

Grant Of Pardon - Constitutional Duty Or Privilege?

Aneesh A. Shahade

Pune University

Abstract: "A Pardon is an act of grace, proceeding from the power entrusted with the execution of laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed"

Previously, normal parlance, will pardon methods to forgive an individual of as much offense. The term 'pardon' need been characterized as a demonstration from claiming grace, proceeding from the control endowed with the execution of the law, which exempts those distinct for whom it may be presented upon, starting with the discipline those law inflicts for a wrongdoing he need submitted. It influences both those discipline endorsed to the offense and the blame of the wrongdoer.

In different words, allow of pardon wipes off those blame from claiming denounced and acquires him of the first position for blamelessness Concerning illustration In he needed never dedicated the offense to which he might have been charged. Under indian law, those claiming from President of India and the Governors of States bring been provided for those force should give pardons, reprieves, respites alternately remissions from claiming discipline or will suspend, dispatch or drive the sentence. The law governing grant of pardon is contained in Articles 72 and 161 of the Constitution.

Shatrughan Chauhan decision is a landmark case in death penalty jurisprudence for many reasons. A prolonged delay in execution of the death sentence has a dehumanizing effect on those condemned.

I. INTRODUCTION: FACT SITUATION AND THE CONTENTIOUS ISSUES

Shatrughan Chauhan case (21 January 2014) is a highly valued articulation of the Supreme Court that expounds new judicial policy guidelines to unknot the grey areas of Articles 72 and 161 of the Constitution of India. This is the most significant judicial determination authored by Chief Justice P. Sathasivam along with Justices Ranjan Gogoi and Shiva Kriti Singh that undue or unexplained or inordinate delay by the majestic head of the State in disposing the mercy petition of death row convicts amounts to torture and, as such, sufficient supervening event for commutation of death sentence to imprisonment for life. The case examines the camouflage or coloring or reality of the exercise of executive power by the majestic heads — President or Governor — to grant or refuse to grant mercy to the convicts of death sentence. The perennial question is whether to consider the mercy petition or not to consider the mercy petition as a "constitutional privilege" or a "constitutional duty". This has remained an unexplored area right from the earliest case till date. Another important question is from the perspective of "access to justice or distributive justice in healthcare", which depends on three A's,

viz., availability, affordability and approachability, when the convict becomes mentally deranged because of the delay caused in the disposal of mercy petition as well as execution of death sentence. Does not the system suffer from the ills of delay inasmuch as the judicial system suffers from the ailment of delay? Therefore, the case is a milestone that unfolds the conflict between "constitutional duty" and "constitutional privilege". The issues pertain to the questions of "standing" under Article 32, and whether it will be in violation of Article 21 to execute the levied death sentence on the accused notwithstanding the existence of supervening circumstances emanating from Articles 72 and 161. The petitions are by the convicts or their family members and public spirited bodies like PUDR for public cause standing based on the rejection of mercy petition by the President (Article 72) and the Governor (Article 161). The petitioners prayer relates to the issuance of a writ of declaration declaring that execution of sentence of death pursuant to the rejection of the mercy petitions by the President of India is unconstitutional and to set aside the death sentence imposed upon them by commuting the same to imprisonment for life. PUDR by way of public cause litigation sought directions in respect of procedure to be followed while

considering the mercy petitions, and in general for protection of rights of the death row convicts.

Before we advert to the issue of maintainability of the petitions, it is pertinent to grasp the significance of Article 32 as foreseen by Dr. Ambedkar, the principal architect of the Indian Constitution. His words were appositely reiterated in... *Minerva Mills Ltd. and Ors. vs. Union of India and Ors. (1980) 2 SCC 625 as follows:*

“87. ...If I was asked to name any particular Article in this Constitution as the most important – an Article without which this Constitution would be a nullity – I could not refer to any other Article except this one. It is the very soul of the Constitution and the very heart of it.” The fundamental right to move this Court can, therefore, be appropriately described as the corner-stone of the democratic edifice raised by the Constitution.

Petitions, under Article 32 of the Constitution, seek relief against alleged infringement of certain fundamental rights on account of failure on the part of the executive to dispose of the mercy petitions filed under Article 72/161 of the Constitution within a reasonable time.

After the secret executions of Ajmal Kasab and Afzal Guru executions of Maganlal Barela in Jabalpur Central Jail along with that of Shivu and Jadeswamy in Belgaum Central Jail were stayed barely a few hours before their scheduled hour of hanging on the grounds that they were not given an opportunity to challenge the rejection of their mercy petitions.

In the Shatrughan Chauhan case, the rejection of mercy petitions by the President was challenged on the grounds of undue delay in disposal of their mercy petitions, mental illness, and solitary confinement as supervening grounds.

SUPERVENING GROUNDS

The origin of supervening circumstance comes from the Latin expression *supervenire*. A supervening cause takes place as something extraneous or unforeseen and appears independently to become the cause of a legal remedy. It alters the natural course of events that might be connected to a wrongful act or injury. If the intensity of such supervening events is high enough to command attention from judiciary then the convict sentenced to death is excused by commutation by converting the sentence to a life imprisonment.

Following are the requisite supervening circumstances to convert a death sentence into an imprisonment for life.

DELAY

Inordinate delay is one of the supervening circumstance to put forth the cause of mercy petition under article 72 and 161. However, question has been raised repeatedly regarding the time taken to decide upon these petitions. Articles 72 and 161 are silent on the time limit factor. By observation over the years it has been recorded that once the accused is convicted and death sentence is announced, that convict invariably exercises his right under article 161. Death sentence is then stayed as the petition is pending on the desk of the Governor. On reviewing the petition, if in case it is rejected by the Governor, the convict then exercises his right under Article 72 and files a mercy petition to the President. This mercy

petition, usually of a couple of pages citing grounds for commutation of sentence is then forwarded to the Ministry of Home Affairs. In order to examine the standing of the mercy petition and to arrive at a conclusion, the documents like copy of the judgments of the trial Court, High Court the Supreme Court, details of the decision taken by the Governor under Article 161 of the Constitution, recommendations of the State Government in regard to grant of mercy petition, copy of the record of the case, nominal role of the convict, and health status of prisoner are gathered from the State Government and Prison authorities. This process consumes a lot of time and involves lot of correspondence between the authorities. The decision of the President is then under Article 72 is then communicated the Stage Government or Union Territory. This process involves undue, unreasonable and prolonged delay in disposal of mercy petition and the execution of death penalty in the face of such an inordinate delay that infringes the fundamental right to life under Article 21 of the Constitution.

In the case of last 13 death row convicts it has been observed that two questions are glaring and too substantial to be ignored- (i) whether the delay in execution itself will be a ground for commutation of sentence, and (ii) whether two year's delay in execution will automatically entitle the condemned prisoner for commutation of sentence. Both the questions are interdependent and possibly cannot survive without each other. This happens so because of the looming haunt of the prisoner condemned in solitary confinement until the lethal hang. Until 1980, the Court observed that that mercy petitions were decided in minimum of 15 days and in maximum of 10-11 months; from 1980-1988 the time taken to for each petition to reach its logical conclusion was an average of years and thus began the era for “developing the jurisprudence of commuting the death sentence based on undue delay”. As to how to overcome undue delay, the Court in Sher Singh' case impressed upon the Governments both of India and all the States for speedy as well as expeditious disposal of petitions under Articles 72 and 161 or under Sections 432 and 433 of Criminal Procedure Code and issued under mentioned directions:

A self-imposed rule should be followed by the executive authorities rigorously, that every such petition shall be disposed of within a period of three months from the date on which it is received. Long and interminable delays in the disposal of these petitions are a serious hurdle in the dispensation of justice and indeed, such delays tend to shake the confidence of the people in the very system of justice.

The Court's direction did have a meaningful impact inasmuch as that from 1989 to 1997 the average time taken for deciding the mercy petitions was 5 months. But unfortunately, from 1988 onwards the history of deciding the mercy petitions under article 72 and article 161 has again become a victim of snail pace of maximum of 12 years and death row convicts from poor strata of society have been driven to insanity between the supervening swings of delay in disposal of mercy petition and delay in execution of death sentence. The Supreme Court, therefore, taking a cogent view, has expressed that undue, inordinate and unreasonable delay in execution of death sentence does certainly attribute to torture which, indeed, is in violation of article 21 and thereby entails as the ground for commutation of death sentence. While commuting

the death sentence into imprisonment for life of death row convicts, the Court unequivocally opined: "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 mulcted offences charged under TADA. 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."

MENTAL ILLNESS, INSANITY OR SCHIZOPHRENIA

Mental illness, insanity or schizophrenia is another significant supervening circumstance that is based on the ground of the unconscionable long delays in deciding mercy petition. Unconscionable long delay in deciding mercy petition is the result of indecisiveness on extraneous as well as political considerations, which consequentially causes the onset of chronic psychotic illness. In other words, insanity, mental illness or schizophrenia is the effect of unexplained, undue or inordinate delay as cause. Therefore, this supervening event is an in depth examination of causal relationship of effect and cause. And as such, the execution of death sentence will be inhuman and against the well established canons of human rights. While re-visiting the national and international legal treatises, the Court has unequivocally observed that such legal documents prohibit the execution of death sentence on an insane/mentally deranged person(s). To put it clear, "insanity" is a relevant supervening factor for consideration by this court.

Mental illness differs from intellectual disability (previously "mental retardation"). Intellectual disability is measured by subnormal intellectual development with various cognitive deficiencies, usually appearing at an early age. The National Alliance on Mental Illness defines mental illnesses as "medical conditions that disrupt a person's thinking, feeling, mood, ability to relate to others and daily functioning."

Many death row inmates suffer from mental illnesses, including schizophrenia, bipolar disorder, delusions, and other impairments. Some were mentally ill before the crime for which they were convicted. For some, the mental illness developed or worsened in prison, a stressful environment not conducive to mental health.

BORDERLINE PERSONALITY DISORDER

Mental health experts have pointed to a history of such abuse as a trigger to the development of Borderline Personality Disorder. The Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition defines Borderline Personality Disorder as marked by "a pervasive pattern of instability of interpersonal relationships, self-image, and affects, and marked impulsivity."

QUESTIONS FOR FURTHER ANALYSIS

- ✓ Should defendants with severe mental illness be exempt from the death penalty? Why or why not?

- ✓ What difficulties do attorneys encounter in working with defendants who are severely mentally ill? Should attorneys be obligated to work with clients who verbally abuse them, mistreat them, or are uncooperative? What should happen if court-appointed attorneys are permitted to decline representation in such circumstances?
- ✓ Should mentally ill death row inmates be allowed to waive their appeals and be executed?
- ✓ Who should determine an inmate's mental competency, and how should they do so? Should there be an adversarial hearing? What should it entail?
- ✓ Should attorneys file appeals on behalf of mentally ill clients who wish to waive them? Should they be required to do so? Consider the ethical implications for proceeding, or not proceeding, under such circumstances.
- ✓ Many mentally ill people do not exhibit their symptoms all the time. If a person sometimes seems to be completely normal and at other times extremely disturbed, how should an accurate assessment be conducted?
- ✓ What do you think about the practice of giving a condemned prisoner drugs or other treatment so that s/he can reach the degree of mental health necessary to carry out a legal execution? What do you think should be done in these cases?

SOLITARY CONFINEMENT

Solitary confinement of the convict prisoners is another supervening circumstance that invites the attention of the Court commutation of death sentence into life imprisonment. The contentious ground is whether the death row convicts could be kept in solitary confinement from the date of imposition of death sentence by the sessions Court. Whether such solitary confinement is a form of torture and contrary to the provisions of IPC or Criminal Procedure Code, Prisons Act and Articles 14, 19 and 21 of the Constitution? Whether death row convicts are to be kept in statutory segregation and not per se in solitary confinement? The Apex Court examined the niceties of these contentious questions in the backdrop of well-settled law in Sunil Batra v. Delhi Administration. The Court observed that death row convicts waiting for hangmen's lethal move cannot be kept under solitary confinement. Solitary confinement is a separate substantive punishment of maddening severity prescribed by Section 73 of the socially less sensitive Indian Penal Code of 1860.

PROCEDURAL LAPSES

The ground of procedural lapses is one of the important supervening circumstances for the plea of commuting death sentence. The Union Government has laid down certain guidelines for deciding mercy petitions under Article 72 or 161. Non-compliance of the guidelines affects the very spirit and soul of Article 21 which is the paramount principle on which rights of the death row convicts are based along with the rights of the victims of crimes or the deceased's family as also social considerations since these elements form part of the sentencing process as well.

The Procedural Guidelines Are As Follows:

- ✓ Personality of the accused (such as sex, age or mental deficiency) or circumstances of the case (such as provocation or similar justification);
- ✓ Cases in which the appellate Court expressed doubt as to the reliability of evidence but has nevertheless decided on conviction;
- ✓ Cases where it is alleged that fresh evidence is obtainable mainly with a view to see whether fresh enquiry is justified;
- ✓ Where the High Court on appeal reversed acquittal or on an appeal enhanced the sentence; Is there any difference of opinion in the Bench of High Court Judges necessitating reference to a larger Bench;
- ✓ Consideration of evidence in fixation of responsibility in gang murder cases;
- ✓ Long delays in investigation and trial etc.
- ✓ These guidelines mutatis mutandis set out that the power under Article 72 and 161 is an extraordinary power to be exercised as a 'constitutional duty' and not lightly or as a matter of course as a mere 'constitutional privilege'.

While analyzing the cases of the petitioners, the Supreme Court could find that there was no explanation for the delay in disposal of petitions for mercy from death row convicts at various stages.

The delay in disposal of the mercy petitions have been culled out with details as follows:

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|-------------------------------------------------------------------------------------------------|-------------------------|------------------------------------------|
| Custody suffered till date | 6.10.1996 – 17.12.2013 | 17 years 2 months |
| Custody suffered under sentence of death | 19.12.1997 – 17.12.2013 | 16 years |
| Total delay since filing of mercy petition till prisoner informed of rejection by the President | 27.04.2001 – 20.06.2013 | 12 years 2 months |
| Delay in disposal of mercy petition by Governor | First petitioner | 9.3.2001 – 28.01.2002 — 27.04.2001 |
| | Second petitioner | 28.01.2002 |
| Delay in disposal of mercy petition by the President | | 10 months |
| | | 28.01.2002 – 08.02.2013 |
| Delay in communicating rejection by the President | 08.02.2013 – 20.06.2013 | 4 months |
| Custody suffered till date | 14.07.1993 – 17.12.2013 | 20 years 5 months |
| Custody suffered under sentence of death | 29.01.2004 – 17.12.2013 | 9 years 11 months |
| Total delay in disposal of the mercy petition | 12.02.2004 – 08.02.2013 | 9 years |
| Custody suffered till date | 16.10.1986 | 26 years 2 months |

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|--|---------------------------------------------------------|--|
| | – 17.12.2013 less one year of under-trial bail | |
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Table 1

The Court after going through various details at various stages urged that undue and unexplained delay in execution is one of the supervening circumstances. Surprisingly, there is no mention of delay by the majestic heads under Articles 72 and 161. Besides, the unexplained delay has caused mental derangement. In the backdrop of this, the Court commuted the death sentence of death row convicts into life imprisonment till last breadth. The Court concluded in both- *Shatrughan Chauhan* and *V. Sriharan Murugan* cases that “the relief sought for under these kind of petitions is not per se review of the order passed under Article 72 or 161 of the Constitution on merits but on the ground of violation of fundamental rights guaranteed under the Constitution to all the citizens including the death row convicts. The clemency procedure under Article 72/161 provides a ray of hope to the condemned prisoners and his family members for commutation of death sentence into life imprisonment and, therefore, the executive should step up and exercise its time-honored tradition of clemency power guaranteed in the Constitution one-way or the other within a reasonable time. We are confident that the mercy petitions filed under Article 72 or 161 can be disposed of at a much faster pace than what is adopted now, if the due procedure prescribed by law is followed in verbatim. The fact that no time limit is prescribed to the President or Governor for disposal of the mercy petition should compel the government to work in a more systematized manner to repose the confidence of the people in the institution of democracy. Besides, it is definitely not a pleasure for this Court to interfere in the constitutional power vested under Article 72 or 161 of the Constitution and, therefore, we implore upon the government to render its advice to the President within a reasonable time so that the President is in a position to arrive at a decision at the earliest”. The Supreme Court has framed the following guidelines for safeguarding the interest of the death row convicts and also for minimizing the delay in the disposal of the mercy petition(s) by the majestic head of the State:

A. SOLITARY CONFINEMENT

Solitary confinement or single cell confinement prior to rejection of the mercy petition by the President is unconstitutional. Prison Manuals provide necessary rules governing the confinement of death convicts and the rules should not be interpreted to run counter and violate Article 21 of the Constitution.

B. LEGAL AID

Legal aid is a fundamental right under Article 21 and inhere rights in a convict till his last breath. After the rejection of the mercy petition by the President, the convict can approach a writ Court for commutation of the death sentence on the ground of supervening events, if available, and challenge the rejection of the mercy petition and legal aid

should be provided to the convict at all stages. The Superintendent of jails will intimate the rejection of mercy petitions to the nearest Legal Aid Centre apart from intimating the convicts. It is submitted that the Legal Aid Clinics of Law Schools in the country should also take up this pious task and involve the law students in rendering the legal aid to such convicts.

C. PROCEDURE IN PLACING THE MERCY PETITION BEFORE THE PRESIDENT

The Government of India's guidelines, as discussed above, for disposal of mercy petitions filed by death convicts after disposal of their appeals by the Supreme Court must be adhered to strictly. The concerned department should be disciplinarian in calling for the records, as spelled out above, in one go and not in piece-meal in order to minimize the delay in the disposal of mercy petition by the majestic head. After getting all the detailed records, the Ministry of Home Affairs should send the recommendations or their views to the majestic head of the State within a reasonable and rational time. Even after sending the necessary particulars, if there is no response from the office of the President, it is the responsibility/obligation/duty of the Ministry of Home Affairs to send periodical reminders and to provide required materials for early decision.

D. COMMUTATION OF REJECTION OF MERCY PETITION BY THE GOVERNOR

Since the convict has a constitutional right under Article 161 to make a mercy petition to the Governor, he is entitled to be informed in writing of the decision on that mercy petition. The rejection of the mercy petition by the Governor should forthwith be communicated to the convict and his family in writing or through some other mode of communication available. It is submitted that the Legal Aid Clinics of the Law Schools in the country can involve their law students as paralegal servers in this perspective so that dormant clinics can be activated.

E. COMMUNICATION OF REJECTION OF THE MERCY PETITION BY THE PRESIDENT

Since the death convict has a constitutional right under Article 72 of the Constitution to make a mercy petition to the President, he is entitled to be informed in writing of the decision on that mercy petition. The rejection of the mercy petition by the President should forthwith be communicated to the convict and his family in writing. As already stated above, the law students engaged in the legal aid clinics in their law schools should be activated as paralegals.

F. DEATH CONVICTS ARE ENTITLED AS A RIGHT TO RECEIVE A COPY OF THE REJECTION OF THE MERCY PETITION BY THE PRESIDENT AND THE GOVERNOR

It discerns that this directive enables the death victim to seek judicial review of the rejection of the mercy petition. It is

submitted that besides legal aid services centers operative under the legal services authorities legislation, the law students engaged in the legal aid clinics of the law schools can play an active role in this perspective and can be activated from their dormant stage and that shall be an experiential learning in clinical legal education modules.

G. MINIMUM 14 DAYS NOTICE FOR EXECUTION

Since the prison manuals do not contain uniform communication procedure, it shall be 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 for the reasons: (a) it shall allow the prisoner to prepare himself mentally for execution, to make his peace with God, prepare his will and settle other earthly affairs; (b) it shall allow the prisoner to have a last and final meeting with his family members; (c) it shall allow the prisoners' family members to make arrangements to travel to the prison which may be located at a distant place and meet the prisoner for the last time. This time schedule is imperative because without sufficient notice of the scheduled date of execution, the prisoners' right to avail judicial remedies will be thwarted and they will be prevented from having a blast and final meeting with their families. Therefore, the Superintendent of Jail/Prison has an obligation to see that the family members of the death convicts receive the message of communication of rejection of mercy petition in time.

H. MENTAL HEALTH EVALUATION

Death row prisoners lose their mental balance due to prolonged anxiety and suffering experienced on death row. There should, therefore, be regular mental health evaluation of all death row convicts and appropriate medical care should be given to those in need.

I. PHYSICAL AND MENTAL HEALTH REPORTS

All prison manuals give Prison Superintendent the discretion to stop an execution on account of the convict's physical and mental ill health. It is, therefore, necessary that after the mercy petition is rejected and the execution warrant is issued, the Prison Superintendent should satisfy himself on the basis of medical reports by Government doctors and psychiatrists that the prisoner is in a fit physical and mental condition to be executed.

J. FURNISHING DOCUMENTS TO THE CONVICT

The death row prisoners must be provided with the copies of the court papers, judgments, etc. within a week by the prison authorities for making appeals, mercy petitions and accessing post-mercy judicial remedies which are essential under Article 21 of the Constitution. Extreme poor conditions of such victims should not be predicament or stumbling block of their rights under Article 21.

K. FINAL MEETING BETWEEN PRISONER AND HIS FAMILY

In the absence of any uniform procedure prescribed in the prison manuals of different States, it is necessary for prison authorities to facilitate a final meeting between the condemned prisoner and his family prior to execution that is intrinsic to humanity and justice.

L. POST MORTEM REPORTS

It must be obligatory to conduct compulsory post mortem on death convicts after the execution.

II. CONCLUSION

The Supreme Court over a period of time has carefully evolved the theory of mercy jurisprudence. "Mercy jurisprudence is a part of evolving standard of decency, which is the hallmark of the society", is the majestic law ever expounded by the Apex Court. It has also observed that exercise of power of Governor and President under Article 161 and Article 72 respectively is strictly and explicitly a "Constitutional Duty" and not a "Constitutional Privilege". The Apex Court has explicitly declared that by law "When the delay caused 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. Right to seek for mercy under Article 72/161 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."

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