

## FREEDOM OR JAIL: WHO PLAYS GOD?

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### ABSTRACT

This article explores the selective cases of release of life convicts, their legality and fallout, and its impact on the criminal justice delivery system. In recent times, debate has been engendered by the release of a convict, an ex-legislator who was serving a life sentence for the murder of a young IAS officer. Political expediency trumped over the penological consequences and the Bihar Government released him after 14 years of imprisonment. This by no means is the solitary instance and not long ago in the month of August, 2022 the State Govt. of Gujarat had granted remission to the 11 convicts in the Bilkis Bano who were serving their sentence for the offense u/s 302, 376 r/w Section 149 of Indian Penal Code. This article also examines the constitutional and statutory responsibilities associated with the power of remission of the President, Governor and the State Government. Related issues are the power of the President under Article 72 and the Governor under Article 161 of the Constitution. The prolonged delay in disposing of mercy petitions for death row convicts has emerged as a pressing issue in the Indian legal system. It argues that the power of pardon is not a matter of grace or privilege, but a fundamental duty of the highest authorities, aimed at ensuring justice rather than defying it. It delves into the concept of pardon, commutation, and remission, explaining their interrelated but distinct nature. The constitutional and statutory provisions empowering the President, Governor, and relevant governments to exercise these powers are also discussed. Furthermore, the article emphasizes the need for transparency, fairness, and consistency in the justice system. By examining the

divide between the two categories of cases and the public concerns they raise, this article sheds light on the challenges faced by India's legal framework in ensuring justice is not only served but also seen to be served.

**Keywords:** Justice Delivery System, Remission, Pardon, Life Imprisonment, Natural Justice.

## INTRODUCTION

The power to push or pull or leave someone hanging in the hands of death is too much power. This cannot be exercised lightly without due thought and due process. The release of a life convict, who also happens to be an ex-legislator involved in the murder case of an IAS Officer<sup>i</sup>, by the Bihar Government garnered attention for controversial reasons. In the present case, a new question has arisen, whether justice once served be revisited especially in heinous crimes? Last year, on the eve of Independence Day, the release of 11 Life Convicts of rape and murder by the Gujarat Government in the Bilkis Bano case<sup>ii</sup> was another such case and had become a cause of concern. While in April, 2022 at Uttar Pradesh, a 75-year-old Prisoner convicted of murder u/s 302 IPC r/w 149 IPC died in jail waiting for pardon.

What is the huge divide which separates these two categories of cases? What did one convict do different from the other? These two contrasting instances bring to limelight the double standards of our Indian Justice Delivery system and the misuse of Legal provisions by the ruling regime in grant of pardons and remissions.

The term life imprisonment to a layman might indicate what the plain words reflect, imprisonment for life. The same has been confirmed in judgments by the apex Court too. For e.g., in *UOI v. Sriharan*,<sup>iii</sup> It was held that life imprisonment per incuriam in terms of Section 53 and 45 of Indian Penal Code (hereinafter referred to as “IPC”) means imprisonment for the rest of life of convict till his last breath. Then how do we see convicts of heinous crimes get released while under trials on the other hand languish in jails.

## **UNDERSTANDING PARDON, COMMUTATION, AND REMISSION: POWERS OF SENTENCE MODIFICATION IN CRIMINAL LAW**

Pardon, Commutation and Remission refers to distinct but interrelated concepts related to the modification of criminal sentences. Pardon is an act of executive clemency that completely exempts an individual from the punishment associated with a criminal conviction. Commutation involves reducing the severity or duration of a criminal sentence by substituting its form without completely eliminating the conviction. It entails changing the punishment to a lesser or more lenient form. Remission refers to the reduction or mitigation of the punishment imposed on a convicted individual while keeping the conviction intact and without changing its character. It involves lessening the duration of the sentence without changing its character.

Thus, pardon completely forgives the punishment and removes legal disabilities, commutation reduces the severity or duration of the sentence, and remission mitigates the punishment while keeping the conviction intact.

## **POWERS OF PARDON AND COMMUTATION IN INDIA: CONSTITUTIONAL AND STATUTORY PROVISIONS**

In our country, there are both Constitutional as well as Statutory provisions which deal with pardon, remission or commutation of sentences given to a convict.

Under the Constitution of India, Article 72 empowers the President to grant pardon, reprieve, respite or remission of punishment, or to suspend, remit or commute the sentence of any person convicted of any offense in all cases-

- (a) where the punishment or sentence is by a court martial;
- (b) where the punishment or sentence is for an offense against a law relating to a matter to which the Union's executive power extends; and
- (c) of a death sentence

Further, Article 161 empowers the Governor of States to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offense against any law relating to a matter to which the executive power of the State extends.

However, the Hon'ble Supreme Court in the case of Maru Ram v. Union of India ('Maru Ram')<sup>iv</sup> and Dhananjay Chatterjee v. State of West Bengal ('Dhananjay')<sup>v</sup> has ruled that the President cannot exercise his power of pardon independent of the government. He has to act on the advice of the Council of Ministers while deciding mercy pleas. Although the President is bound by the Cabinet's advice, Article 74(1) empowers him to return it for reconsideration once. If the Council of Ministers decides against any change, the President has no option but to accept it.

Further, it is given that nothing in sub-clause of clause (1) shall affect the power to suspend, remit or commute a sentence of death exercisable by the Governor of a State, under any law for the time being in force.

Another different but similar type of power has been provided by The Code of Criminal Procedure, 1973 (hereinafter referred to as "CrPC") to the respective Central and State Governments under Section 432 and provides for Power to Suspend or Remit Sentences. According to this Section, when an individual has been sentenced for an offense, the relevant government has the authority to suspend the execution of the sentence or remit either the entire punishment or a portion thereof, either unconditionally or subject to conditions that the sentenced person accepts. In addition, Section 433A stipulates that regardless of the provisions in Section 432, a person sentenced to life imprisonment for an offense for which death is a possible punishment, or an individual whose death sentence has been commuted under Section 433 to a life sentence, shall not be released from prison until they have served a minimum of fourteen years of imprisonment.

Given the perceived resemblance of provisions within the Constitution of India and CrPC, one might question the necessity of having both. However, the Supreme Court has clearly established that these are distinct powers. In the case of Maru Ram, the Supreme Court declared that Sections 432 and 433 of the CrPC are separate but related powers, and are not an expression

of Articles 72 and 161 of the Constitution. The Constitution Bench, in this case, upheld the legality of Section 433A of the CrPC, which was introduced in 1978 to prevent certain life prisoners from being released before serving 14 years in prison. According to the ruling, a prisoner cannot be released until they have completed 14 years in custody in cases where the death penalty was legal but a person was sentenced to life imprisonment, or when death penalties were commuted to life terms. The court reiterated that a life sentence means imprisonment until the end of one's life, except in cases where the government grants a pardon. Furthermore, the ruling established that the President and Governor can only act on the recommendations of the relevant governments when deciding whether to grant mercy petitions or appeals for remission or commutation. This principle was emphasized in the case of *Kehar Singh & others v. Union of India*<sup>vi</sup>.

## **THE CASE OF BILKIS BANO, CONTROVERSIAL AMENDMENTS AND RELEASE IN BIHAR: A DISTURBING TURN OF EVENTS**

In the past one-year, alarming incidents have come to the forefront, shedding light on the precarious functioning of the legal system and the state of justice in India. Two cases, in particular, have ignited significant concerns: the release of convicts in the Bilkis Bano case and the controversial amendment leading to the release of former Member of Parliament, Anand Mohan Singh, in Bihar<sup>vii</sup>. These cases highlight the misuse of the Prisons Act, unlawful interpretations of "life imprisonment." The resulting impact of these arbitrary actions leads to violations of established principles of natural justice of fairness, equity. It casts a dent on the credibility of the legal framework.

The Bilkis Bano case which stands as a poignant reminder of a harrowing incident that unfolded in India, leaving an indelible mark on the nation's collective memory was again in the limelight because of all the wrong reasons. On 15th August, 2022, all 11 individuals who were convicted and sentenced to life imprisonment for the 2002 Bilkis Bano gang rape and murder of 14 members of her family were released from Godhra sub-jail in Gujarat. Their release was permitted by the Gujarat government under its remission policy. The case had initially been

tried by a special CBI court in Mumbai, which on January 21, 2008, had handed down life sentences to the 11 accused for their involvement in the heinous crimes. The conviction was later upheld by the Bombay High Court.

After serving over 15 years in jail, one of the convicts had approached the Supreme Court with a plea for premature release. In response, the apex court directed the Gujarat government to consider remission of the convict's sentence. Consequently, a committee was formed, led by Panchmahals Collector, to examine the matter. The committee, which had been established a few months ago, unanimously recommended remission for all 11 convicts. Upon receiving the orders from the state government, their release was facilitated. It is important to highlight that the individuals convicted in the Bilkis Bano case were released based on the earlier Remission Policy of the Gujarat Government, established in 1992, and not due to the recent special directions issued by the Central Government concerning the release of condemned convicts as part of the "Azadi ka amrit mahotsav" celebrations. According to the current policy, prisoners convicted of grave offenses like rape, murder, terrorism, and money laundering are ineligible for release. However, a lingering question arises regarding the fairness and justice of releasing individuals convicted of such severe crimes.

Another recent turn of events in Bihar, the state government's amendment to Rule 481(1)(a) of the Bihar Prison Manual, 2012, has stirred controversy. This amendment removed the phrase "heinous crime," which encompassed the "murder of a public servant on duty." By reclassifying former Member of Parliament and Member of Legislative Assembly, Anand Mohan Singh, from a "specific class of convicts" to a "general convict," the amendment made him eligible for sentence remission after serving only 14 years in prison. This amendment highlights the misuse of the Prisons Act, as the power to make rules is conferred solely on the state government under Section 59 of the Prisons Act<sup>viii</sup>. The amendment's legislative nature, affecting a larger class of prisoners, is evident from its impact on 26 other convicts falling under the same category. Moreover, the government's interpretation of "life imprisonment" as a fixed term of 14 years contradicts judicial pronouncements and the understanding that a life sentence implies imprisonment until the end of life.

## **INEXCUSABLE DELAY IN MERCY PETITIONS: A VIOLATION OF CONSTITUTIONAL RESPONSIBILITY**

The power of pardon, as elucidated by Justice Holmes of the United States Supreme Court in the case of *Biddle v. Perovich*<sup>ix</sup>, holds great significance within the constitutional framework. The authority vested in the President under Article 72<sup>x</sup> and the Governor under Article 161<sup>xi</sup> of the Constitution is not a matter of grace or privilege, but a crucial constitutional duty entrusted to the highest authority by the people.

The power of pardon is an executive action that must be exercised in the pursuit of justice, not in defiance of it. The agony of prolonged mercy petitions placing a convict in a state of suspense while their mercy petition awaits consideration by the President for several years inflicts profound agony upon them. This prolonged delay creates adverse physical and psychological conditions for the convict under a death sentence. When the rejection of a clemency petition by the President is examined by this Court under Article 32 in conjunction with Article 21 of the Constitution, the excruciating delay suffered by the convict cannot be justified solely based on the gravity of their crime.

India, as a signatory to the Universal Declaration of Human Rights (1948)<sup>xii</sup> and the United Nations Covenant on Civil and Political Rights (1966)<sup>xiii</sup>, is bound by provisions that prohibit cruel and degrading treatment and punishment. As per the judgment in *Vishaka v. State of Rajasthan*<sup>xiv</sup>, international covenants to which India is a party become part of domestic law unless they contradict specific existing laws. It is the principle of "cruel and degrading treatment and/or punishment" that has inspired the philosophy behind the *T.V. Vatheeswaran v. State of Tamil Nadu* ('Vatheeswaran')<sup>xv</sup> and subsequent cases. The *Smt. Triveniben & others v. State of Gujarat* ('Triveniben')<sup>xvi</sup>, particularly, has been followed in Commonwealth countries. In cases where undue and unexplained delays in execution occur due to pending mercy petitions or when both the executive and constitutional authorities fail to consider relevant aspects, this Court has the power under Article 32 to address the convict's grievance and commute the death sentence to life imprisonment, provided the delay was not caused by the accused themselves. Thus, the jurisprudence has evolved in accordance with the mandates of our Constitution and various Universal Declarations and UN directives.

The procedure established by law, which deprives an individual of their life and liberty, must be just, fair, and reasonable. Such a procedure requires humane conditions of detention, whether preventive or punitive. In this context, although the petitioners were sentenced to death in accordance with the established procedure, the unexplained delay caused by the executive branch is inexcusable. As established, Article 21 of the Constitution extends beyond the pronouncement of the sentence and encompasses its execution. The prolonged delay in executing a death sentence has a dehumanizing effect on the accused. When circumstances beyond the control of prisoners' causes delay, commutation of the death sentence becomes necessary. In *Vatheeswaran*, the Court emphasized the distinction between a sentence of death and a lengthy period of imprisonment before execution. The appropriate remedy in cases where the execution of a death sentence is delayed is to vacate the sentence. In para 13 of the same case, the Court clarified that Articles 14, 19, and 21 complement each other, and the right derived from the Constitution is a substantive right of the convict, not merely a matter of procedure established by law. This understanding stems from the judgment in *Maneka Gandhi v. Union of India*<sup>xvii</sup>.

In the case of *Shatrughan Chauhan & others v. Union of India*<sup>xviii</sup>, it was observed that mercy petitions were disposed of more expeditiously in the past compared to the present. Until 1980, mercy petitions were typically decided within a minimum of 15 days and a maximum of 10-11 months. However, from 1980 to 1988, the time taken to dispose of mercy petitions gradually increased to an average of 4 years. It was during this period that cases like *Vatheeswaran* and *Triveniben* were decided, which led to the development of jurisprudence regarding commuting death sentences based on undue delay. It is worth mentioning that the Court observed in these cases that when such petitions under Article 72 or 161 are received, it is expected that they will be disposed of expeditiously. In *Sher Singh* case<sup>xix</sup>, the Court urged the Government of India and State Governments to expedite the disposal of petitions filed under Articles 72 and 161, emphasizing that delays in their disposal hinder the dispensation of justice and erode public confidence in the justice system.

Prolonged Incarceration and Controversial Releases: A Threat to Justice and Institutional Integrity



The release of convicts in the Bilkis Bano case and the controversial amendments in Bihar raise broader questions about the long-term institutional health of law and order in India. Upholding constitutional provisions and ensuring the integrity of the judiciary are crucial to maintaining a fair and just system. When political interests influence actions, as observed in these cases, the principles of justice and the credibility of the legal framework are jeopardized.

The release of life convicts by state governments under Section 433A of the CrPC in India has sparked significant controversy due to concerns related to the criteria, process, and potential consequences involved in granting premature release. Central to the controversy are issues surrounding the fairness and thoroughness of the assessment criteria applied when granting early release, as well as the potential implications for society and the rights of victims. One of the primary concerns raised pertains to the diligent application of the premature release process, specifically whether factors such as the gravity of the offense, the conduct of the convict, and the opinions of victims or their families are being adequately considered. Critics argue that in certain cases, external factors, including political influences, may improperly sway decisions regarding premature release, potentially compromising principles of justice and equity. Moreover, the release of life convicts without proper assessment or rehabilitation programs raises concerns about public safety. Critics contend that comprehensive measures should be in place to ensure that early-released convicts have genuinely undergone reform and pose minimal risk to society.

Another facet of the controversy focuses on the rights of victims and their families. Advocates argue that the opinions and concerns of victims and their families should carry greater weight in decisions regarding the release of life convicts. Considering the significant psychological and emotional impact on victims and their families when a convict is released prematurely, it is essential to prioritize their perspectives and well-being. To address these concerns and promote transparency, various recommendations have been made, such as the establishment of an independent board or committee responsible for evaluating and deciding on the premature release of life convicts. This board could consist of members from the judiciary, law enforcement, and social welfare sectors, ensuring a fair and comprehensive assessment process. In summary, the controversy surrounding the release of life convicts under Section 433A of the CrPC highlights the importance of maintaining a balanced approach that takes into account the

interests of justice, public safety, and the rights of victims. Striking this balance is crucial to ensure that the process of granting premature release is conducted in a fair, transparent, and accountable manner.

## **EXECUTIVE AUTHORITY AND JUDICIAL REVIEW: INSIGHTS FROM INDIAN SUPREME COURT CASES**

The executive possesses the authority to remit, suspend, or commute the sentence imposed by the judiciary on an offender. The Constitution and The Code of Criminal Procedure, 1973 provides the President and the Governor with several powers to modify the offender's sentence. Initially, there were limited avenues for judicial review, but through a few judicial cases, a slight opportunity for such review has been established. However, there remains a lack of clarity in these provisions, and the ruling dispensation often misuses them according to their own preferences and inclinations.

Under the Indian Constitution, the exercise of the power of pardon has not been devoid of controversies, raising several questions that have come before the courts. These include:

- (i) Does the President exercise personal discretion or merely act as a constitutional figurehead when exercising the power of pardon?
- (ii) Should the President grant a personal hearing to the convicted individual or their lawyer before making a decision?
- (iii) Are there any norms, such as Article 14 of the Constitution, that govern the exercise of the power of pardon?
- (iv) Is the exercise of this power subject to judicial review?

It has been clarified through various judicial interpretations that while the power of pardon is formally vested in the President, the President exercises this power, like any other power, based on the advice of the relevant Minister, in this case, the Home Minister, as per Article 74(1) of the Constitution. Hon'ble Supreme Court in the case of Maru Ram in 1980 and Dhananjay Chatterjee in 1994 has ruled that the President cannot exercise his power of pardon independent

of the government. He has to act on the advice of the Council of Ministers while deciding mercy pleas. Although the President is bound by the Cabinet's advice, Article 74(1) empowers him to return it for reconsideration once. If the Council of Ministers decides against any change, the President has no option but to accept it.

## CONCLUSION

In the 4th century BCE, the importance of rule of law started to be noticed in Athens, where the word was coined. Justice Coke, Dicey and so many have discussed the importance of having a rule of law. Arbitrariness strikes at the root of the principle of equality, and rule of law. And yet, are we heading towards a society governed by rule of law and constitutionalism or away from it? Because of the tussle for power and politicization of justice, the uncertainty continues on who gets to give the last judgment, the judiciary or the executive. Was the purpose behind provisions of pardon and remission aimed only towards the enemies/friends of political parties?

The prolonged delay in disposing of mercy petitions is an inexcusable violation of the constitutional responsibility entrusted to the highest authorities. Living under the constant uncertainty of pending mercy petitions inflicts immense agony on the convicts, contrary to the principles of justice and the rights enshrined in international covenants. The procedure established by law must ensure just, fair, and humane conditions, and the prolonged delay in executing death sentences is dehumanizing for the accused. The evolving jurisprudence recognizes the substantive rights of the convict, and the Court has the power to commute death sentences based on undue delay. It is imperative that mercy petitions be disposed of expeditiously, adhering to a self-imposed rule of completion within three months, as recommended by the Court. The repeated occurrence of lengthy delays in disposing of mercy petitions undermines the trust of the people in the justice system and must be rectified.

Moreover, the release of convicts in the Bilkis Bano case and the controversial amendments in Bihar expose serious flaws in the functioning of the legal system. The arbitrary use of the Prisons Act, unlawful interpretations of "life imprisonment," and political influences erode public trust and compromise the pursuit of justice. It is imperative to address these concerns,

uphold constitutional provisions, and safeguard the integrity of the judiciary to restore faith in the fairness and credibility of the legal framework in India.

The unrestricted power bestowed upon the appropriate government, particularly under Section 432 and 433A, necessitates careful amendments to address instances of grave misuse. There have been alarming cases where this provision has been liberally exploited by ruling parties for political gains, creating a significant loophole in the overall justice delivery system. To rectify this, it is crucial to impose limitations on the exercise of this power. Furthermore, there is a pressing need to impose stricter restrictions on the powers of remission under Section 433A, particularly in cases involving heinous offenses such as rape, murder, dacoity with murder, and similar crimes. The current framework allows for the potential misuse of remission, undermining the severity of punishments mandated for these grave crimes. Strengthening the restrictions will help ensure that justice is upheld and that those convicted of heinous offenses serve their appropriate sentences. In addition, establishing a permanent board consisting of the five most senior judges in each district could prove instrumental in expediting the decision-making process related to remission or commutation. This dedicated board, operating on a fast-track basis, would effectively address matters concerning remission, ensuring timely and just resolutions. By introducing these measures, the power of remission will be subjected to necessary reforms, enhancing the integrity of the justice system. Stricter restrictions on remission for heinous offenses and the establishment of specialized boards will contribute to a more robust and efficient delivery of justice, minimizing potential political influences and safeguarding the principles of fairness and accountability.

Our research findings provide a recommendation to avoid a pause, but it is ultimately the responsibility of the government, whether at the federal or state level, to decide whether and why the current Remission Rules should continue until a more comprehensive system is implemented. During the Azadi ka Amrit Mahotsav celebrations, the Central government issued special directives to states in June of this year regarding the release of condemned convicts. According to this policy, prisoners convicted of heinous crimes such as rape, murder, terror charges, and money laundering were not eligible for release. In the case of Bilkis Bano, it was not this policy that was followed, but rather the earlier Remission Policy of the Gujarat Government established in 1992. However, the question remains as to whether it is just and fair

to release convicts involved in such heinous offenses. It is important to note that law and justice are not always synonymous. What is considered lawful may not always be seen as just. Instances like the release of convicts in the Bilkis Bano case highlight the fact that, as a society, we still have a long way to go in terms of achieving justice.

## ENDNOTES

<sup>i</sup> Avinash Kumar, *Bihar govt notifies release of former MP Anand Mohan Singh, 26 other prisoners*, <https://www.hindustantimes.com/india-news/bihar-govt-releases-former-mp-anand-mohan-singh-and-26-others-from-jail-after-amending-prison-manual-101682363419168.html>, accessed 10 July, 2010

<sup>ii</sup> Jimna PV, *The Remission through the Lens Of Bilkis Bano's Case*, JCLJ (2022) 1527.

<sup>iii</sup> *UOI v. Sriharan* 2016 (7) SCC 1.

<sup>iv</sup> *Maru Ram v. Union of India* 1980 AIR 2147, 1981 SCR (1)1196.

<sup>v</sup> *Dhananjay Chatterjee v. State of West Bengal* 1994 SCR (1) 37, 1994 SCC (2) 220.

<sup>vi</sup> *Kehar Singh & others v. Union of India* 1989 AIR 653.

<sup>vii</sup> Santosh Singh, *Bihar government tweaks jail rules, sets free murder convict-politician Anand Mohan*, <https://indianexpress.com/article/india/bihar-government-jail-rules-free-murder-convict-politician-anand-mohan-8574385/>, accessed 10 July, 2023.

<sup>viii</sup> *The Prisons Act 1894*, ss 59.

<sup>ix</sup> *Biddle v. Perovich* 274 U.S. 480 (1927).

<sup>x</sup> *The Constitution of India*, art 72.

<sup>xi</sup> *The Constitution of India*, art 161.

<sup>xii</sup> *United Nations General Assembly, The Universal Declaration of Human Rights (UDHR)*, New York:UNGA, 1948.

<sup>xiii</sup> *United Nations (General Assembly), 1966, "International Covenant on Civil and Political Rights," Treaty Series 999 (December): 171.*

<sup>xiv</sup> *Vishaka v. State of Rajasthan* (1997) 6 SCC 241.

<sup>xv</sup> *T.V. Vatheeswaran v. State of Tamil Nadu* (1983) 2 SCC 68.

<sup>xvi</sup> *Smt. Triveniben & others v. State of Gujarat* 1989 AIR 1335, (1988) 4 SCC 574.

<sup>xvii</sup> *Maneka Gandhi v. Union of India* (1978) 1 SCC 248.

<sup>xviii</sup> *Shatrughan Chauhan & others v. Union of India* (2014) 3 SCC 1.

<sup>xix</sup> *Sher Singh & others v. The State of Punjab* 1983 AIR 465, 1983 SCR (2) 582.