SHATRUGHAN CHAUHAN V. UNION OF INDIA: REVIEWING EXECUTIVE LETHARGY[1]

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The death penalty jurisprudence in India has seen numerous landmark judgments being handed out by the judiciary. Shatrughan Chauhan v. Union of India, although forms yet another one in the long line of judgments, it is distinct in that it does not question the legality of the death penalty per se, but sets into motion the wheels of a movement that would hopefully result in a more just and humane approach to the delicate question of the capital punishment.

Instead, the issues in this case were related to the post conviction stage, dealing with the pardoning power of the executive and the disposal of mercy petitions. This case comment attempts to analyze the major themes and principles that this judgment deliberates upon. Through this analysis, the authors seek to present the Apex Court's perspective on the interplay between the judiciary and the highest echelons of the executive.

Additionally, the authors also study the Court's approach in light of the 'death row phenomenon', the judiciary's stance as the guardian of the country's citizens and the due respect accorded to the rights of death row convicts. The comment also delves into what might have been, without prejudice to the landmark nature of the judgment and its positive implications.

When Patanjali Shastri, CJ described the Supreme Court of India as a sentinel on the *qui vive* in context of Fundamental Rights,[2] he was merely stating what the Apex Court would come to reiterate in different words, over the course of the coming years and judgments. After that, the Supreme Court has repeatedly

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[2] State of Madras v. V.G. Row, A.I.R. 1952 S.C. 196.

asserted its status as the protector[3] of Fundamental Rights and ultimate interpreter of the Constitution,[4] through a plethora of judgments.

Recently, in its much lauded judgment in the case of *Shatrughan Chauhan v. Union of India*,[5] the Supreme Court once again assumed this role while dealing with multiple writ petitions that prayed for commutation of death sentence to life imprisonment, post rejection of the mercy petitions by the President. Without dwelling upon the legality or otherwise of the death penalty itself, the three-judge Bench has done well to meticulously analyze previous judgments on the topic and to concretize the principles therein.[6]

BACKGROUND AND FACTS

A three-judge Bench of the Supreme Court was called upon to decide on the writ petitions of 15 death convicts whose mercy petitions to the President had been rejected. The petitions were filed on the grounds of violation of Article 21, caused due to the supervening circumstances while the mercy petitions were pending. It was argued that such procedure was outside the ambit of the 'procedure established by law'. Therefore, the challenge was on the procedure, and not the merits of the death sentence. It was prayed that the death sentences be commuted to life imprisonment.

Apart from ruling upon the prayer of the petitioners, the Court also dwelled upon the extent of judicial review and whether the judiciary could lay down guidelines regarding the disposal of mercy petitions.

ARTICLE 21 AND 'THE DEATH ROW PHENOMENON'

The Court relied on the Article 21 jurisprudence that the protection so offered does not cease when a person becomes convicted and sentenced.[7] Instead,

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[3] I.R. Coelho v. State of Tamil Nadu, (2007) 2 S.C.C. 1.

[4] I.R. Coelho v. State of Tamil Nadu, (2007) 2 S.C.C. 1.

[5] Shatrughan Chauhan v. Union of India, MANU/SC/0043/2014 (2014).

[6] Anup Surendranath, *Redeeming the Supreme Court*, THE HINDU, Jan. 28, 2014, available at http://www.thehindu.com/todays-paper/tp-opinion/redeeming-the-supreme-court/article5624932.ece

[7] Shatrughan Chauhan v. Union of India, MANU/SC/0043/2014 (2014).

it set down that executive action may be reviewed by taking supervening circumstances into account on the foundation of Article 21, which is intended to protect the prisoner 'till his last breath'.[8]

The Court relied, without stating in explicit terms, on an established concept of the 'death row phenomenon'. A death convict is usually put under harsh conditions of death row,[9] which includes the element of delay and other factors, including solitary confinement. The element of delay causes the 'brooding horror haunting the prisoner'[10] and 'the anguish of alternating hope and despair and the agony of uncertainty'.[11] In the face of arguments that Article 72 does not envisage a time limit for the disposal of the mercy petition, and the fact that there are a number of time-consuming procedural safeguards which need to be followed,[12] the Court held that unreasonable, unexplained or inordinate delay is a ground for the commutation of a death sentence to life imprisonment.[13]

The aspect of solitary confinement was discussed by the Court as another different supervening circumstance. While solitary confinement is a cruel and separate substantive punishment prescribed by the IPC,[14] the Prisons Act also provides for confinement 'in a cell apart from other prisoners' of a person under sentence of death.[15] Although the Court has argued that such provisions are to maintain discipline and the meaning of the impugned provision is different from the punishment under the IPC because of ample space for community life in dormitories and the possibility of other persons under death sentences being kept

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[8] Shatrughan Chauhan v. Union of India, MANU/SC/0043/2014 (2014).

[9] Patrick Hudson, *Does the Death Row Phenomenon Violate a Prisoner's Human Rights under International Law?,* 11 EJIL 833, 834 (2000).

[10] Ediga Anamma v. State of Andhra Pradesh, AIR 1974 SC 799.

[11] T.V. Vatheeswaran v. State of Tamil Nadu, AIR 1983 SC 361.

[12] Shatrughan Chauhan v. Union of India, MANU/SC/0043/2014 (2014).

[13] Shatrughan Chauhan v. Union of India, MANU/SC/0043/2014 (2014).

[14] Shatrughan Chauhan v. Union of India, MANU/SC/0043/2014 (2014); Indian Penal Code, § 73 (2006).

[15] The Prisons Act, § 30(2) (1894).

in the same cell,[16] there remains not much difference in the practical manifestation of both the provisions. This is due to the fact that the prisoners are kept in cells for most parts of the day, and the possibility of a number of death row convicts being kept in the same prison is not particularly high. Such dehumanizing conditions in prisons leave a huge physical and psychological impact on the death row convicts. In the words of Krishna Iyer J., the 'prisoner is reduced to a vegetable.'[17]

If the above aspects were to be overlooked, it would mean that a person is given death, but after a torturous period of delay. Such cruel, inhuman and degrading treatment is against recognized norms of international law,[18] which is also manifest in international judgments.[19] The Court further held that such inexplicable delays are against the procedure established by law, since they go against the Constitutional mandate that such procedures be just, fair and reasonable and ensure humane conditions of detention.[20]

However, the Court could have been more liberal and clarified better as to the circumstances when the death sentence may be commuted. While the Court held that the delay may be commuted after satisfying the condition that it was not caused at the instance of the accused[21] and such delay should have been caused by circumstances beyond the prisoner's control.[22]

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[16] Sunil Batra v. Delhi Administration, AIR 1980 SC 1579; Shatrughan Chauhan v. Union of India, MANU/SC/0043/2014 (2014).

[17] Rajendra Prasad v. State of UP, 1979 3 SCR 78.

[18] International Covenant on Civil and Political Rights, art. 6, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171; Universal Declaration of Human Rights, art. 3, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948).

[19] Soering v. United Kingdom, 161 Eur. Ct. H.R. (1989); Riley v. Attorney General of Jamaica (1983) 1 AC 719 (P.C.); Pratt & Morgan v. The Attorney General for Jamaica, (1993) 4 All ER 769 (P.C.).

[20] Shatrughan Chauhan v. Union of India, MANU/SC/0043/2014 (2014).

[21] Shatrughan Chauhan v. Union of India, MANU/SC/0043/2014 (2014).

[22] Shatrughan Chauhan v. Union of India, MANU/SC/0043/2014 (2014).

Delays may be caused entirely by the fault of the prisoner, such as cases of escape of custody etc. wherein such commutation may not be done.[23] Alternatively, it may be entirely attributable to the state, where such commutations may be possible.[24] But in certain circumstances, a prisoner might make legitimate appeals available to him which might also have the intention of causing delays. In such cases, it would be incorrect to blame the convict, since it is a part of human nature that a person would make every attempt to save his life.[25] It was held in *Pratt*[26] that if the appellate procedure enables the prisoner to prolong appellate hearings, then the fault would lie with the system and not the prisoner. Moreover, it is the consequence of such delay, and not the reasons, that are more important.

On a side note, the case also discussed the flawed rationale behind treating offences under the Indian Penal Code and the TADA[27] differently for the purpose of commutation of sentences. In the *Bhullar*[28]judgment the Court had made a false distinction of not considering supervening circumstances for commutation of sentences under TADA owing to the serious and heinous nature of the crimes. While sentence of death may only be imposed in the rarest of rare cases,[29] the Court in *Bhullar*[30] was incorrect in conceptualizing another distinction within the 'rarest of rare' threshold for the purpose of commutation of sentences. It is submitted that, irrespective of the legislation a person is convicted under, the gravity of the offence to warrant a death sentence is the same, that of being heinous and barbaric, and the rarest of its kind.[31] Therefore, the disqualification

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[23] Hudson, *supra* note 8, at 850-851.

[24] *Id.*

[25] Pratt & Morgan v. The Attorney General for Jamaica, (1993) 4 All E.R. 769 (P.C.); Hudson, *supra* note 8, at 850-851.

[26] Pratt & Morgan v. The Attorney General for Jamaica, (1993) 4 All E.R. 769 (P.C.).

[27] Terrorist and Disruptive Activities (Prevention) Act, (1995).

[28] Devender Pal Singh Bhullar v. N.C.T. of Delhi, A.I.R. 2013 S.C. 1975.

[29] Bachan Singh v. State of Punjab, A.I.R. 1980 S.C. 898.

[30] Devender Pal Singh Bhullar v. N.C.T. of Delhi, A.I.R. 2013 S.C. 1975.

[31] Bachan Singh v. State of Punjab, A.I.R. 1980 S.C. 898.

of all TADA convicts or convicts of any legislation for that matter from commutation was without reason, and was rightly held as *per incuriam*.[32]

CLEMENCY, FUNDAMENTAL RIGHTS AND JUDICIAL REVIEW

The people's power to pardon has been recognized and embodied in the highest offices of the President and the Governor. [33] [34] The pardoning power is present in the shape of a Constitutional duty as opposed to a private act of grace.[35]

The determination of the extent of permissible judicial review of this unbridled power, if any, was a major issue of deliberation by the Bench. The Court relied on its previous judgments and tilted in favour of limited judicial review of the executive orders made under Article s 72 and 161.[36] The Court self-restrained itself from going into the merits of the decision, but reserved for itself the power to review the executive decisions on limited grounds[37] of procedural impropriety.[38] This possibility of review of executive decisions in exercise of the power of pardon was evident in *Swaran Singh,*[39] followed by *Satpal Singh.*[40] Both these cases were instances where the Supreme Court quashed the executive's order of acceptance of the mercy petitions, on the grounds of arbitrariness and non-application of mind, respectively. By logical extension, such power of review is also available to the Court while considering cases of rejection of mercy petitions, and in effect to this case.

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[32] Shatrughan Chauhan v. Union of India, MANU/SC/0043/2014, 19 (2014).

[33] INDIA CONST. Article 72; INDIA CONST. Article 161.

[34] Kehar Singh v. Union of India, (1989) 1 S.C.C. 204.

[35] Biddle v. Perovich, 71 L. Ed. 1161; Epuru Sudhakar v. Govt. of A.P., (2006) 8 S.C.C. 161.

[36] Shatrughan Chauhan v. Union of India, MANU/SC/0043/2014 (2014).

[37] Narayan Dutt v. State of Punjab, (2011) 4 S.C.C. 353; Epuru Sudhakar v. Govt. of A.P., (2006) 8 S.C.C. 161.

[38] Parul Kumar, *The Executive Power to Pardon: Dilemmas of the Constitutional Discourse,* 2 NUJS L. Rev. 9, 27 (2009).

[39] Swaran Singh v. State of U.P., (1998) 4 S.C.C. 75.

[40] Satpal Singh v. State of Haryana, (2000) 5 S.C.C. 170.

PUDR's prayer for the laying down of guidelines to regulate the manner in which the mercy petitions were considered comes after the Bench itself made a recommendation to the same effect in *Maru Ram*.[41] The judges in the instant case, refrained from laying down guidelines, based on firstly, the settled proposition that there is a presumption that the Constitutional authority acts with application of mind,[42] and secondly, the bar on setting out guidelines imposed in *Kehar Singh*.[43] The Court clearly states that exhaustive guidelines related to the delay in the disposal of the mercy petitions cannot be laid down and the determination of the nature of delay would have to be done on a case by case basis.[44]

Halfway through the judgment, it appears as if the Bench is taking shelter within the safe havens of judicial minimalism. By declining to substantively review executive actions,[45] preferring to review actions of the executive only to ensure compliance with procedures,[46] adopting a one-case-at-a-time approach[47] and restricting the power to quash executive actions to grounds such as vagueness and non–application of mind,[48] the Court appears to be taking a minimalist stance. But, towards the end, the Court suddenly throws off the minimalist robes and gives in to the need for some guidelines related to the disposal of mercy petitions. Each of the twelve guidelines is related to the protection of the death row convicts and is in keeping with the Court's less deferential approach adopted in Fundamental Rights adjudication.[49] None of the

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[41] Maru Ram v. Union of India, (1981) 1 S.C.C. 107.

[42] Bikas Chatterjee v. Union of India, (2004) 7 S.C.C. 634.

[43] Kehar Singh v. Union of India, (1989) 1 S.C.C. 204.

[44] Shatrughan Chauhan v. Union of India, MANU/SC/0043/2014 (2014).

[45] Aparna Chandra & Mrinal Satish, *Of Maternal State and Minimalist Judiciary,* 21 NAT'L L. SCH. INDIA REV. 51, 58 (2009).

[46]*Id.*

[47] Michael C. Dorf, *Legal Indeterminacy and Institutional Design,* 78 N.Y.U. L. REV. 875, 886-887 (2003).

[48] Chandra & Satish, *supra* note 44, at 56.

[49] *Id.,* at 77.

guidelines direct the manner in which the power of pardon under Article 72 and 161 is to be exercised, which highlights the Court's apprehension of transgressing its sphere of adjudication and prevents a contravention of the judgment in *Kehar Singh*.[50]

The guidelines assume greater importance in light of the hanging of Afzal Guru, the prime accused in the Parliament attack of 2001. After the rejection of his mercy petition, Afzal Guru was not accorded the chance to meet his family[51] and was hanged within 14 days of the rejection. The guidelines put forth by this landmark judgment would work efficiently to prevent future violations of the rights of death row convicts in this manner.

It is argued that the presumption that Constitutional authority acts with an application of mind falls in this case as the 'supervening circumstances' were not considered when the President rejected the petitions of the fifteen convicts. This non-application of mind by merely sitting over the mercy petitions was the ground on which the Court commuted the sentence to life imprisonment. Since there had been clear non-application of mind, the Court could have gone further and laid down a timeline for the disposal of mercy petitions. No doubt, *Triveniben*[52] ruled that a timeline cannot be laid down, but it is argued that with all due respect to the high status of office of the President and Governor, an outer time limit for disposing the petitions should have been laid down in the present case, in consideration of the non-application of mind on part of the executive. Where there is inaction by the executive for whatever reason, in exercise of its Constitutional obligations the judiciary can provide a solution till such time as the legislature or the executive act to perform their roles.[53] Beyond this time threshold, the sentence would be automatically commuted to life imprisonment. It is imperative to take a case by case perspective on this matter, but beyond a

[50] (1989) 1 S.C.C. 204.

[51] Sandeep Joshi, *Prove it was not a selective execution, says Omar,* The Hindu, Feb. 11, 2013, available at http://www.thehindu.com/news/national/other-states/prove-it-was-not-a-selective-execution-says-omar/article4400266.ece

[52] (1988) 4 S.C.C. 574.

[53] Vineet Narain. v. Union of India, (1998) 1 S.C.C. 226.

certain time this requirement can be set aside and automatic commutation made the norm.[54]

CONCLUSION

The judgment rendered in *Shatrughan Chauhan* may be criticized on various grounds, ranging from the judicial review exercised by the Court to the interpretation given to 'supervening circumstances', but it is undeniable that this is a judgment characterized by a sense of coherence.

Although, the judgment cannot be said to have made any major jurisprudential statement, its landmark status is unarguable. The judgment should be put on the pedestal of praise for the sheer protection that it extends to the Fundamental Rights of death row convicts, a class of people shunned by the society. The troika of judges mark out the executive lethargy and inaction, without violating the separation of powers doctrine. This delicate balance has been maintained by the Bench through a well reasoned judgment.

Also, the manner in which the judgment cures the injustice in cases like *Bhullar* and lays down safeguards to prevent future infractions like that in Afzal Guru, warrants due appreciation for the far reaching influence and positivity flowing from it.

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[54] Upendra Baxi, *Bending Towards Justice,* THE INDIAN EXPRESS, Jan. 30, 2014, available at http://indianexpress.com/article/opinion/columns/bending-towards-justice/