentally unfit was not shared with the President while advising rejection of their mercy petitions.¹⁰

Rule VI of the instructions mandates that *“upon receipt of the orders of the President, all orders will be communicated by telegraph and the receipt thereof shall be acknowledged by telegraph. In the case of other States and Union Territories, if the petition is rejected, the orders will be communicated by express letter and receipt thereof shall be acknowledged by express letter. Orders commuting the death sentence will be communicated by express letters, in the case of Delhi and by telegraph in all other cases and receipt thereof shall be acknowledged by express letter or telegraph, as the case may be”*. This Rule is routinely violated and the condemned prisoners are not provided any information about the rejection of their mercy petitions. As the Shantrughan Chauhan judgment shows, in the case of Suresh and Ramji, on 29.07.2004 the Governor of Uttar Pradesh rejected the mercy petitions but they were never informed about the same until 20.06.2013.

In the case of Praveen Kumar, on 26.03.2013 the President had rejected the mercy petition but he had not received any communication till the judgment of the Supreme Court on 21.01.2014. In the case of Gurmeet Singh, on 05.04.2013 he heard the news reports that his mercy petition was rejected by the President but till the judgment of the Supreme Court on 21.01.2014 he had not received any official written communication about the rejection of his mercy petition. Further, when the condemned prisoners are informed about the rejection of their mercy petitions, there is considerable delay. In the case of Jafar Ali of Uttar Pradesh on 22.06.2013 the prison authorities were informed vide letter dated 18.06.2013 that the President rejected the condemned prisoner's mercy petition but it was only on 08.07.2013 that he was informed of the rejection. In the case of Manganlal Barela, on 16.07.2013 the President rejected his mercy petition but he was orally informed on 27.07.2013 and was neither furnished with any official written communication regarding the rejection of his mercy petition by the President nor was he informed that his mercy petition had been rejected by the Governor. With respect to Shivu and Jadeswamy of Karnataka, on 27.07.2013 the President rejected their mercy petitions but they were informed only on 13.08.2013. In the case of Simon, Gnana Prakash, Madhiah and Bilavendra of Karnataka, the President rejected their mercy

petitions on 08.02.2013 but they were informed only orally and the prison authorities refused to hand over the copy of the rejection letter to them or to their advocates despite obtaining their signatures.

The failure to notify the rejection of a mercy petition on time or notify at all, has direct implications on the right to challenge the rejection of mercy petition by the President before the Courts and subsequent execution of the condemned prisoners. As per the Prison Manuals, which vary from State to State, execution can be scheduled from one day to 14 days of informing the prisoner of rejection of mercy petition. This was blatantly violated in the case of Afzal Guru who was denied the opportunity to challenge the rejection of his mercy petition by the President and was executed on 09.02.2013 in secrecy.¹¹ The family members of Guru were not informed about the rejection of the mercy petition and about his scheduled execution. The official communication dated 06.02.2013 informing the scheduled execution of Guru was received by his family members two days after his execution at Tihar Jail, Delhi.¹²

The Ministry of Home Affairs has framed broad guidelines¹³ for granting mercy to death row convicts. These guidelines are violated at will. The MHA in complete disregard for the guideline (i) relating to “personality of the accused” recommended rejection of mercy petitions of Sundar Singh and Manganlal Barela who were declared as mentally unfit by doctors.¹⁴ With respect to guideline (ii) “cases in which the appellate Court expressed doubt as to the reliability of evidence but has nevertheless decided on conviction”, Devender Pal Singh Bhullar was sentenced to death by majority decision of 2:1 by the Supreme Court, the first appellate court under the Terrorist and Disruptive Activities (Prevention) Act, (TADA).¹⁵ The presiding judge of the bench, Justice M B Shah in a dissenting judgment set aside conviction of Bhullar as the reliability of evidence was questionable and ordered his release.¹⁶ Yet, the MHA recommended rejection of his mercy petition and the President was too compliant. With respect to Guideline (iii) “cases where it is alleged that fresh evidence is obtainable mainly with a view to seeing whether fresh enquiry is justified”, Surender Koli, accused of rape and murder of several children who went missing between 2005 and 2006 from Nithari Village in Gautam Budh Nagar district, Uttar Pradesh,¹⁷ alleged that he was tortured by the police to extract confession and was threatened with more torture if he did not repeat his confession before the magistrate. In his letter to the Supreme Court, Koli mentioned that the magistrate failed to notice the telltale signs of torture on him. His fingernails and toenails were allegedly missing due to torture. Koli's confessional statement was made before a magistrate in Delhi and not in Ghaziabad, Uttar Pradesh. Koli alleged that it was done so that the investigators could have a magistrate of their choice. The police on the other hand claimed that the statement was recorded before a magistrate in Delhi due to security reason following an attack on Koli by the lawyers when he was brought to a Ghaziabad court. However, the police had taken him to the same court in Ghaziabad

twice after the said attack before recording the statement in Delhi. It was also alleged that the statement was taken down in English, a language Koli did not understand. Further, the stenographer who noted down the statement of Koli was not examined in court. Koli was allegedly not medically examined before or after the confessional statement.¹⁸ The police were under pressure to solve the case due to high media coverage. While the Supreme Court could not have acted as a trial court to consider the fresh allegations made by Koli before it, the President while considering his mercy petition ought to have ensured the respect for guideline "relating to cases where it is alleged that fresh evidence is obtainable mainly with a view to see whether fresh enquiry is justified". With respect to guideline "(iv) where the High Court has reversed on appeal an acquittal by a Session Judge or has on appeal enhanced the sentence", the Ministry of Home Affairs recommended rejection of mercy petitions of death row convicts in cases where the appellate courts had enhanced the life sentence to death sentence. Simon, Gnana Prakash, Madhiah and Bilavendra were sentenced to life imprisonment by the designated TADA Court but the Supreme Court suomotu enhanced their sentence to death.¹⁹ The President rejected their mercy petitions on 08.02.2013 despite the Supreme Court as the first and the only appellate court under the TADA²⁰ had enhanced the sentence. Similarly, Sonia Choudhary and Sanjeev Choudhary of Haryana were convicted in May 2004 of the murder of eight relatives in August 2001 and sentenced to death. On appeal, the Punjab and Haryana High Court commuted their sentences to life imprisonment in April 2005 but the Supreme Court enhanced the life sentence into death penalty in February 2007. Their mercy petitions were rejected by the President on 29.06.2013. With respect to guideline (v) "any difference of opinion in the Bench of High Court Judges necessitating reference to a larger Bench", there are a number of cases such as Gurmeet Singh²¹, Saibanna Nigappal Natikar²² and B A Umesh²³, where difference of opinion in the Bench of High Court judges necessitated reference to a larger Bench.

The President once again had been too compliant to reject their mercy petitions. In fact, the government of India has developed its unwritten guideline to reject all mercy petitions of those convicted of terror offences. Equally disturbing is the blatant violations of the orders of the Supreme Court by the Government of India. The President should ideally be the first person to ensure respect for the judgments and the rule of stare decisis i.e. law established by previous decisions of the superior courts. However, while rejecting mercy petitions, the President repeatedly violated the courts' ruling by failing to consider violations of the court directions like prohibition of solitary confinement, grant of mercy in the cases already declared per incuriam by the Supreme Court, consider "delay" as a ground for granting mercy after the Shatrughan Chauhan²⁴ judgment (Holiram Bordoloi)²⁵ and consult with the Presiding Judge as per Section 432(2) of the Criminal Procedure Code while deciding on mercy petitions

despite specific direction in the case of Devender Pal Singh Bhullar. While the political decision to reject mercy petitions of all terror convicts is all pervasive, in order to examine arbitrariness and non-application of mind, ACHR examined 41 cases of mercy petitions considered by the President. These are broadly categorised into six categories i.e. (1) cases of murder of spouse and children, (2) cases of murder by servants for gains; (3) cases of murder due to enmity, (4) cases of murder by relatives, (5) cases of rape and murder of minor girls, and (6) cases of kidnapping followed by murder for gains. In all these cases, the President gave contradictory opinion with respect to the cases with similar facts and circumstances. That President Kalam recommended commutation of death penalty of Mahendra Nath Das while his successor President Patil was made to act on the recommendation to rejection of the mercy petition of the same Mahendra Nath Das shows the grave arbitrariness in granting mercy.

Aim of the Study

The aim is to provide a platform for researchers, practitioners, academicians and professional to share innovative research achievements & practical experiences to stimulate scholarly debate in the development of decision making. It is dedicated to publish high quality research papers providing meaningful insights into the subject areas.

Conclusion

The pardoning power of Executive is very significant as it corrects the errors of judiciary. It eliminates the effect of conviction without addressing the defendant's guilt or innocence. The process of granting pardon is simpler but because of the lethargy of the government and political considerations, disposal of mercy petitions is delayed. Therefore, there is an urgent need to make amendment in law of pardoning to make sure that clemency petitions are disposed quickly. There should be a fixed time limit for deciding on clemency pleas. Regarding the judicial review debate, pardoning power should not be absolute as well as Judiciary should not interfere too much in exercise of this power. As judicial review is a basic structure of our Constitution, pardoning power should be subjected to limited judicial review. If this power is exercised properly and not misused by executive, it will certainly prove useful to remove the flaws of the judiciary.

The failure to ensure due care and diligence has resulted in wrongful executions including of Ravji Rao and Surja Ram²⁶ while Afzal Guru was denied the right to challenge the rejection of his mercy petition by the President before the Courts unlike others sentenced to death under the same terror offences. The failure to ensure respect for the instructions for dealing with mercy petitions and the guidelines for granting mercy are caused either by incompetence leading to non application of mind by the officials of the Ministry of Home Affairs or belief of the officials of the MHA in death penalty as the panacea for all crimes, which seriously hampers independent and impartial consideration of the mercy petitions. This failure has made the decisions of the President poorer

than many Superintendents of Prisons and brought so much disrepute that the President has lost the moral authority and his decisions on mercy petitions no longer evoke the necessary confidence that the decisions taken by the President meet the tests of due care and diligence for compliance with the instructions for dealing with mercy petitions, the guidelines for granting mercy, judgments of the Supreme Court and respect for stare decisis. The instructions for dealing with mercy petitions and the guidelines for granting mercy is highly inadequate, restrictive and inherently against the death row convicts. At the same time, ACHR is of the considered opinion that had these instructions and guidelines were implemented in letter and spirit, a number of death row convicts would have been given mercy.

Endnotes

1. Article 72. Power of President to grant pardons, etc., and to suspend, remit or commute sentences in certain cases.— (1) The President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence— (a) in all cases where the punishment or sentence is by a Court Martial; (b) in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends; (c) in all cases where the sentence is a sentence of death. (2) Nothing in sub-clause (a) of clause (1) shall affect the power conferred by law on any officer of the Armed Forces of the Union to suspend, remit or commute a sentence passed by a Court Martial. (3) Nothing in sub-clause (c) of clause (1) shall affect the power to suspend, remit or commute a sentence of death exercisable by the Governor of a State under any law for the time being in force.
2. Article 53. Executive power of the Union.—(1) The executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution. (2) Without prejudice to the generality of the foregoing provision, the supreme command of the Defense Forces of the Union shall be vested in the President and the exercise thereof shall be regulated by law. (3) Nothing in this article shall— (a) be deemed to transfer to the President any functions conferred by any existing law on the Government of any State or other authority; or (b) prevent Parliament from conferring by law functions on authorities other than the President.
3. Law Commission of India, Report No.262 The Death Penalty August 2015 available at <http://lawcommissionofindia.nic.in/reports/Report262.pdf>
4. The statistics was submitted by the Additional Solicitor General of India in *Devender Pal Singh Bhullar v. State of N.C.T. of Delhi* decided on 12.04.2013, <http://judis.nic.in/supremecourt/imgst.aspx?filename=40266> (Accessed 13.05.2015)
5. See Annexure A in reply to Rajya Sabha unstarred question No. 815 of S.S. Ahluwalia answered by S. Regupath, Minister of State in the Ministry of Home Affairs on 29.11.2006 at: <http://164.100.47.5/qsearch/QResult.aspx> (Accessed 14.05.2015)
6. Bikram Jeet Batra, 'Court' of Last Resort A Study of Constitutional Clemency for Capital Crimes in India, See Annexure I, pp 94-95, <http://www.jnu.ac.in/cslg/workingPaper/11-Court%20%28Bikram%29.pdf> (Accessed 14.05.2015)
7. *Shatrughan Chauhan v. Union of India* (2014) 3 SCC 1, *Sher Singh and others Vs State of Punjab* (1983)2SCC 344, *Triveniben Vs State of Gujarat* (1989) 1SCC 674 etc
8. *Shatrughan Chauhan v. Union of India* (2014) 3 SCC 1
9. *Mahindra Nath Das v. Union of India* (2013) 6 SCC 253
10. *Shatrughan Chauhan v. Union of India* (2014) 3 SCC 1
11. Afzal Guru hanged in secrecy, buried in Tihar Jail, *The Hindu*, 10 February 2013
12. See '2 days after hanging, Afzal Guru's wife receives letter from Delhi' *Rediffnews*, 11 February 2013, <http://www.rediff.com/news/report/letter-from-delhi-delivered-to-afzal-guru-s-wife-today/20130211.htm>
13. "Guidelines Regarding Clemency To Death Row Convicts" available at <http://mha1.nic.in/par2013/par2014-pdfs/rs-120214/2280.pdf>
14. *Shatrughan Chauhan v. Union of India* (2014) 3 SCC 1
15. *Devender Pal Singh Bhullar v. State (NCT of Delhi)* (2002) 5 SCC 234
16. Dissenting judgment of Justice M B Shah in *Devender Pal Singh v. State (NCT of Delhi)* is available at: <http://judis.nic.in/supremecourt/imgst.aspx?filename=18351>
17. *Surendra Koli v. State of U.P. Ors* available at <http://judis.nic.in/supremecourt/imgst.aspx?filename=37556>
18. See 'Hanging Koli May Bury The Truth Of Nithari Killings', *Tehelka*, 30 August 2014, Issue 35 Volume 11, at: <http://www.tehelka.com/nithari-killing-hanging-surinder-kohli-will-bury-the-truth/>
19. *Simon And Ors v. State Of Karnataka*, Supreme Court of India, 16 October, 2003, <http://judis.nic.in/supremecourt/imgst.aspx?filename=21075>
20. See TADA at <http://www.satp.org/satporgtp/countries/india/document/actandordinances/Tada.htm#19>. Section 19 of the TADA laid down the following for appeal. "19. Appeal- (1) Notwithstanding anything contained in the Code, an appeal shall lie as a matter of right from any judgment, sentence or order, not being an interlocutory order, of a Designated Court to the Supreme Court both on facts and on law. (2) Except as aforesaid, no appeal or revision shall lie to any

court from any judgment, sentence or order including an interlocutory order of a Designated Court. (3) Every appeal under this section shall be preferred within a period of thirty days from the date of the judgment; sentence or order appealed from: Provided that the Supreme Court may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that the appellant had sufficient cause for not preferring the appeal within the period of thirty days

21. Gurmeet Singh v. State of Uttar Pradesh in Criminal Appeal No. 1371 of 2004, Supreme Court of India, 28.9.2005
22. Criminal Ref. Case No. 2/2003 and Criminal Appeal No. 497 of 2003, High Court of Karnataka, Judgment available at: <http://judgmenthck.kar.nic.in/judgments/bitstream/123456789/367873/1/CRLRC2-03-10-10-2003.pdf>
23. B.A. Umesh v. Registrar General, High Court of Karnataka., MANU/SC/0082/2011 : (2011) 3 SCC 85
24. (2014) 3 SCC 1
25. Holiram Bordoloi v. State of Assam [AIR2005SC2059]
26. Law Commission of India Report No. 262 "The Death Penalty" August 2015