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Putting a full stop to death sentence

President	Mercy petitions pending at start of tenure	Mercy petitions received during tenure	Mercy petitions decided during tenure	Mercy petitions commuted during tenure
K.R. Narayanan (1997-2002)	1	14	0	0
A.P.J. Abdul Kalam (2002-07)	15	10	1	1
Pratibha Patil (2007-12)	24	18	24	23
Pranab Mukherjee* (2012-present)	18	Not known	21**	1

*As of January 2014; **Estimate; Source: Collected from various databases

The death penalty cannot be administered in a manner that does not attract some form of injustice

The recent decision of the Supreme Court of India in *Shatrughan Chauhan v. Union of India* is a remarkable example of how innovative judicial craftsmanship can lead to the upholding of constitutional values, while humanising capital punishment. The judgment has arrived just when there was a feeling among a number of human rights lawyers and public interest advocates that the death penalty debate has reached some sort of a saturation point. Prior to this judgment, it was well settled that once the courts have awarded the death sentence in the "rarest of rare" cases, the process surrounding the execution of the sentence is entirely in the domain of the executive, with any reform of this process on humanitarian grounds being left to the wisdom of Parliament. But the status quo has been challenged quite effectively in this landmark judgment.

From 1997 to 2007, just one mercy petition was decided by the Executive, with the fate of the other petitioners left hanging in the balance. From 2007 to 2013, there was a drastic change with more than 40 petitions being decided, out of which more than 20 petitions were rejected. Such inordinate delays in taking a decision relating to the petition to the President for pardon tantamount to torture and an inhumane form of punishment. As the Supreme Court has observed: "…Keeping a convict in suspense while consideration of his mercy petition by the President for many years is certainly an agony for him/her. It creates adverse physical conditions and psychological stresses on the convict under sentence of death. Indisputably, this Court, while considering the rejection of the clemency petition by the President, under Article 32 read with Article 21 of the Constitution, cannot excuse the agonizing delay caused to the convict only on the basis of the gravity of the crime." The judgment emphasises the need for accountability in exercising constitutionally enshrined powers in a responsible manner. Although the Court refrained from commenting on instances of arbitrariness in exercise of pardon powers, there was an omnipresent notion of seeking accountability and ensuring responsibility while acting on the basis of the constitutional mandate. In this regard, the Court observed: "…if there is undue, unexplained and inordinate delay in execution due to pendency of mercy petitions or the executive as well as the constitutional authorities have failed to take note of/consider the relevant aspects, this Court is well within its powers under Article 32 to hear the grievance of the convict and commute the death sentence into life imprisonment on this ground alone…"

Power of pardon

Re-examining the power of pardon through the “fair, just and reasonable” doctrine: There has been a rich array of judgments, which have evolved over the years, on the nature and scope of the powers of pardon by the President of India under Article 72 or the Governor of a State under Article 161 of the Constitution of India. However, this judgment has emphatically observed that the powers that ought to be exercised under these provisions of the Constitution expects and necessitates a fair, just and reasonable process. The Court observed: “It is clear that after the completion of the judicial process, if the convict files a mercy petition to the Governor/President, it is incumbent on the authorities to dispose of the same expeditiously…The procedure prescribed by law, which deprives a person of his life and liberty must be just, fair and reasonable and such procedure mandates humane conditions of detention, preventive or punitive…” This provides guidance to the executive in relation to the exercise of the powers of pardon, and a failure to adhere to this guidance will lead to the decision-making process being subject to judicial review so as to ensure that it was not in any way arbitrary.
Eliminating distinction in death penalty cases due to the depravity of the crime: One of the anomalies in the implementation of the death penalty after the judgment of the Supreme Court in Devender Pal Singh Bhullar’s case was about the consideration of the gravity of crime as a factor in deciding whether delay in execution ought to be considered for commutation. The Court, in Shatrughan Chauhan’s case, clearly observed that considerations such as the gravity of the crime, extraordinary cruelty involved or some disastrous consequences for society caused by the offence are irrelevant after the Constitution Bench decision in Bachan Singh’s case in 1980. The Court observed, “…all death sentences imposed are impliedly the most heinous and barbaric and rarest of its kind. The legal effect of the extraordinary depravity of the offence exhausts itself when the Court sentences the person to death for that offence. Law does not prescribe an additional period of imprisonment in addition to the sentence of death for any such exceptional depravity involved in the offence…we are of the view that unexplained delay is one of the grounds for commutation of sentence of death into life imprisonment in all types of cases including the offences under TADA …” This is indeed a significant part of the judgment as the brutality of the crime is often put forth as an argument for undermining the constitutionally protected rights of those sentenced to death.

Moratorium

Opportunity for the executive to consider moratorium on death penalty: While the judgment has done what it was expected to do, which is to provide a legal

and constitutional basis for infusing fairness into the procedure and process relating to the execution of the death penalty, it remains to be seen what the government can do towards generating a serious debate on the death penalty in light of this judgment.

It is indeed worthy to consider the fact that one of the ways by which countries can respond to the need for greater accountability in the process of both the imposition and execution of the death penalty is to have a moratorium for a fixed period of time. During this moratorium, a systematic analysis of the death penalty as a form of punishment may be undertaken with the necessary empirical evidence on its implications for crime prevention, deterrence as well as other objectives that are pursued for retaining capital punishment on the statute books. What augurs well for India is that there have been a few State governments, which have passed legislative Assembly resolutions against the imposition of death penalty in relation to a few individuals. While this alone may not be sufficient for assessing the political will to abolish the death penalty, it does provide a basis for seeking a moratorium on carrying out executions for a period of time. This is also in line with the most recent U.N. General Assembly resolution dated December 2012 calling for a moratorium on the death penalty with the ultimate objective of its universal abolition. This was adopted by a record 111 member states, a feat that once again reiterates growing international consensus relating to the abolition of the death penalty.

Towards abolition

Impetus to civil society for seeking the abolition of capital punishment: The most recent judgment of the Supreme Court has reiterated the importance of human rights struggles and the need for pursuing them with determined effort. It also demonstrates the continuing ability of institutions to respond to constitutional issues with a deeper recognition of human rights as the basis for the protection of freedoms. Indian democracy needs to move towards abolishing the death penalty as a form of punishment for all offences. Civilised societies cannot retain the death penalty for any offence and enough empirical evidence is available from around the world to support the view that the death penalty cannot be administered in a manner that does not attract some form of injustice. Professor Roger Hood of the University of Oxford, in his seminal work entitled: “Towards Global Abolition of the Death Penalty: Progress and Prospects,” has observed through his systematic empirical analysis that capital punishment all over the world is in ever rapid retreat. This was further confirmed in the U.N. Secretary General’s Report on the Status of Capital Punishment (2010).

The Supreme Court's recent judgment is indeed a first and important step towards humanising the implementation of capital punishment. It creates new forms of the accountability of the executive at all stages of the pardon process, right from the level of the Ministry of Home Affairs all the way up to the office of the President of India. It will no longer be possible for the executive to give excuses for the delay in taking a decision on pardon petitions.

The Court has extensively referred to its expanding and evolving jurisprudence under Article 21, thereby committing itself to the deeper values of constitutionalism embedded in the provisions relating to the fundamental rights enshrined in the Constitution. The values of constitutionalism are not shaped by the exigencies of current situations, political considerations or, for that matter, public perception; they are based upon a deeper commitment to the societal values that are inherent in the Constitution.

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