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THE USE AND MISUSE OF MERCY PETITIONS : ITS GROWTH AS A DEFENCE

Rupesh Sunil Dhengre* and Omeshwari Pancham**

Abstract

Mercy Petitions have been a matter of discussion for a long time, in terms of social values, cultural beliefs and political ideologies. While all religions ardently believe in the concept of forgiveness and mercy, they also talk about punishing one who does crimes. But the question lies here: should punishment is declared, go as far as awarding death penalty? As soon as capital punishment is declared, victims may have the option to ask for mercy and to be forgiven from the death penalty, depending on the law governing them. This is so because some countries do not have provisions for mercy petitions, and some have no place in their law for death penalty.

As it always happens in laws, the loopholes in the law is used to the advantage and leaves scope for misuse and abuse of the law. In the context of mercy petitions to escape from death penalty, it was either no time limit to file mercy petition or difference in approach taken by different governments over the years. India has learnt from its mistakes and has been on its path to improvement.

Keywords: - *Mercy, Punishment, Death Penalty, Capital Punishment.*

INTRODUCTION

One of the most debated agendas that in law today is the issue of 'mercy petition', be it at the national or at the international level. Times are moving forward and different countries across the globe are moving towards abolishing death penalty, however, India is working towards reforms on mercy petition and death penalty.

Mercy Petition is asked for when one is awarded a death penalty. The Constitution gives provision for mercy petition which may be granted by the President under Art. 72 and the

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Governors under Art. 161 of the Constitution. This means that the one can ask for mercy petition (which may be granted or rejected subsequently) only after the death penalty has been pronounced.[1]

Even after 7 decades of Independence, our law has been subjected to many hurdles in terms of its application and this hold true even towards the issue of mercy petition (and its execution). Only to state a few are long delays stretching over numerous years, inefficiency in pointing out clemency cases, etc. The negative effects of the present structure for implementation of the law relating to mercy petition, especially the part that is imposed upon the prisoners is termed by many as a 'misery' which is far beyond the utmost suffering permitted under Art. 21.[2]

Although most countries having a law on mercy petition do not contain an entailing provision that clarifies the time limit for the execution of a death penalty, it has been widely recognized by countries that delay in the process may be violative of the humane treatment of a convict. Such delay often leads to mental health issues among convicts as well.

In *Sunil Batra v. Delhi Administration*[3] the court had held that when one is kept in isolation and solitary confinement leads to violation of Art. 21. Further, in *T.V. Vatheeswaran v. State of Tamil Nadu*[4] the Honourable Supreme Court held that the retardation of two years is violative of Art. 21 and also held that such retardations may be the ground for shuttling of capital punishment.

The 262nd Law Commission Report brought attention to the fact that 140 countries had already abolished death penalty, implying that it did not need a law on mercy petition. However, on the basis of the 'Retributive Theory' of punishment, the provisions for death penalty is defended, which means that the law on mercy petition is also present in India. Deflecting from the words of the father of the nation, Mahatma Gandhi, 'an eye for an eye will make the world blind', the law for death penalty exists and mercy petition is a solution to the strict punishment. This is done in order to bring some relaxation on the harshness of a punishment like death penalty.

1 Satendra Pratap Singh, *Mercy Petition v. Death Penalty*, LEGAL SERVICE INDIA, (May 11, 2020, 10:04 AM), http://www.legalserviceindia.com/legal/article-974-mercy-petition-vs-death-penalty.html.

2 Rajgopal Saikumar, *Negotiating Constitutionalism and Democracy: The 262nd Report of the Law Commission of India*, Vol. 12(1) Socio-Legal Review 81, 81-107 (2016).

3 *Sunil Batra v. Delhi Administration*, (1978) 4 S.C.C. 494 (India).

4 *T.V. Vatheeswaran v. State of Tamil Nadu*, (1983) 2 S.C.C. 68 (India).

Religious Values Attached to Mercy Petitions

Religion is a set of beliefs that a group of people follow. Although the world has seen a lot of religions, but the core values of all the religions have certain ones in common. Generally, these are those values which empower the human civilization as a whole including love, compassion, peace, mercy. To look at mercy from a religious point of view might add more perspective, especially in the Indian context.

The Islamic preaching are also very strict about heinous crimes (which in the modern times might attract death penalty) and has also laid down that "whoever saves a life, it is as though he has saved the lives of all men. whoever kills a person, it is as though he has killed all men". At the same time, it has been said that according the Quran and the Sunnat in Islam, forgiveness and mercy is allowed even to the extent of pardoning a murderer if he is forgiven by the victim's family.[5] There is a differential criteria of possessing the power to grant forgiveness in a situation, it lies with the State[6] and in the other, it seems to be in the hands of the victim/victim's relatives. But it does establish the presence of values of forgiveness and mercy, even for the most serious crimes.

Even in Christianity, dating back at least to the New Testament era, the power to grant pardon for various crimes lied with the head/leader of the state. One of the earliest formal inclusion of this power in the Constitution was done by the USA, however its meaning and scope of it was left to be interpreted by the judiciary. This power starkly reflected the powers that were given in the hands of English monarchs who were believed to hold the power of pardoning, politically equivalent to pardon sins committed by the convict. Moreover, it was considered as an act of kindness by the monarch and which could not be demanded to be granted as a matter of right.

The judiciary has played a significant role in taking forward this line of thought. In United *States v. Wilson*,[7] it was held that "A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed". This interpretation of the nature of forgiveness power was reviewed and then upheld accurately

5 UK Border Agency, *Country of Origin Information Service: Pakistan*, HOME OFFICE OF UK BORDER AGENCY (May 11, 2020, 11:00 AM), https://www.refworld.org/pdfid/4b5827122.pdf.

6 RFE/RL's Uzbek Service, *Uzbek President Pardons Dozens Of Inmates On Eve Of Eid Al-Fitr*, RADIO FREE EUROPE/RADIO LIBERTY (May 11, 2020, 09:00AM), https://www.rferl.org/a/uzbek-president-pardons-dozens-of-inmates-on-eve-of-eid-al-fitr/29288052.html.

7 *States v. Wilson*, 32 U.S. 150 (1833).

by the Supreme Court in *Burdick v. United States*[8] case and therefore it paved the way for mercy petitions.

Hindus considers the Bhagavad Gita as its sacred book and Lord Krishna is believed to have been an ardent follower of it. It is said that in the Mahabharata, around five thousand years ago, he had referred and read the Bhagavad Gita.[9] It is also said and widely believed that all the animals that passed away during the war that took place in the Kurukshetra attained their initial and original form after the end of their lives.

The Vedas in many documents also refers to the term "Prayashchita" finds mention and explanations. This is a reflection of how early the genesis way laid down for the forgiveness and mercy shown towards those who repent their mistakes. It formed the essence of the Indian society and till dates such values can be seen deeply imbedded into the Indian culture and value system.

Mercy Petition: Boon Or Bane?

Mercy Petitions were brought with the intention of saving those, in other words, showing mercy to those, who had been wronged while trying to deliver justice. When a convict goes through the fear of being hanged till death and craves for mercy be shown to his/her life, it is expected that it will serve as an incentive to correct his behaviour and action if he is pardoned his life. This is the main intention behind mercy petitions – ultimately, to correct the behaviour of the convict.[10]

Many developed countries like the United States of America and Canada also have a law relating to Mercy Petitions. India too has a law relating to it, mentioned in the Constitution under Art. 72 and Art. 161. It is believed to add a 'humane touch', in the hands of the President, to the otherwise strict laws that are in place when there are harsh provisions like that of capital punishment – it creates a balance. It authorizes the State to look at the matter from a case to case and from a more holistic view as examining a mercy petition requires to look beyond legal provisions and evidences. At the same time, there is no obligation on the President or the Governor to accept all such mercy petitions. Most of the petitions till date have been rejected.

8 *Burdick v. United States*, 236 U.S. 79 (1915).

9 Eternal Religion, *The Only Proven God of Mercy, Forgiveness, and Love*, ETERNAL RELIGION (May 12, 2020, 06:00 AM), https://eternalreligion.org/the-only-proven-god-of-mercy-forgiveness-and-love/.

10 Prashanti Upadhyay, *Mercy Petition: Boon or Bane?*, LEGAL SERVICES INDIA (May 10, 2020, 01:23 PM), http://www.legalservicesindia.com/article/2026/Mercy-Petition-Boon-or-Bane.html.

In the Ranga Billa Case,[11] the scope of Art. 72 was discussed wherein capital punishment was pronounced for one of the convicts. The right of having reprieving power of president specifically of the mercy petition was bought into question. Herein, the mercy petition filed by the convict was rejected by the President which led him to file a writ before the Apex Court challenging the element of discretion available at the behest of the President while deciding on such cases of mercy petition. He argued that it was arbitrary that the President denied his mercy petition, allowing him to be hanged till death, without giving any reason for rejecting his petition. However, the Honourable Supreme Court upheld the rejection given by the President and held that he holds discretionary powers and may pronounce such a rejection without giving reasons.

The above ratio was once again upheld by the Honourable Apex Court in *Kehar Singh v. Union of India*[12] wherein it also explained that a person cannot demand his a mercy petition to be accepted. The granting of pardon or reprieve by the President was an act of being lenient towards convict and therefore it is a privilege and cannot be claimed by the convict. Getting his pardon granted is not a right.

It might seem like that the law is unfair to the convict, however, it must be taken into account that the Constitution of India confers a right to the convicts for making an appeal for mercy but, At the same time it also imposes a duty on the Presidents and the Governor to duly evaluate all the relevant facts and circumstances before deciding on whether to allow the mercy petition or not.as at last it's not the duty of the president or the governor to take decisions on any mercy petition promptly so as to not delay the process.

In 1983, the Supreme Court shifted its position on putting a time limit[13] of three months for the discarding a petitions which were filed under Art. 72 or Art. 161, or under Sec 432 or Sec 433 of the Criminal Procedure Code. Despite having such a mechanism in place, Afzal Guru's case is worth mentioning. He was sentenced to death on the accusation for being involved in the Attack on the Parliament happened in 2001. At first, the execution of his sentence was stayed due to a clemency petition filed in the Supreme Court. Again, a mercy petition was filed in 2013 which was eventually rejected by the President, the execution of his death sentence was delayed. Thereafter, he was finally hanged till death in the Tihar Jail in February 2013 and his cremation rites were also carried on within the jail premises.

11 *Kuljeet Singh @ Ranga v. Union Of India & Anr.*, AIR 1981 S.C. 1572 (India).

12 *Kehar Singh v. Union of India*, (1989) 1 S.C.C. 204 (India).

13 *Sher Singh & Ors. v. State of Punjab*, AIR 1983 S.C. 465 (India).

Similar was the case of Yakub Memon who was held guilty of being involved in the Mumbai serial blasts. He too was awarded a death sentence. He exhausted all his legal remedies before invoking the provision of filing a mercy petition before the Governor of Maharashtra. However, when all his remedies exhausted and he was not granted pardon, death sentence was finally executed on him.

Keeping in mind the abuse of remedies that were partaken purposely to hinder the execution of their death sentence, the Centre has urged the Supreme Court to limit the time for filing mercy petition to seven days after pronouncement of death sentence. This development took place as a response to recourse to multiple legal remedies being taken by the various accused, on by one, in the Nirbhaya Rape Case.

The Case of Yakub Memon: A Paradigm Shift

Another controversial case involving mercy petition has been that of Yakub Abdul Razak Memon, who was accused of criminal conspiracy in the Mumbai serial blasts of 1993. He was awarded death sentence and it was set to be executed on 30th July 2015. However, looking at the history of mercy petitions and the politics behind it reveals how the process of granting or rejecting a mercy petitions how involves individual thoughts and beliefs.

In April 2014, the President of India had rejected the mercy petition filed by Yakub Memon after having received the recommendation, reliefs and advice from the council of ministers, headed by the newly elected Prime Minister, Narendra Modi. The fact that a change in the government brought into action the law related to mercy petitions and execution of death sentences reflects on the role of politics on this matter.

In 1997, there was only one mercy petition pending before the President, the authority that either grants or rejects the request of a mercy petition. By 2014, this number rose to 28 pending mercy petitions. However, with the change of the government, a new perspective on mercy petitions was seen in action. The mercy petition of Yakub Memon was rejected by President Pranab Mukherjee.

If looked at who held the post of Presidents before President Pranab Mukherjee had different opinions on the subject and issues related to the 'capital punishment' and the harshness of death penalty. President KR Narayanan, President APJ Abdul Kalam and President Pratibha Patil were all hesitant to take a call on the question of death penalty. The discomfort in taking such tough calls was widely being observed in the previous governments, which

changed in 2014.[14] In fact, in 2012, when President Pratibha Patil was questioned as to why she was not acting on the petitions, she sought to the defence of Art. 74 of the Constitution and saying that she could not act on her own as she is supposed to take suggestions on the matter as per the aid and advice of the council of ministers. However, the Supreme Court had already mentioned in Kehar Singh v. Union of India[15] that the President of India under Art. 72 of the Constitution can go into the merits of the case in spite of that it has been judicially concluded and may come to a conclusion that may not be the same as the Court.

The entire scenario had changed by May 2015 wherein the Rashtrapati Bhawan records show that none of the mercy petitions were pending. It displays how with a change of the government, the approach towards a serious matter like mercy petitions changed. It shows the paradigm shift from a hesitant outlook on death sentences and mercy petitions to one where action and decisions are taken head on.

In most cases, when a decision is not taken on mercy petitions, the situation, especially of the convict, is left in a limbo. Taking prompt decisions is therefore an important aspect. It was stated in *Madhu Mehra v. Union of India*[16] that Art. 21of constitution grants the right to life and personal liberty as a fundamental right also implies that getting a speedy trial is also one part of this right. This aspect of having the right to life and personal liberty equally applies to discard of a mercy petitions.

In the famous case of *Bacchan Singh v. State of Punjab*,[17] the Supreme Court had also addressed an issue in performing a capital punishment. The Court observed that if there is no uniformity in the manner how a capital punishment is then it can often lead to the process being arbitrary. This has the potential to violate the right to equality under Art. 14 of the Constitution. This has led to different approaches of different governments who came to power on the issue of mercy petition exercised by the titular head of President.

The Nirbhaya Rape Case: Creating a Balance

In recent times, one of the most controversial cases related to death penalty and mercy petition has been that of the Nirbhaya Rape Case wherein the convicts were awarded with death sentence. However, because of the lengthy process involved in filing mercy petitions,

14 Manish Tewari, *The Politics of Mercy Petitions*, DECCAN CHRONICLE (May 14, 2020, 02:25 PM), https://www.deccanchronicle.com/150722/commentary-op-ed/article/politics-mercy-petitions.

15 *Supra* note 12.

16 *Madhu Mehra v. Union of India,* (1989) 3 S.C.R. 775 (India).

17 *Bacchan Singh v. State of Punjab,* AIR 1980 S.C. 898 (India).

as well as filing it before authorities multiple times, the death penalty was being postponed as by considering the facts of the case they had committed an extremely heinous crime cause of which death sentence was awarded to them. But due to the delay in executing it, the society's outcry for 'justice delayed is justice denied' led the Honourable Supreme Court in putting a cap on the delays in the procedure.[18]

On repeated delaying of executing the death sentence of accused due to filing of mercy petitions, the Honourable Delhi High Court said that the law cannot be abused by always resorting to it at the eleventh hour.[19] The Supreme Court was urged by the Government at the Centre to certain guidelines to end such malpractices. It sought for a move which would be in favour of the victim and society-centric (to bring back faith in the rule of law) and for the limiting the convict to file for mercy petition beyond seven days.[20] The Supreme Court confirmed that the right to file for mercy petition with the convict was rather being used a privilege, and was against the interest of the victim. Since the death penalty was awarded as a penalty for the sufferance of the victim, such privilege was not approved by the Apex Court. Therefore, a bench comprising of Chief Justice Bobde and Justice Surya Kant issued a notice to the Centre to modify the execution guidelines.

Focusing on the necessity to amend or re-outline the current rules which initially brought up to assure the interest of a death row convict. But the Solicitor General Tushar Mehta presented before the Court that these rights and privileges was being abused as an instrument to postpone the execution of the death sentence and it required reconsideration. He argued before the Court that "There is no time-limit for availing the legal and constitutional remedies available to a death row convict. The court should now take into account the interests of victims and society and lay down the guidelines which are in furtherance of the already laid down guidelines for the accused". The execution of the death sentence was delayed twice as three of the convicts were yet to exhaust their legal remedy to file for mercy petition.

18 Times of India, *Mercy plea: Supreme Court to consider seven-day limit*, Times of India (May 11, 2020, 10:00AM), https://timesofindia.indiatimes.com/city/delhi/mercy-plea-sc-to-consider-7-day-limit/articleshow/73818059.cms.

19 Aditi Singh, *You Always Come at the Eleventh Hour: Delhi Court Seeks Report from Tihar in Nirbhaya Convicts Plea to Stay Execution of Death Warrant*, Bar and Bench (May 11, 2020, 04:25 PM) https://www.barandbench.com/news/litigation/you-always-come-at-the-eleventh-hour-delhi-court-seeks-report-from-tihar-in-nirbhaya-convicts-plea-to-stay-execution-of-death-warrant.

20 Aditi Singh, *Nirbhaya: No stay on trial court order postponing execution of convicts, HC directs convicts to avail all legal remedies within 7 days*, Bar and Bench (May 11, 2020, 04:25 PM), https://www.barandbench.com/news/litigation/breaking-nirbhaya-no-stay-on-trial-court-order-postponing-the-execution-of-convicts-directs-convicts-to-avail-all-legal-remedies-within-7-days.

Highlighting that how rules were abused, the Centre said that denounced convicts and specially if there were multiple (as in the Nirbhaya Case),should be embraced with a procedure to document corrective appeal in the Supreme Court in a steady progression to defer execution of capital punishment granted to them. It was addressed to the court to fix a specific time limit in which as convict could for a curative petition after dismissal of survey appeal by the Supreme Court. The service said the rules set somewhere around January 2014[21] for seeking mercy petition and execution of capital punishment considered the interests of those waiting for capital punishment and this must be adjusted by another arrangement of solutions which considered the interests of the person in question, their families and larger public interest.

The implementation of the Centre urged the Apex Court to order all subordinate courts and relevant authorities, including state governments, to enforce a sentence of death penalty within seven days from the date of rejecting the mercy petition that was filed. It was urged that this be enforced without any effect of a pendency of review of order or a curative petition filed by other convicts. With this, there was a shift in the law relating to mercy petitions from being inclined towards a convict a more balanced approach. This made sure that while the right to file for a mercy petition by a convict is still effective, the delaying of giving justice to the victim is not hampered.

Conclusion

The existence of death penalties in a legal system paves the way for use of mercy petitions. Death penalties have become a norm when the case falls within the category of 'rarest of the rare' which means that the court often faces cases which it has not faced before. Therefore, even the laws sustaining mercy petitions have evolved over the years and to be fair, it is still evolving. The dynamic nature of the law owing to new emerging situations has inevitably led to developments in the jurisprudence of the law governing mercy petition in India, mostly through judicial activism.

Indian culture witnesses the genesis of values of mercy and forgiveness to way back. In a country where moral values are deeply imbedded, it is only an enhancement of the beliefs of the people that the concept of mercy petition was included in its grundnorm. It was revealed by news outlets that the convicts of the Nirbhaya Rape Case went through a breakdown when the news reached them that their mercy petitions had been denied on them. This meant that their next step was to prepare themselves for their hanging. To get a

21 *Shatrughan Chauhan v. Union of India,* (2014) 3 S.C.C. 1 (India).

hold on the tensed situations, the Gita was also read out to them.[22]

Politics and different approaches taken by different governments has played a role in what verdict is given on a mercy petition, and under the current government (starting from 2014), all pending petitions were also discharged. However, as we have seen in the Nirbhaya Rape Case, the repeated use of the mercy petition provisions one by one at the eleventh hour led to delaying the execution death sentence. Therefore, the Centre urged the Supreme Court to formulate regulation to set a time bar of 7-days beyond which a convict awarded death sentences cannot seek to file a mercy petition. Now it lies in the hands of the Supreme Court as to how it will form guidelines to ensure use and prevent misuse of the mercy petition. Since the Supreme Court has previously shied away from formulating regulation on mercy petition, it is awaited to see if it will finally take a call now that the Centre has submitted its plea.

22 Ananya Bharadwaj, *Night Before Hanging, 16 December Rapists 'Crying Bitterly', Counsellors read Gita to them*, The Print (11 May, 2020, 05:30 PM), https://theprint.in/judiciary/night-before-hanging-16-december-rapists-crying-bitterly-counsellors-read-gita-to-them/384186/.