

## LEGALITY OF DELAY IN EXECUTION OF DEATH PENALTY

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All the religions contend that life is a precious gift from god and therefore commands respect. However, this is not practiced and life is destroyed all around us, sometimes for attaining one's own selfish ends and sometimes the law approves the same in the form of euthanasia and death penalty. Death penalty has been used as a method of retribution from times immemorial. However, with the passage of time, society has civilized and modes of death punishment have witnessed significant humanized changes. In India, Capital punishment has been and is a controversial issue. Despite the abolition by many countries, India still retains such punishment. Although the numbers of legislations that prescribe the judiciary have increased, the actual number of executions or hangings carried out in India has reduced. The past decade has seen only three judicial executions.<sup>1</sup> This paradoxical situation can be attributed to the provisions of pardons, respites, remission, reprieves in the Indian constitution. In order to make the death sentence awarded by the session court final, the CrPC requires it to be confirmed by the high court.<sup>2</sup> Once confirmed, the condemned convict has the option of either appealing to the Supreme Court, or where the court either refuses to hear the appeal or upholds the death sentence, the prisoner also has the option of submitting a 'mercy petition' to the president of India and the Governor of the State where he was sentenced to death seeking reduction of punishment from death sentence to one of imprisonment for life or a complete pardon<sup>3</sup>. Although, the motive of the constitution makers behind vesting the ultimate power to grant pardon in the executive was to ensure that the court's decision to award death sentence is just and that the person is not being deprived unnecessarily of his right to life. However, this provision has failed to meet its expected ends and several complications have arisen leading to

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<sup>1</sup> Statistics on executions since 1995 are available in prison statistics, an annual publication of national crime records Bureau of ministry of home affairs.

<sup>2</sup> Section 366, CrPC, 1973

<sup>3</sup> Article 72, Indian constitution.

delayed justice. 14 mercy pleas are pending with the president Pranab Mukherjee<sup>4</sup>. Among them, mercy petition of Parliament attack convict Afzal Guru had been on the top of the list. Guru was ordered to be hanged in 2006<sup>5</sup>. His petition was finally decided by the president after a considerable delay in 2013. The government seems totally indifferent to the plight of such convicts who are kept in suspense for many years. However, it is the need of the hour to emphasize, that human beings are not chattels and should not be used as pawns in furthering some larger political or government policy. Even the Supreme Court of India has recognized that:

***“Any prolonged delay in executing a death sentence can make the punishment when it comes, inhuman and degrading. The trauma and psychological stress, coupled with solitary confinement, creating a conflict known as “death row phenomenon,” in them amounts to a cruel punishment. The prolonged anguish of alternating between hope and despair, the agony of uncertainty and the consequence of such suffering on the mental, emotional and physical integrity and health of not only the convict but also his family members should never be allowed in a civilized society.”***

By article 72 and 161, the constitution confers a right on convicts and duty on the president and governor (govt. in actual practice) to duly consider the petitions and take actions on them expeditiously. If properly exercised, this power could have helped in preventing gross miscarriage of justice even by the highest court. But sadly, this provision has never been exercised in a humane manner in India. As per Article 21, no person shall be unnecessarily deprived of his life and personal liberty except according to the procedure established by law. And unjustified delay of years by the president and governor in disposing of the mercy petitions is not a procedure established by law and therefore is unconstitutional.

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<sup>4</sup> “After Kasab, 14 mercy pleas pending before president”, available at <http://www.indiatvnews.com/news/india/after-kasab-mercy-pleas-pending-before-president-18713.html>, accessed on 27<sup>th</sup> Nov. 2012

<sup>5</sup>No ‘Deadline’ on mercy petition, Indian Express: Nation, 30<sup>th</sup> Aug, 2012

Constitutionality to death sentence was upheld if the court found a case to be “rarest of rare”. The Supreme Court on the suggestion of amicus curie has recorded the various aggravating and mitigating factors in which death penalty may or may not be awarded<sup>6</sup>. The court however, indicated that these circumstances were not exhaustive and that the court did not want to be seen as fettering judicial discretion in the matters of sentencing.

### **Art. 72 & 161 and the delay caused:**

The framers of our Constitution were well aware of the existence of capital punishment as a permissible punishment under the law and that is why power has been provided to the President and Governor under Art. 72 and 161 respectively of the constitution to grant pardons, reprieves, respites or remissions of punishment or to suspend remit or commute the sentence of any person convicted of any offence “in all cases where the sentence is a sentence to death”. This power has been conferred onto them in order to prevent gross miscarriage of justice even by the highest Court. By virtue of the aforesaid Articles, the Constitution makers intended to vest a duty on the Governor and Specially the President to expeditiously dispose of the cases. However in the actual practice, the procedure to get pardon granted or rejected is quite lengthy and time consuming. This can be clearly proved from the case of *Mahendra Nath Das v. UOI & Ors*<sup>7</sup>:

- **14 May 1999:** Date of judgment of Hon’ble Supreme Court.
- **07.04.2000:** Date of rejection of mercy petition by Hon’ble Governor of Assam.
- **April, 2000:** A petition dated nil of Mahendra Nath Das addressed to the Hon’ble President of India was received through Government of Assam.
- **June, 2001:** File submitted to President’s Secretariat for the first time. July, 2004 File returned by President’s Secretariat for re-examination in Ministry of Home Affairs (MHA).
- **April, 2005:** File submitted to the President’s Secretariat for the second time.
- **27.09.2010:** File called back for review in Ministry of Home Affairs (MHA).
- **19.10.2010:** After review, file submitted to the President’s Secretariat for the third time.
- **08.05.2011:** Decision communicated to the Government of Assam.

<sup>6</sup> Bachan singh V state of Punjab, 1980(2) SCC 684 and Dr. Y.S. Chitale, the senior advocate was the amicus curie

<sup>7</sup> Writ petition no. 35 of 2011

This is just an instance of how speedily the cases are being disposed of and justice is being delivered in the country<sup>8</sup>. Dhananjay Chatterjee had to wait for fourteen years before he could be finally executed. There are plenty of cases which can be cited here including the Afzal Guru's petition, the story of disposal of cases by the president on the advice of ministry of Home Affairs<sup>9</sup> has always been the same throughout. The question which arises is at this stage. Whether this delay of years is rendering the execution of death penalty unconstitutional? This issue is often ignored in the retentions and abolitionist debate over death penalty. The legality of prolonged delay in executing a prisoner is seldom taken into account.

### **Justice Delayed is Justice Denied:**

Delay in execution of death sentence poses several questions:

- Whether it passes the 14, 19, 21 test?
- Can the President take any number of years while disposing of a mercy petition?
- Whether the delay in disposing of the mercy petitions is amounting to the abuse of powers by President and Governor conferred by Art. 72 and 161 of the constitution respectively?
- Conflict of powers.

**14,19,21 Test** : Article 21 directly confers a right on every person residing within the territory of India to be treated with dignity. The Expression "Life" includes right to live with dignity which can be taken away only by just and Fair Procedure. 'Procedure established by law' does not end with the pronouncement of sentence; it includes the carrying out of sentence. Prolonged detention to await the execution of a sentence, of death is an unjust, unfair and unreasonable procedure and the only way to undo the wrong is to quash the sentence of death Causing agony and torture to a person by keeping his mercy petition pending for years is in violation of Article 21 of the Constitution. Sentence of death is one thing; sentence of death followed by lengthy imprisonment prior to execution is another. The procedure prescribed by law has to be fair, just and reasonable, not fanciful, oppressive or arbitrary.<sup>10</sup> Even the fullest compliance with the

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<sup>8</sup>In State of U.P. v. Lalla Singh, A.I.R. [1978] S.C 168  
Bhagwan Baux Singh v. State of U.P, A.I.R. [1978] S.C 168  
Sadhu Singh v. State of U.P, A.I.R. [1978] S.C. 1506  
State of U.P. v. Sahai, A.I.R. [1981] S.C. 1442

<sup>9</sup> Art. 74, Indian Constitution

<sup>10</sup> Maneka Gandhi Vs. UOI

requirements of Art.21 is not the journey's end because a law which prescribes fair and reasonable procedure for curtailing or taking away the personal liberty granted by Art. 21 have still to meet a possible challenge under the other provisions of the Constitution. Convicts are not, by mere reason of the conviction, denuded of all the Fundamental Rights which they otherwise possess. Even convict is entitled to the precious right guaranteed by Article 21 of the Constitution that he shall not be deprived of his life or personal liberty except according to procedure established by law<sup>11</sup>.The expression 'personal liberty' in Art 21 is of the widest amplitude and covers a variety of rights which go to constitute the personal liberty of man<sup>12</sup>.The Court has also recognized that the right to life and liberty guaranteed by Art. 21 of the Constitution includes the right to a speedy trial. The right to a speedy trial may not be an expressly guaranteed constitutional right in India, but it is implicit in the right to a fair trial which has been held to be part of the right to life and liberty guaranteed by Art.21 of the Constitution<sup>13</sup>. A detailed interpretation of Art.21 has been given by the SC in the case of Maneka Gandhi vs. UoI<sup>14</sup>.Relevant portion of it has been produced below wherein it was held that:

*“We have to remember that the fundamental rights protected by Part III of the Constitution, out of which Articles 14, 19 and 21 are the most frequently invoked, form tests of the validity of executive as well as legislative actions when these actions are subjected to judicial scrutiny. We cannot disable Article 14 or 19 from so functioning and hold those executive and legislative actions to which they could apply as unquestionable even when there is no emergency to shield actions of doubtful legality. These Articles are not several, isolated walled fortresses, each not reacting on the other, but, on the other hand, are parts of a great scheme to secure certain basic rights to the citizens of the country, each article designed to expand but never to curtail the content of the right secured by the other article. The procedure contemplated by Art. 21 must answer the test of reasonableness in order to be in conformity with Art. 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Art. 21 would not be satisfied.”*

<sup>11</sup>Bhuvan Mohan Patnaik v. State of A.P [1975] 2 S.C.R

<sup>12</sup> R. C. Cooper v. Union of India [1973] 3 SCR 530

<sup>13</sup> Kadra Pahadiya v. State of Bihar, [1981] 3 SCC 671

<sup>14</sup>[1978] 2 S.C.R. 621

A period of anguish and suffering is an inevitable consequence of sentence of death, but a prolongation of it beyond the time necessary for appeal and consideration of retrieve is not. And, it is no answer to say that the man will struggle to stay alive<sup>15</sup>. Now it can be argued here that, if the agony and torture of the offender is bothering this much then what about the agony and torture of those people whose rights were directly violated by the heinous crime of the offender. Well, the argument is well accepted. But this delay in execution of death sentence is causing agony and mental trauma to not only the offender but definitely to those as well whose rights were directly or indirectly affected by his offence as there is always an uncertainty whether they will get justice and the wrongdoer will be punished or not. There is always an apprehension in their mind as to what will happen if the pardon is granted and the culprit comes out of jail. Indian legal system follows criminology and not victimology. The anguish and trauma of the victim is often left unattended in criminal offences and as the matter is decided between the state and the offender. Mental agony is caused also to the near and dear ones of the offender as well as there is a continuing uncertainty whether the offender will ever be able to come out and be with them again or not. In the case of *Jagdish vs. State of Madhya Pradesh in 2012*, the Supreme Court highlighted not only the agony of the convict by inordinate delay of execution but also the agony and trauma of his close relatives. The solitary confinement of the offender and long lasting uncertainty about his life makes his life worse than hell and there is always a doubt in his mind as to whether he will be able to witness the next morning ever again or not. In *Edigma Anama vs. State of A.P. in 1974*, Justice Krishna Iyer spoke of the “brooding horror of haunting the prisoner in the condemned cell for years.” Therefore in all, there different parties are not in a position to live a normal life without any reasonable apprehension and mental agony and trauma. Therefore it can be concluded that delay in execution fails in the test of 21.

In *SunilBatra v. Delhi Administration*<sup>16</sup> there was 8 years delay in executing the sentence. It was observed that when a person is made to undergo inhuman and degrading punishment where execution is endlessly delayed and the accused is made to suffer most excruciating agony and anguish, the Court could give relief where necessary. Prolonged delay in execution of death

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<sup>15</sup> T.V. Vatheeswaran vs State Of Tamil Nadu 1983 AIR 361

<sup>16</sup> AIR 1978 SC 1675

sentence was against the right of fair procedure. Even a person under lawful sentence of death or imprisonment was entitled to fundamental rights.<sup>17</sup> It was held that right to speedy trial was implicit in right to fair trial.<sup>18</sup> Long delay in executing death sentence was a recognized factor which rendered death sentence liable to be vacated. It was further held that delay exceeding two years in execution of sentence was to be considered sufficient to entitle a person to demand quashing of death sentence.<sup>19</sup> United States of America has right to speedy trial as a constitutionally guaranteed right.

Also, Article 14 requires equals to be treated equally. The power to grant power is completely a discretionary power in the hands of the president (ministry of home affairs in practice) and one person may not be granted pardon while the situations of the offender and in which the crime was committed being the same, although, some other offender might have got pardon granted in the same situations. He is further protected by Article 361 which confers special privileges on the President and by virtue of which he cannot be called to appear before the court to justify any of his actions. Therefore excessive delay caused in grant of pardon by the president is violative of fundamental right conferred by Art. 14. The prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death<sup>20</sup>.

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<sup>17</sup> Bhuvan Mohan Patnaik vs. State of AP, 1974 SCC (Crl.) 803

<sup>18</sup> State of Maharashtra v. Champalal Punjaji Shah, (1981) 3 SCC 610

<sup>19</sup> Hussainara Khatoun (I) vs. Home Secretary, State of Bihar, (1980) 1 SCC 81

Vivian Rodrick v. The State of West Bengal, [1971] 1 SCR 468

State of U.P. v. Paras Nath Singh & Ors., [1973] 3 SCC 647

Bihar v. Pashupati Singh, [1974] 3 SCC 376

<sup>20</sup> Furman v. State of Georgia, 408 U.S. 238

*Whether the president can take any no. of years in disposing of the petition?*

In **Sher Singh's**<sup>21</sup> case, a Bench of three Judges, observed that right under Article 21 required fair procedure at all stages, including the stage of execution. Even where death sentence was justified when passed, its execution may not be justified by reason of undue delay. It was observed that the Executive should follow self-imposed rule that a mercy petition under Article 72 and 161 of the Constitution should be disposed of within a period of 3 months as long delay erodes the confidence of the people in the very system of justice. It was further held that rule of two years could not be laid down for every case. However the only delay which would be material for consideration will be the delay in disposal of the mercy petitions or delays occurring at the instance of the executive. When such delay is caused at the instance of the person himself, he shall not be entitled to gain any benefit out of such delay.<sup>22</sup> However in the present case, the SC overruled its own decision in *T.V. Vaitheeswaran v. State of Tamil Nadu*,<sup>23</sup> in which a bench of two Judges held that two years delay in execution of the sentence after the judgment of the trial court would entitle the condemned prisoner to ask for commutation of his sentence of death to imprisonment for life. The same was applied in other cases also<sup>24</sup>. In *Sher Singh's case*, the Court held that delay alone is not sufficient to ask for commutation. Undue long delay in execution of the sentence of death would entitle the condemned person to approach Supreme Court under Article 32 but the Court would only examine the nature of delay caused and circumstances ensued after sentence was finally confirmed by the judicial process. The Court might consider the question of inordinate delay in the light of all circumstances of the case to decide whether the execution of the sentence should be carried out or should be altered into imprisonment for life.

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<sup>21</sup>[1983] 2 SCR 582

<sup>22</sup> Smt. Triveniben vs. State of Gujrat, (1989) 1 SCC 678

<sup>23</sup> [1983] 2 SCR 348

<sup>24</sup>Javed Ahmed Abdul Hamid Pawala v. State of Maharashtra, [1985] 2 SCR 8



**Unjustified long delay is amounting to abuse of power conferred by Article 72 and 161:**

Although it may be contended by the ministry of home affairs that the discretionary powers enjoyed by the president under Article 72 of the Constitution for granting mercy or rejecting such pleas were special powers overriding all other laws, rules and regulations in force. The Decision of the president in such cases “could not be altered, modified or interfered with any manner whatsoever by any statutory provision or authority”. Also, no time frame could be set for the president in this regard.<sup>25</sup> But it can be questioned whether this is what the power was vested in him for? If the experienced and well educated constitution makers after due consideration conferred this power to him then it simply means that they presumed the cases to be disposed of expeditiously and nowhere intended to give an opportunity neither to the govt. nor to the president to just sit and relax on the pile of the mercy petitions without being in a position to justify the delay. Just because the president is protected by Art 361 doesn't mean that the ministry in his name can do anything it feels like doing. Therefore unjustified long delay in deciding the mercy petitions can be rightly termed as abuse of power conferred by Articles 72 & 161 and is also enabling the misuse of constitutional provisions at the sake of several fundamental and other rights of the parties aggrieved. Also, this delay is creating another conflicting situation between the executive and judiciary whereby the honorable Supreme Court commutes the punishment of Death penalty in Life imprisonment in several cases when the ministry of home affairs is not in a position to justify the delay caused. It implies that the decision of the executive coming out of the power conferred in him by the Supreme law of the land is sometimes not acceptable by the Judiciary<sup>26</sup>. Therefore to secure the Supremacy of constitutional provisions and to meet the ends of Justice, speedy disposal of cases is very much necessary.

***Conflict of powers:***

Silence in the constitution regarding the time limit in which the mercy petition should be disposed off conveys an unstated discretion to the president. Generally, the main reason behind the delay is the restriction imposed by Article 74 of the constitution which bounds the president

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<sup>25</sup> Delay doesn't render bhullar's execution unconstitutional: Home Ministry to Sc, The tribune, October 20, 2011, a main page.

<sup>26</sup> Ramesh v. State of Rajasthan (2011) 3 SCC 685,

to act in accordance with the aid and advice of council of ministers. However, the president may require the council of ministers to reconsider such advice, and the President shall act in accordance with the advice tendered after such reconsideration. When it appeared that the executive was not likely to revise its initial advice to the President, the Presidents used the option to delay the rejection of a petition as long as they could, even by not acting on it till the completion of their tenures. Presidents K.R. Narayanan, Abdul Kalam, and Pratibha Patil used this option, as the Constitution does not impose any time limit for the President within which a mercy petition must be disposed of. Most of the 35 commutations decided by Ms Patil were part of the backlog left by Mr. Narayanan and Mr. Kalam. Ms Patil left the mercy petitions of 16 convicts undecided. This suggests that she might have disagreed with the government's advice to reject the mercy petitions of these convicts.

The power to grant pardon has been vested on both the President (Art. 72) and the Governor (Art. 161). The constitution doesn't envisage any hierarchy of powers between the President and the Governor. Being a quasi-federal nation, thus the States cannot be treated as mere delegates or agents of the Central Government. This creates an ambiguous situation sometimes that whether state Government can stop the execution of an offender and consider afresh the commutation petition if the president of India had rejected his earlier commutation petitions. Power to commute under Article 161 is a constitutional power which cannot be curtailed by statute or executive directions. This kind of fact situation arose in **'Daysingh vs Union of India'**<sup>27</sup>. The convict therein filed a mercy petition before the Government of Haryana after his mercy petition was dismissed by the President of India. The petition before the Governor was pending for more than two years. In the counter affidavit, the delay was explained by the Union of India stating that the Government of Haryana referred the matter to the President of India seeking clarification on the questions as to whether the Governor could exercise the constitutional powers in a case where an earlier mercy application had been rejected by the President. The matter was referred to the Ministry of Law for advice which then ultimately gave the directive under Article 257(1) of the Constitution to all the Chief Secretaries of all State Governments. The SC did not consider valid the directive u/ Article 257(1) that the Governor has no power to entertain fresh mercy petition after it was rejected by the President, because if the

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<sup>27</sup>(1991 (3) SCC 61)

Governor was without power, the pendency of the petition before the authority that had no powers cannot said to be a delay at all. So there may at times a possibility of conflict between state government and union.

Also, there may be a conflict of powers between the executive and Judiciary. Although the right to decide on mercy petitions given by the constitution to the President and Governor is a sovereign and absolute privilege and cannot be questioned, but a conflictual situation is created when the same decision is challenged through right to seek judicial review provided to the petitioner by the constitution itself. The Constitution provides the power of judicial review in order for courts to examine the reasons for the rejection of a mercy petition by the President. There are numerous cases in Indian history, where even after the rejection of a mercy petition, courts have exercised this power. This has been done so that if the President's exercise of his power was questionable, the higher judiciary may ask him to reconsider. There are instances where when the SC did not find the explanations given by the executive for delay caused in disposing the mercy petitions reasonable, it has itself commuted the punishment from death sentence to life imprisonment disregarding the fact that the executive has rejected the mercy petition. This is how the three convicts sentenced to death in the Rajiv Gandhi assassination case, Santhan, Murugan, Perarivalan, secured a reprieve from the Madras High Court after the President dismissed their clemency petition in 2011.

### **Way Ahead:**

The unjustified delay in disposing of the mercy petitions should be declared unconstitutional and a particular time frame should be fixed for the deciding such cases by the President. This can be done in two ways:

- Either the Supreme Court by way of Precedent sets a time period in which the President is bound to dispose of the petitions; Or
- The legislature comes up with any legislation or statute fixing the time period and manner of disposition of mercy petitions and regulating the powers conferred by Art.72 &161.

Although, a third way by means of constitutional amendment is also possible but due to the rigid structure of Indian Constitution, this is not feasible and therefore not strongly

recommended. It is apprehended that this may lead to violation of doctrine of separation of powers but then strict separation of powers between executive, judiciary and legislature has never been possible and so is the scenario now. In fact, it will operate as a check on the unfettered power of the executive and will help in better administration of justice. Moreover, separation of powers between executive and judiciary has been provided in Art. 50 of the constitution which forms a part of the Directive Principles of State Policy and hence cannot be claimed to be justiciable. The unnecessarily long delay causes several other complications such as terrorist may engage themselves in anti- social activities like hijacking planes or kidnapping people and demand release of the person whose petition is pending with the president at the cost of such planes and people<sup>28</sup>. And sometimes, when court commutes the punishment to life imprisonment, there is a threat to the society that their rights might be affected by further instances of re-offending. All the situations emerging out of the delay in execution of death penalty need to be give due consideration and the matter needs to be settled.

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<sup>28</sup> Maqbool bhatt case