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Mercy, Fairness and Death Penalty in India: A Critical Study

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ABSTRACT

“The true measure of our character is how we treat the poor, the disfavored, the accused, the incarcerated, and the condemned.”

- **Bryan Stevenson**

Mercy petition is one of the most debated and stressed topics in the sphere of law and justice at national and international levels. The discussion on mercy petition and death penalty is never ending, be it the House of Commons or United Nation Human Rights Commission. At this time most of the countries have already abolished the death penalty or are under a moratorium but India is still on the verge of seeking reform on Mercy petition as well as capital punishment. Mercy Petition and death penalty are interrelated because it is only when a convict is being sentenced with death penalty the need for knocking the door of president arises. Even after so many years of independence there is still impediment in the “proper application of mercy petition and death penalty” in India.

The long delay and inefficiency in dealing with a mercy petition is the most lamenting part of the executive. The debilitating effects of this complex phenomenon imposed upon the prisoners that can be only called a living death are far beyond the maximum suffering permitted by Article 21.³ As per a report⁴, there are 142 which have abolished the death penalty. Still, India is defending the retributive theory and forgetting the words of Gandhi, "an eye for an eye makes world blind". Under the Indian Constitution clemency powers are given to the President of India and Governor of the States by the virtue of Article 72 and 161 respectively. The said articles authorize the executive to grant Pardon, commute, suspend, reprieve, respite and to remit the capital punishment even if sentenced by the highest court of the land. The mercy can be granted by the President on any redeeming fact of the case, trial or other factors. Yet the numbers show that the outcomes of mercy petition depend less on the crime or the criminal but on the fact that who occupies the Rashtrapati Bhavan.³

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³ The Law Commission of India, Two Hundred and Sixty Two report on “Death Penalty”

Amnesty International” available at <https://www.amnesty.org/download/document/act5066652017.english.pdf>

Under the provisions of the Constitution President and Governor can reduce the sentence of the prisoner or can grant pardon altogether. In cases of death penalty the President can commute it to life imprisonment but his decision is based on the recommendation of the home minister. President can ask the minister to reconsider but if the minister insists on the death penalty then the option available is either to comply or to exercise pocket veto, leaving the decision pending for their successor.⁵ The pocket veto is the only way for a president to express disagreement with the Home Ministry's recommendation.

In India the death row prisons have to face long delays in trial, appeals and thereafter in executive clemency because of which they suffer from extreme agony, anxiety and debilitating fear arising out of an imminent yet uncertain execution.”⁶

This paper focuses on clemency power of the executive and how they decide mercy petitions. Also this paper will try to highlight the problems and irregularities that take place while deciding mercy petition and how that leads to grave violation of human rights. Also, with the help of cases and data this paper emphasizes on the need to improve the existing system.

I. THE CONCEPT OF MERCY

(A) Object of Clemency Power

Mercy is an ancient concept that has a long and venerable tradition in religion, philosophy, literature, and the criminal law. The tradition of mercy was implemented in North America through the pardon authority of the colonial governors, and, later, the discretion of juries to recommend mercy.⁷

Mercy has often been seen as either subordinate to justice filling in the gaps left by particular instantiations of due process or as superior and external to the justice yielded by due process. Mercy has the element of discretion of the decision-makers and it has been eroded by the politics and an increasingly bureaucratized capital punishment system. Mercy's demise can be seen particularly in the actions of governors and juries, who have been discouraged from exercising merciful discretion. Yet a host of constitutional, legal, and public policy factors, as well as humane intuitions, argue that mercy must play a central role in any capital punishment

⁵ The Law Commission of India, Two Hundred and Sixty Two report on „Death Penalty“

⁶ Ibid.

⁷ Paul Whitlock Cobb, “Reviving Mercy in the Structure of Capital Punishment”, *The Yale Law Journal*, Vol. 99, No.2, Nov, 1989, pp. 389-409

scheme.⁸ Once an offender has exhausted all his/her judicial appeals the only option left is to turn towards executive clemency. If a person is granted mercy his or her death sentence reduces to life imprisonment. If few cases grant of clemency is purely “an act of grace” by the executive. And there have been instances where clemency has prevented grave miscarriage of justice. Despite its prominence, clemency powers are discretionary and not subject to any restraints.⁸

The philosophy underlying the pardon power is that that “*every civilized country recognizes and has, therefore provided for the pardoning power to be exercised as an act of grace and humanity in proper cases, without such a power of clemency to be exercised by some department or functionary of government, a country would be most imperfect and deficient in its political morality and in that attribute of deity whose judgments are always tampered with mercy.*”⁹ Pardon may help save an innocent person in cases where there have been miscarriage of justice or the conviction is doubtful. The underlying principle is that it is always preferable to grant liberty to an offender than to punish an innocent person. The purpose of pardoning power is to correct the judicial error that may result into grave miscarriage of justice as no human system of judicial administration can be free from imperfection.

(B) Mercy Petition in India

In India once the offender has exhausted appeal process and higher courts have confirmed the death sentence, a mercy petition can be file before the state or the national executive.

According to the Indian Constitution, the President of India⁹ and the State Governor¹⁰ have the power to suspend, pardon, or commute death sentences.¹² With the advice of their cabinets these constitutional functionaries can pardon those on death row. In addition, the executive can commute the death sentence of an offender to any other punishment provided by the Penal Code without the consent of the offender.¹³ Further, the Constitution states that the Governor can confer authority over capital cases to the relevant District or Regional Council.¹¹

The power to pardon provided under the constitution act as an act of humanity towards the convict who has been given death sentence. It is not necessary for the executive to review the petition of mercy from a legal angle or from the perspective of a legal expert who opinion is solely based on the available evidences and testimony of witnesses. Thus, the law clearly provides that the death penalty must stand the constitutional mandate.

⁸ Ibid. ⁸Joshua D. Freilicht and Craig J. Rivera, “Mercy, Death and Politics: An Analysis of Executions and Commutations in New York State”, *American Journal of Criminal Justice*, Vol. 24, No.1, September 1999, pp 15

⁹ *The Constitution of India*, 1950, Art. 72

¹⁰ *The Constitution of India*, Art.

¹¹ *The Constitution of India*, 1950, Sixth Schedule

When the Supreme Court has finally affirmed the death sentence, a convict on the death row can approach the president directly, via prison officials, via the Union Home Ministry or via the governor of the state where he/she is incarcerated.

The President while deciding the mercy petition seeks the opinion of the Union Cabinet, which is provided by the Ministry of home affairs. In some cases President may find it appropriate to send the recommendations of the Ministry back for further reconsideration. Once Ministry of Home Affairs has submitted its recommendations, the President will act accordingly. However, there is no time frame given to decide mercy petition.

In *Maru Ram v. Union of India*¹² a Constitution Bench of the court held that the power under article 72 is to be exercised on the advice of the central government and not by the President on his own, and that the advice of the government binds the head of the state. Article 72 only comes into play after the conviction and death penalty is confirmed by the Supreme Court, showing that grounds for mercy are distinct from substantive legal or procedural grounds. Indeed, the justification for mercy has its roots not in merit, but in need. All of us – the best and the worst – are in need of mercy, and it is only by showing mercy that morally, we ourselves become entitled to receiving it.¹³

It has been observed by the Supreme Court in cases that the undue delay in granting pardon to a convict on death row is grave violation of human rights of the convict. For example, in *Shatrughan Chauhan v. Union of India*¹⁷, the Indian Supreme Court held that the executive is required to consider mercy petitions within a reasonable time period. The Court held that inordinate, undue, and unreasonable delay in considering mercy petitions constitutes torture and amounts to violation of Indian and international law. It also issued certain guidelines when considering mercy petitions. The Court stated that prisoners have a right to legal aid to prepare legal challenges to the clemency process and to be informed of the result of their mercy petition in writing. In addition, it stated that prison officials should ensure that prisoners receive regular mental health evaluations and be given "appropriate medical care".¹⁸

II. DEATH PENALTY IN CRIMINAL JUSTICE SYSTEM

(A) International Scenario

Death penalty is one of the most controversial and debatable issues in criminal justice system

¹² (1981) 1 SCC 107

¹³ Shubhangi Agarwalla, "The Role of mercy", *The London School of Economics and Political Science*, available at <https://blogs.lse.ac.uk/southasia/2018/08/13/the-role-of-mercy-in-india/> (Last accessed on sept. 5, 2019) ¹⁷ (2014) 3 SCC 1 ¹⁸ Ibid.

around the world. Since World War II, efforts have been made for abolishing the death penalty. Article 6 of International Covenant on Civil and Political Rights (ICCPR), 1966 mentions various restriction in awarding death penalty, whereas the second Optional Protocol, 1989 to the ICCPR, 1966 directs the States to abolish death penalty. The United Nations Human Rights Council (UNHRC) has been trying to resolve this issue for the past decades.¹⁴

In June 2014, the UN general assembly adopted a Resolution¹⁵ discussing the Report of UN Secretary General where the report confirms that the trend towards the universal abolition of the death penalty is continuing. The Report of UN Secretary General has shown that most of death penalty retentionist Countries have introduced temporary moratorium (suspension on the application of the death penalty and expressly called for the imposition of prison terms instead of the death penalty.¹⁶ India has not ratified the OP II, 1989.

Despite being party to the International Covenant on Civil and Political Rights (ICCPR) that requires a progression towards abolition of death penalty, India appears to be heading the other way.¹⁷ Death sentence has been abolished in 142 countries in law or practice across the world while 56 have retained it, according to this March 2018 report by Amnesty International, a global human rights advocacy.²³

Article 51(c) of the Indian Constitution clearly provides that India should strive to respect international law and treaty obligations.¹⁸ Therefore India should comply with international obligation which includes customs, conventions and treaties including human rights treaties. As India has ratified ICCPR, 1966 there it should adhere to restrictions provided under Article 6 of ICCPR, 1966 whenever India awards death penalty.

III. DEATH PENALTY AS DETERRENCE: A FLAWED CONCEPT

Jurists and intellectuals who are in favor of continuing death penalty argues that it has deterrent effect and it prevents commission of serious offences in future. For example, Professor of Jurisprudence and Public Policy, Fordham University opined that "*execution of those who have committed heinous murders may deter only one murder per year. If it does, it seems quite warranted. It is also the only fitting retribution for murder I can think of. Most abolitionists*

¹⁴ Available at <http://ibsb.ro/qrfiles/uploads/2015/06/Human-Rights-Study-Guide-2-Death-Penalty.pdf> (Last accessed on sept. 6, 2019)

¹⁵ UNGA, A/HRC/27/23, June 2014

¹⁶ Available at www.ohcr.org/EN/HRBodies/HRC/RegularSessions/Sess. (Last accessed on sept. 6, 2019)

¹⁷ S. Muralidhar, "Hang Them Now, Hang Them Not: India's Travails with the Death Penalty", *Journal of the Indian Law Institute*, Vol. 40, No. 1/4, December, 1998, pp. 143-173

¹⁸ *The Constitution of India*, 1950, Art. 51(c)

acknowledge that they would continue to favor abolition even if the death penalty were shown to deter more murders than alternatives could deter. Abolitionists appear to value the life of a convicted murderer or, at least, his non execution, more highly than they value the lives of the innocent victims who might be spared by deterring prospective murderers.”¹⁹

However, those who are against the imposition of death penalty believe it is not a solution to remove the wrong and does not have any deterrence effect and therefore it should be abolished. Some criminologists opine that the death penalty has the opposite effect, i.e., society is brutalized by the use of the death penalty, and this increases the likelihood of more heinous crimes.²⁰ Another argument in favour of abolition of death penalty is that it violates two basic human rights that is right to life and right to be free from torture which are protected under Universal Declaration of Human Rights, 1948 and International Convent for Civil and Political Rights, 1966.

Various reports which shows years of data suggests that death penalty does not deter heinous and violent crimes such as murder, rape, terrorism etc. Still courts sentence hundreds of people to die and most of them stuck in a process paralyzed by delay. Most of them are poor and cannot afford to defend themselves. All of this contradicts some of the most enduring and accepted notions about capital punishment in India. The death penalty contradicts the enduring and accepted notions of capital punishment because of the following reasons - (a) death penalty is irreversible and could be, given the law, inflicted upon innocent persons; (b) there was no convincing evidence that the death penalty purpose- its deterrence remained unproved, retribution end of punishment and reformation of the criminal and primary purpose of punishment; (c) execution by whatever means for whatever offence was grading punishment.²¹

There has been no substantial evidence or research that proves that death penalty deters violent crimes such as murder. The United Nations has even referred to it as a “myth.” no correlation between executions and homicide rates in the US. Sentencing is a discretionary power.²²

(A) Argument against Death Penalty

The Supreme Court has repeatedly held that excessive delay in executing the death penalty,

¹⁹ Ernest van den Haag, “The Ultimate Punishment: A Defence 1986”, *Harvard Law Review*, Vol. 99, No. 7, May, 1986, pp. 1662-1669

²⁰ “Arguments for and Against the Death Penalty” available <http://www.bbc.co.uk/newsround/15007511>(Last accessed on sept. 7, 2019)

²¹ S. Muralidhar, “Hang Them Now, Hang Them Not: India's Travails with the Death Penalty”, *Journal of the Indian Law Institute*, Vol. 40, No. 1/4, December, 1998, pp. 143-173

²² Aparna Alluri, “Seven Myths about the Death Penalty, Debunked”, *Hindustan Times*, 17 June, 2016, available at <https://www.hindustantimes.com/static/deaths-door/death-penalty-seven-myths.html> (Last accessed on Sept. 7, 2019)

leaving the condemned prisoner to suffer a “*dehumanizing effect*” of “*facing the agony of alternating between hope and despair*” renders the capital punishment too inhuman to be inflicted, thus entitling the prisoner to the lesser sentence of a life term. It has been often argued that the state does not have the right to execute a convict. “*Execution kills the criminals and not the crime... How can judiciary decide as to who should live and who should die*”.²³

It is not a merely theoretical possibility that there can be stances where an innocent person can be hanged. In the United States, a report issued in 1993 by the subcommittee on Civil and Constitutional Rights, Committee on the Judiciary of the US Congress, entitled '*Innocence and the Death Penalty: Assessing the Danger of Mistaken Executions*', noted that at least 48 people have been released from prison after serving time on death row since 1973 with significant evidence of their innocence. In 43 of these cases, the defendant was subsequently acquitted, pardoned or charges were dropped. Some of these men were convicted on the basis of perjured testimony or because the prosecutor improperly withheld exculpatory evidence.²⁴

There can be a possibility where court can be wrong in awarding death penalty to a person. In appeals made before Supreme Courts and High Courts a quarter of the convicts who were sentenced death penalty by the Sessions court between 2000 and 2014 were acquitted. Some of them had spent nearly a decade on death row.

Out of those who are sentenced death penalty, most of them are poor. As we know the system is inclined towards those who are rich and/or educated. Most of them cannot afford lawyers to defend themselves in the court of justice. Although, legal aid may be a solution but these lawyers are underpaid and overworked. Also poor families cannot afford things which may prove them innocent or mitigate the sentence such as expert witnesses, medical evidences or any other evidence that weighs in favor of the accused. Also whether a prisoner should live or die depends on judge decides their case. The data suggest that justice in death penalty cases is neither exact nor consistent. It's arbitrary. This applies in other cases of the criminal justice system too such as bail. But the stakes in capital cases are much higher. They are literally matters of life and death.

(B) Death Penalty and Indian Judiciary

The constitutionality of death penalty has been challenges in many cases before the Indian

²³ “Justice or Revenge? The death penalty has no place in a civilised society, but India seems to celebrate it”, *Economic and Political Weekly*, Vol. 47, No. 47, December, 2012, p. 7

²⁴ Roger Hood, *The Death Penalty : A Worldwide Perspective* 104

Judiciary. In 1983, in *Bachan Singh v. State of Punjab*,²⁵ the Supreme Court of India upheld the constitutionality of the death penalty. However, the Supreme Court stated in its decision that the death penalty should only be used in the "rarest of rare" cases. Again, to decide whether a case falls under the category of rarest of rare case or not was completely left upon the court's discretion. The Supreme Court laid down a few principles which were to be kept in mind while deciding the question of sentence. One of the very important principles is regarding aggravating and mitigating circumstances. It has been the view of the court that while deciding the question of sentence, a balance sheet of aggravating and mitigating circumstances in that particular case has to be drawn. Full weightage should be given to the mitigating circumstances and if after taking them into account the court feels that justice will not be done if any punishment less than the death sentence is awarded, then and then only death sentence should be imposed.³²

In *Mithu v. State of Punjab*,²⁶ the Court determined that the mandatory death penalty under Section 303 of IPC, 1860 is unconstitutional in India. Various statutes relating to drug and atrocity offenses prescribe the mandatory death penalty, but the Supreme Court has not expressly struck down the language in such statutes as unconstitutional, hence, Indian courts do not seem to apply the mandatory death penalty for these crimes.

²⁷In 2011, in a landmark decision of *Indian Harm Reduction Network v. Union of India*,³⁴ the Bombay High Court ruled that the mandatory death penalty for drug offences was "unconstitutional". Though the Court did not strike down Section 31-A of the Narcotic Drugs and Psychotropic Substances Act of 1985, but stated that the courts were no longer obligated to hand down the death penalty for repeat drug offenders under the Act.

In 2012, the Supreme Court ruled in *State of Punjab v. Dalbir Singh*²⁸ that the mandatory death penalty as punishment for crimes stipulated under article 27(3) of the Indian Arms Act of 1959 was unconstitutional in light of judicial review under the Constitution and the judgments in *Bachan Singh v. State of Punjab*²⁹ and *Mithu v. State of Punjab*³⁰. Because the Court ruled against the law, that particular article of the Arms Act is null and void. The courts can now impose a lesser sentencing.³¹

²⁵ (1983) 1 SCR 145 at para 224

²⁶ (1983) 2 SCC 277

²⁷ SCC Online Bom 715

²⁸ (2012) 3 SCC 441

²⁹ (1980) 2 SCC 684

³⁰ (1983) 2 SCC 277

³¹ *The Arms (Amendment) Bill*, 2011

Justice P.N. Bhagwati in his dissenting opinion found that the death penalty necessarily arbitrary, discriminatory and capricious. He reasoned that "the death penalty in its actual operation is discriminatory, for it strikes against the poor and deprived sections of the community and the rich and affluent usually escape, from its clutches."³²

In 1989, in *Triveniben v. State of Gujarat*,³³ the moot questions were whether undue delay in executing death penalty violates human rights of the convict? Whether such delay could be a sole ground for commutation? Here the Court condemned undue delay in execution and providing cruel and unusual punishment due to extended stays. The Court ruled that undue delay in execution of a sentence of death could be ground for judicial commutation of the condemned sentence; however, delay would only be a single factor, and not be the sole factor. Further, death sentenced prisoners may technically have a right to contest their sentences if they are not executed within 5 years of sentencing.³⁴

IV. NEED FOR CHANGE IN THE SYSTEM

(A) Procedural irregularities

In India, the pardoning power vests with President under Article 72 however President does not decide clemency cases on his own. His decision is based on the recommendation made by the council of minister. In a country where the post of President is de jure and not de facto, the interference of the legislature in while deciding clemency cases by the executive as per their whims and fancies is very much implied.

But this is not the president's decision alone: the home minister's advice is binding. Other than the pocket veto, the president has no option but to sign on the dotted line. In fact, when a new home minister enters office, the president sends back every pending petition for a review. If the home minister changes, the recommendation might change with him. Since the president cannot be expected to read every document in the file, the notes from the MHA are crucial pointers. In these notes, the MHA is expected to consider age, income, disabilities, motive, insufficient evidence, disagreement among judges, delays, and so on.

Once a mercy petition is rejected by the President it is necessary that the convict or those who petitioned on his/her behalf must be informed about the rejection. For example Maharashtra Prison Manual stipulates that once the State Government has fixed the date of execution, the

³² *Bachan Singh v. State of Punjab*, 1982 3 SCC 24 at para 81

³³ (1989) 1 SCC 678

³⁴ Navrikan Singh, "Lawyers for Human Rights International: India", Interviewed by DPW, (India Doc. 1 24 February 2010.)

date must be communicated to the prisoner and his relatives. It is well settled in law that the President's decision is subject to judicial review and therefore the prisoner and those who petitioned on his behalf have a right to challenge the rejection of the mercy petition. Apart from this, a prisoner may also have various other grounds to challenge the government's decision to execute the prisoner. The mere fact that a particular procedure has been stipulated in the rules is not enough to justify it procedure has to pass the further test of being fair, just and reasonable. The Government of India's apparent distrust of the law was shared by the Supreme Court in many instances where it has admitted error in cases of convicted prisoners sentenced to death. The Indian experience of the death penalty is replete with flawed forensics, police and prosecutorial corruption, false witnesses, false confessions and miscarriages of justice. There has also been „a pattern of confusion, contradiction and aberrations“ in such cases.³⁵

In cases of mercy petition neither prisoners nor their lawyers can track the progress of the appeal. Most of them are never given a copy of the document that says they have exhausted their last appeal to live. Those who do get a copy can rarely read it also the rejection letters are almost always in English.³⁶

(B) Undue Delay in deciding mercy petition

Apart from the humanitarian argument, latest data also indicate that in India trial delays make the death sentence ineffective and result in protracted waits for the accused and their families. *“Death row prisoners continue to face long delays in trials, appeals and thereafter in executive clemency,”* the Law Commission of India 2015 report on the death penalty said. *“During this time, the prisoner on death row suffers from extreme agony, anxiety and debilitating fear arising out of an imminent yet uncertain execution.”*³⁷

Some prisoners had waited for over a decade to learn the fate of their petitions; others had been denied mercy even after providing evidence that could save their lives. This, the courts held, violated the prisoners' right to life because the Constitution guaranteed them a fair shot at mercy.

That's all it really is a shot in the dark.⁴⁵

Also, while awaiting the outcome of the mercy petition, the prisoner on death row is subjected

³⁵ *Shatrughan Chauhan v. Union of India*, (2014) 3 SCC 1.

³⁶ *Ibid.*

³⁷ *Supra* at 3 ⁴⁵Aparna Alluri, “The Quality of Mercy, Seeking mercy is the last resort for those on death row. It's also the least transparent”, *Hindustan Times*, 27 may, 2016 available at <https://www.hindustantimes.com/static/deaths-door/thequality-of-mercy.html> (Last accessed on Sept. 8, 2019)

to a "lingering death", which is something more than mere extinguishment of life. He exists under the specter of death, coping with crippling uncertainty about whether he will live to see another day or not. This degrading and brutalising effect on the human spirit of the condemned prisoner is the most disturbing and horrific aspect of the death row.³⁸

The courts of civilized states have recognized and acknowledged that a prolonged delay in executing a death sentence can make the punishment inhuman and degrading. The protracted anguish of alternating between hope and despair, the agony of uncertainty, the consequences of such suffering on the mental, emotional and physical integrity and health of not only the convict but also his family should not be allowed in civilized societies.³⁹

The Constitution confers a right on such convicts and a duty on the Presidents and Governors to duly consider the Petitions and take action on them expeditiously. Keeping such Petitions pending for an inordinately long period, the government seems to be totally ignorant of its obligations in law and of the human aspect of the suffering of persons on death row. It treats them as if they are standing in a queue for rations. This trauma of being under a sentence of death faced by the convicts is called the "death row phenomenon" which exacts its own mental and physical punishment, even if the person is subsequently spared from gallows.⁴⁰

V. DATA AND PROMINENT CASES

(A) Statics

The whole purpose of Article 72 is that it gives a death row convict a chance to cross-check any errors committed by Supreme Court. The data, however, is not so happening, the 262nd Law commission report shows that Presidents, with the exceptions of Mr. Rajendra Prasad and Smt. Pratibha Patil has dealt with mercy petitions largely without mercy.

- According to information released by the government under the RTI Act, of the 77 mercy pleas decided by President between 1991 and 2010, 69 were rejected. R Venkataraman (1987-1992) rejected 44 mercy pleas, the most by any President.⁴¹

³⁸ S.B. Sinha, "To Kill or Not To Kill: The Unending Conundrum", *National Law School of India Review*, Vol. 24,

No. 1 2012, pp. 1-29

³⁹ Supra at 29

⁴⁰ Brandon L. Garrett, "The Banality of Wrongful Executions", *Mich. L. Review*, 2014.

⁴¹ Anand Katakam and Aparna Alluri, "The Mercy Lottery, Who wins? That depends on who the president is", *Hindustan Times*, 26 May, 2019 available at <https://www.hindustantimes.com/static/deaths-door/the-mercy-lottery.html> (Last accessed on Sept. 10, 2019)

- Since India became republic till 1982, a period that saw six Presidents, only one mercy petition was rejected. During 1982-97, three Presidents rejected 93 mercy petitions and commuted seven sentences. Unfortunately, no pleas were decided during the tenure of President K R Narayanan (1997-2002), after which A P J Abdul Kalam (2002-2007) decided on two pleas, rejecting one and granting the other out of total 24 petitions.
- The most commendable work was shown by Smt. Pratibha Patil, the first woman President of India (2007-2012) commuted 34 mercy pleas and rejected only five.⁵⁰
- After her, the Finance Minister turned President Pranab Mukherjee (2012-17), on the other hand, rejected 30 of the 33 mercy pleas he decided.⁴²
- Among the prisoners whose mercy petitions were rejected by the President of India, the median time spent in prison under trial was 16 years nine months, and median time under sentence of death was 10 years five months.⁴³

(B) Kasab's Case

In regards to mercy petition Ajmal Kasab is a very interesting case to revisit. Kasab had of course committed an unpardonable crime, and, due to damning photographs and videographic evidence his guilt was not questioned. In Kasab's case his mercy petition was rejected on 5th November, and the Maharashtra government was informed about this on 8th November. Kasab was informed about the rejection of his petition on 20th November that is a day before his execution. The government's responsibility to inform the prisoner's family was purportedly discharged by sending a fax to the Pakistan embassy on 20 November, though Kasab's full village address was available to police and jail authorities. Those who petitioned the President for mercy for Kasab learnt about the rejection of their petitions through the media only after Kasab had been executed.⁴⁴

In this case there was clear violation of established procedure but what is more troubling is the reason given by the government for this unreasonable secrecy. The Indian Home Minister and Chief Minister of Maharashtra in separate interviews admitted that the rejection of petition and date of execution was kept secret to prevent human right activists to move to the courts and obtain injunctory relief. This is an extraordinary admission of defiance of the law in order to

⁴² Dev Gosami, "No Mercy: Pranab Mukherjee rejected 30 mercy petitions as President", *India Today*, 18 July, 2017, available at <https://www.indiatoday.in/india/story/president-pranab-mukherjee-mercy-petitions-1025001-2017-0718> (Last accessed on Sept. 12, 2019)

⁴³ Chaitanya Mallapur, "371 Indians are on death row; only 4 have been executed in 13 years", *Business Standard*, 28 May, 2018 available at https://www.business-standard.com/article/current-affairs/371-indians-are-on-death-row-only-4-have-been-executed-in-13-years-118052800123_1.html, (Last accessed on Sept. 12, 2019)

⁴⁴ *Supra* at 18

prevent recourse to lawful remedies.

And if we could not follow due process in letter and generous spirit in this major case, what hope is there for other current and future convicts?

(C) Afzal Guru's Case

Similarly, the case of Afzal Guru is criticized to have been decided on scanty evidence. It is widely acknowledged that President Pranab Mukherjee's rejection of Afzal Guru's mercy petition after seven-and-a-half years was in response to the pressure put on him by local politicians return for political support during his election campaign.⁴⁵ In a statement made by President Pranab Mukherjee he said that *"Before a mercy petition comes to the President, it passes through various stages and different actions had already been taken."* He also stated that the president only goes by the advice of the government and if government advises rejection then the President has to comply by the advice. Also, he stated that the president cannot assume the role of the court which has already considered the death penalty at various stages.⁴⁶

(D) Yakub Memon's Case

In Yakub Menon's case it was argued by the petitioner was that President could not decide a mercy petition overnight and that stay should be granted on Memon's execution for the next 14 days. Also, it was contented that the guideline laid down in Shatrughan Chauhan v. Union of India has not been followed because as per the guidelines there must be atleast minimum period of 14 days between receipt of communication of the rejection and the scheduled date of execution. The petitioners further argued that Article 21 of the Constitution had been violated as the convict has the right to legal aid at all stages including after rejection of mercy petition. Other procedural faults were pointed out, such as the mercy petition to the President in April 2014 was filed by Memon's brother and couldn't displace his personal right to opt for mercy petition and that the rejection of the mercy petition by the President should forthwith be communicated to the convict and his family in writing or through some other mode of communication available. Further, the guidelines require a 14-day gap between the receipt of communication of the rejection of the mercy petition and the scheduled date of execution so

⁴⁵ "Congratulations, now hang Afzal Guru, Thackeray tells Pranab", *Firstpost*, 23 July, 2012 available at <https://www.firstpost.com/politics/congratulations-now-hang-afzal-guru-thackeray-tells-pranab-386832.html> (Last accessed on Sept. 12, 2019)

⁴⁶ "Pranab Mukherjee says he rejected Afzal Guru's mercy petition based on government's counsel", *Scroll.in*, 21 Oct, 2017, available at <https://scroll.in/latest/854879/pranab-mukherjee-says-he-rejected-afzal-gurus-mercy-petitionbased-on-governments-counsel-report> (Last accessed on Sept. 12, 2019)

that the convict has time to settle his affairs, prepare himself mentally for execution, to make his peace with God and also to provide time to meet with his family members.⁴⁷

VI. RECOMMENDATION

The following recommendations are made for improving the present condition with regard to capital punishment and deciding mercy petition by the executive:

1. India should ratify the second Optional protocol, 1989 to the International Covenant on Civil and Political Rights and the International Convention against torture, Cruel, inhuman degrading treatment, 1984. In this regard, India must consider the recommendations made by various UN Human rights bodies such as Human Rights Committee.
2. Until India ratifies the second Optional protocol, 1989, it should adapt temporary moratorium (suspension) on the application of death penalty and should expressly call for imposition of prison terms instead of death penalty.
3. Till then Indian law must fix a time period within which the executive must decide the mercy petition. The executive should consider mercy petition within a reasonable period of time as inordinate, undue, and unreasonable delay in considering mercy petition amounts to torture and violation of Human Rights.
4. Prisoners should be informed about the result of their mercy petition in writing within a reasonable period of time.
5. The prison officials must ensure that prisoners should receive regular healthcare and proper mental health evaluations
6. The constitution of India grants pardoning power to executive as it is the last resort to save life of a convict who has been awarded death penalty. But because of political factors, red tapism and procedural irregularities the disposal of mercy petition is delayed. Therefore there is an urgent need of amendment in Law so that mercy petitions are disposed quickly.
7. Government should follow the procedural guideline while deciding a mercy petition such as proper communication of rejection of mercy petition, providing reasonable time period between communication of rejection and execution.

⁴⁷ Shilpa Jain, Aishwarya Mallik, "Death Penalty: Debated, Delayed not Denied", *Centre for Advanced Studies in Human Rights*, SCC online

8. In cases of inordinate delay in deciding mercy petition Courts should consider such inordinate delay as a ground for commuting a death sentence.

VII. CONCLUSION

Under the criminal justice system the purpose of punishment may be different such as incapacitation, retribution, deterrence, reformation etc. Death penalty is considered to have deterrent effect and incapacitate the criminal. However after World War II efforts were made at international level to abolish death penalty as it violates human rights. This led to fierce debate for and against death penalty. Various international and regional instruments directly or indirectly impose restriction on execution of death penalty or explicitly provides for its abolition. For example, Article 6 of ICCPR, 1966 impose restriction on death penalty whereas OP II, 1989 talks about its abolition.

It has been observed from the past experiences that death penalty does not serve the deterrence effect any more than imprisonment. We have move to society where more focus should be on reformation of criminals. In a constitutionally mediated society there is no role of "an eye for an eye, tooth for a tooth". It is very well known that death penalty is eminently fallible, yet irrevocably final. It operates in a system that is highly fragile and open to manipulation and mistake. The clemency power given to the executive plays a significant role in correcting errors of judiciary. However after analysis the existing data and cases we can conclude that the exercise of pardoning power under Articles 72 /161 as a final bulwark against the miscarriage of justice arising from arbitrary, unfair or wrongful exercise of death penalty has also failed. Because of many factors such as political influence, red tapism, procedural irregularities the purpose of mercy petition has failed to realize its goal. The Supreme Court has repeatedly pointed out the irregularities and gaps in deciding of mercy petition by the executives. When even the exercise of mercy power is vitiated because of non-application of mind or gross procedural violations, capital punishment becomes indefensible.

Therefore it is concluded that till India abolishes death penalty we should seriously reconsider in reforming and improving the exercise of clemency power by the executive. It is important because the arbitrary, inconsistent and erroneous use of the death penalty necessitates an additional filter to correct miscarriages of justice and it humanizes the increasing bureaucratization of our lives. Therefore, there is an urgent need for amendment in law of pardoning power to make sure that mercy petition are dealt quickly and there are no procedural violations.

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