

Mercy Petition in India – A Critique

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***Abstract:** The genesis of mercy petition directly or indirectly lies in the very basic and spiritual right i.e. Right to life and personal liberty under the Article 21 of the Indian constitution. The law in the absolute senses implies that the person's right to life can only be taken away by a proper process of law. The need of filling mercy petition is come into the picture when the accused is under the award of death penalty. Under Article 72 president has power to grant pardons to any person convicted of any offence. In this paper we are discussing that no doubt mercy petition is there but what are the consequences if the mercy petition is allowed.*

1. Introduction:

As we all know the very basic principle of natural justice is he who seeks equity must do equity. It means justice should be delivered to those who come to seek justice with clean hands. But generally the phenomenon has been changed. The persons who were seeking justice have not done justice to the victims. Hence, the person who is seeking amnesty from the president, had he done or showed mercy to the victim while committing the crime? Generally mercy petition is the last option for condemned prisoners. In our constitutional scheme of things, the president has been and owed with the power under article 72 to grant pardon and to suspend, remit or commute sentences in certain cases, including in those matter where the sentence is death penalty. This power is independent of judiciary. The apex court in a decision said the power of pardon vested with the president is "essential attribute of sovereign power" so far, there have been innumerable instance in which President rejected or allowed the mercy petition filed by the convicts awarded with the capital punishment. In criminal jurisprudence followed in our country, a death penalty has to be confirmed by the high court but this has not been extended to SC as a statutory right of a convict. In fact the law commission of India has way back in 2003 recommended for attending this right of appeal to the Supreme court in cases where a high Court confirms the death sentence passed by Session Judge or where the high court enhances the sentence passed by the Session Judge and awards sentences of death. It has asked for amending the SC (Enlargement of animal Jurisdiction) Act, 1970.

India retains capital punishment for a number of serious offences. The Supreme Court in *Mitthu V/s State Of Punjab*ⁱ struck down section 303 of the Indian Penal Code, which provides for mandatory death punishment for offenders serving life sentences. The capital punishment is not always followed by executions (even when it is held on appeal), because of possibility of commutation to life imprisonment. The number of people executed in India since independence in 1947 is a matter of dispute. However, The People Union for Civil Liberties cited information from appendix 34 of the 1967 law commission of India report showing that 1422 execution took place in 16 Indians states from 1953 to 1963 has suggested that the total number of executions since independence may be as high as 3000 to 4300ⁱⁱ.

In December 2007, India voted against a United Nations General Assembly resolution calling for a moratorium on the death penalty.ⁱⁱⁱ In November 2012, India again upheld its stance on capital punishment by voting against UN general Assembly draft resolution seeking to ban death penalty.^{iv}

2. Crimes punishable By Death:

Under Article 21 of the constitution of India, No person can be deprived of his life except according to procedure established by law. It implies that everyone has right to live freely and develop his life with maximum possible efforts and live with human dignity. Article 21 is called heart of Fundamental Rights because all other Fundamental Rights depends upon it. Rights and duties are correlative. The Fundamental Rights are intended to severe as a constant reminder to every citizen that while the constitution specifically requires citizens to observe certain basic norms of domestic behaviors.^v So hence, it is expressly stated in the express provisions of the constitutions of India that one must obey the, right of another i.e. my right is your duty and my duty is your right. Hence everyone has the right to life. But when anyone commits crime of such nature for which the punishment prescribed is death penalty and after the trial he found guilty of that offence and sentenced to death penalty, he cannot claim this right to life under Article 21 of the Constitution. Before discussing about Mercy Petition we just

have to look the offences which are punishable with death penalty under the Indian Penal Code.

Section Under IPC	Nature of crime
120 B	Punishment of criminal conspiracy
121	Waging, or attempting to wager war, or abetting waging war against the Govt. of India
132	Abetment of Mutiny
194	If an innocent person be convicted and executed in the consequence of such false evidence to procure conviction of capital sentence
302	Murder
305	Abetment of suicide of child or innocent person
364 A	Kidnapping for ransom
376 A & E	Punishment for causing death or resulting in persistent vegetative state of victim & Repeat offenders
396	Dacoity with murder If any one of five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity, every one of those persons shall be punished.

The Supreme Court in A.K Roy v/s Union of India held that the death penalty should be imposed only in the rarest of the rare case". While stating that Honour Killing fall within the "rarest of the rare case" category, Supreme Court of India has recommended the death penalty be extended to those who found guilty of committing "Honour Killing", which deserves to be a capital crime.

In addition to the Indian Penal code, a series of legislation enacted by the parliament of India have provision for the death penalty. Sati is an inhuman practice involving the burning or burying alive of any widow or woman along with the body of her deceased husband or any other relative or with any article, object or thing associated with the husband on such relative. Under the commission of Sati (Prevention) Act, 1987 Part II, section 4 (1), if

any person commits sati either directly or indirectly, shall be punishable with death.

The Scheduled Caste and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 was enacted to prevent the commission of offense of atrocities against the members of scheduled caste and the scheduled tribes. Under Section 3 (2) (i) of the Act, bearing false witness in capital case a member of a scheduled caste and the scheduled tribe, resulting in that person's conviction and execution, carries the death penalty. In 1989 The Narcotic Drugs and Psychotropic Substance (NDPS) Act was passed which applied a mandatory death penalty for a second offence of "large scale narcotics trafficking."

In recent years, the death penalty has been imposed under new Anti-terrorist legislation for the people who involved in the terrorist activities. The Supreme Court of India ruled that the death penalty should be imposed only in the "rarest of the rare cases". On 3 February 2013, in response to public outcry over a brutal gang rape in Delhi, the Indian government passed legislation which applied the death penalty in the case of rape that leads to death or leaves the victim in a persistent vegetative state.^{vi} The death penalty can also be handed down to repeat offenders under the Criminal Law (Amendment) Act 2013.

3. Clemency under the Indian Constitution:

After the award of death sentence passed by a Session (trial) court, sentence must be confirmed by a high court to make it final.^{vii} Once confirmed, the condemned convict has the option of appealing to the Supreme Court. Where the condemned person is unable to appeal 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 governor of the state.

4. Power of the President:

The present day constitutional clemency power of president and the governor originate from the Government Of India Act, 1935 but unlike the Governor- General, the President and Governor in independent India do not have any prerogative clemency powers.

Article 72 Power of the President to Grant Pardon etc. The president shall have the power to grant pardons, reprieves respites or remission of punishment or to suspend remit or commute the sentence of any person convicted of any offence;

In all cases where the punishment or sentence is for offence against any law relating to a matter to which the executive power of union extends;

In all cases where the sentences is a sentence of death.

Article 161: Power of governor to grant pardons etc...^{viii} Article 161 says that the governor of the state shall have the powers to grant pardons reprieves, respites or remission of punishment or to suspend remit or commute the sentence of any person convicted of any offence against the law relating to a matter to which the executive power of the state extends.

Under the Article 72 the president's power is wider than that of the governors of state firstly the president has exclusive power to grant pardon in cases where the sentence is a death sentence while the governor can't grant pardon in cases of death sentences. Secondly, the president can pardon punishment of sentence inflicted by court martial. The governor has no such power in respect of suspension remission and commutation of sentence of death both have concurrent power.

A pardon is an act of grace and therefore it can't be demanded as a matter of right. The effect of pardon is that it not only removes the punishment but in the eye of law place the offender in the same position as if he had never committed the offence. The executive can exercise the pardoning power at any time after committed of an offence either before legal proceedings are taken or during their tendency or either before or after conviction.^{ix}

In a significant decision in Epuran Sudhakan v/s State of A.P^x, the Supreme Court has held the governor can't exercise his pardoning power arbitrarily. In the instant case a congress worker was awarded death sentence by the trial court for committing murder of a Telegu Desam party worker. The high court of Andhra Pradesh had confirmed the death sentence. The governor of the state granted him pardon. The deceased's son filed a writ petition in the Supreme Court challenging the validity of the pardoning power of the governor. The Supreme Court quashed the pardoning power of the governor as illegal and upheld the judgment of high court of A.P. awarding the accused the sentence of death. The apex court held that if the exercise of pardoning power is done on the ground of political considerations the court can examine its constitutional validity.

In Kuljeet Singh v/s Lt. Governor of Delhi,^{xi} the Apex Court held that the exercise of the president's power under Article 72 will be examined on the facts and circumstance of each case the court has reined the Power of judicial review even on a matter which has been vested by the constitution solely in executive. This would make the exercise of the pardoning power a matter

for further litigation as it has been demonstrated in the present case.

In Sher Singh v/s State of Punjab^{xii}, Chandrachud, C.J., said "a self-imposed rule should be followed by the executive authorities vigorously, that every such petition shall be disposed of within a period of three months from the date when it is received. Long delay in the disposal of these petitions are a serious hurdle in the disposition of justice and indeed, such delay tend to shake the confidence of people in very system of justice"

But present scenario is going towards the way which was not intended by the makers of the constitution at the time when the constitution of India was being drafted. In today's era, there are hundreds of mercy petition which are pending. After the 42nd Amendment of the constitution, 1976 Article 74(1) reads as "there shall be a council of ministers with the prime minister at the head to aid and advise the president who shall, in the exercise of his functions, act in who shall in with such advice"^{xiii}. Despite the language of the constitutional provisions clemency is exercise not by the president but by the government. For all practical purposes, the decision on a mercy petition is arrived at within the ministry of home affairs. A memorandum on the case is prepared by junior officials in the ministry and on the basis of same a joint secretary or an additional secretary recommends a decision to compute the death sentence or reject the mercy petition^{xiv}. This 'recommendation' is on the behalf of the cabinet of Ministers to the president. The Proviso of Article 74(1) provides that the President with only one opportunity to return the 'recommendation' for the decision to be reviewed. If no change is to be made, the President has to sign his assent.

About 26 mercy petitions are pending before the President, some of them from 1992. These includes those of Khalistan Liberation force terrorist Davinder Singh Bhullar, the case of slain forest brigand Veerappan's four associates for killing 21 policemen in 1993; and one Praveen Kumar for killing four members of his family in Manglore in 1994. At least 100 peoples in 2007, 40 in 2006, 77 in 2005, 23 in 2002 and 33 in 2001 were sentenced to death (but not executed). No official statistics of those sentenced to death have been released.^{xv} On 6 may 2010, the trial court sentenced kasab to death for attacking Mumbai and killing 166 peoples on 26 November 2008 along with nine Pakistan terrorist. He was found guilty of 80 offences, including waging war against the nation which is punishable by the death.^{xvi} Kasab's death sentenced was upheld by Bombay High court on 21 February 2011 and on august 29, 2012 by the Supreme Court. His mercy petition was rejected by

the President on 5 November 2012. Kasab was hanged in the Yerwada central jail in Pune. On 5 March 2012, a sessions Court in Chandigarh order the execution of Balwant Singh Rajoana a terrorist from Babbar Khalsa, convicted for his involvement in the assassination of Punjab Chief Minister Beant Singh. The sentence was carried out on 31 march 2012 in Patiala central jail , but the centre stayed the execution due to worldwide protest by Sikhs that the execution was unfair and amounted to Human Rights violation. In June 2012 , it become known that Indian President Pratiba Patil near the end of her five years terms President commuted the death sentenced of as many as 35 convicts to life , including four on the same day 2 June , which created a strom of protest.^{xvii} As on February 2013, there are 476 convicts on death row in India. States the maimum number of prisoners on death row are U.P. (174), Karnataka (61), Maharashtra (50) and Bihar (37).^{xviii}

5. Conclusion and Suggestions:

After going through all of the aspect of mercy petition, in our view a man murdering and raping a minor girl, should he be granted mercy after committing rape of such girl.^{xix} A man murdering five of the infant daughters is in no civilized country be forgivable.^{xx} Please do not make your views sound like as if pardoning criminals would miraculously bring down crime rates. We all know a lot more need to be done in order to achieve any success in prevention and conviction of crime. But the ones who have been convicted and are given punishment, please stop making them look like they deserve pardon, even if indirectly so. When justice is to be done, the fairest sympathies must always be with victim and not with the culprits.^{xxi} That is why; unbiased, impartial judges only must decide cases. If sympathies exist with culprits, no justice can be done to victims. This said we must also understand that, while doing justice to the victim, punishment to the culprit must be proportionate to the offence committed and not in any way disproportionate to it.

In the case of Davinder Pal Singh Bhullar v/s St. of NCT of Delhi,^{xxii} it is stated by the Hon'ble Supreme Court that it is paradoxical that the merciless killers seek mercy for themselves when they caught and punished and the court must be conscious that it has to do justice in exact conformity with some obligatory law. Basically law was made for the benefit of the victim and to compensate them. But in the present scenario this very function of law is in the favour of merciless killers. Hence in this paper our basic concern is whether the mercy should be shown to those persons who themselves are merciless.

In the case of Shatrughan Chauhan v. UOI the Apex Court held that if there is mercy petition before Governor/president. It is incumbent on the authorities to dispose of the same as early as possible.^{xxiii} Otherwise the accused takes the advantage of undue, unexplained and inordinate delay in the execution due to the pendency of mercy petition. In most of the case the accused get the advantage of delay.

So while concluding our discussion about pros and cones of mercy petition, we want to say that while considering the right to life of the accused once a look must be given to the victim. That victim whose right to life has already been deprived of once the look must be given to the family and his dependents. That person who is asking for mercy, he was where when he did such a heinous and anti social crime. No doubt he must be granted with an opportunity to reform himself but that mercy should not be unconditional. While concluding this paper we just want to say that mercy is not to be allowed frequently but the brutality and the heinousness of his sin must be considered.

References

- ii □ *AIR 1983 SC 473.*
- iii □ *Batra , Bikramjeet, "1422 Executions in 10 years, many more" India together 2 April 2005.*
- iv □ *"General Assembly G/A/10678, Sixty Second, General Assembly plenary 76th & 77th Meetings, ANNEX VI. Retrieved on 30July 2013.*
- v □ *General Assembly G/A/11331, Sixty Seventh, General Assembly plenary 60th Meetings", 20 Dec.2012, ANNEX XIII. Retrieved on 30July 2013.*
- vi □ *Pandey, J.N., Constitutional Law of India, ed. 2011, P. 431.*
- vii □ *"Notorious Attack Spurs India to Approved New Rape Laws"; New York Times; 3 Feb. 2013; Retrieved on 13/2/2014*
- viii □ *Section 366, The code of Criminal procedure, 1973.*

ix	□ <i>Article 161; constitutional law of India.</i>	xvii	□ <i>http://capitalpunishmentinindia; Retrieved on 13/2/2014.</i>
x	□ <i>In re, channugadu , AIR 1954 Mad. 911.</i>		□ <i>'President PratibaPatil goes on mercy overdrive', The Times of India; 23 June 2012.</i>
xi	□ <i>Times of India, 5 August, 2006.</i>	xviii	□ <i>BBC.co.UK.2012-12-13; Retrieved on 23/01/2014</i>
xii	□ <i>AIR 1982 SC 774.</i>	xix	□ <i>Dhananay Chatterjee's case.</i>
xiii	□ <i>AIR 1983 SC 361.</i>	xx	□ <i>MaganlalBarela's case: "Justice as a Game of Chance" The Hindu dated 14/8/2013.</i>
xiv	□ <i>Article 74; The Constitution of India.</i>	xxi	□ <i>Ibid.</i>
xv	□ <i>http://www.lawyersclubindia.com/forum; Retrieved on 13/2/2014.</i>	xxii	□ <i>2013 (2) RCR Cr. 647.</i>
xvi	□ <i>ibid</i>	xxiii	□ <i>2014 (1) RCR (cr.) 741 sc.</i>