

## Position of Death Convicts in the Sea of Humanitarian Jurisprudence: Need for a Review

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*"In any case, frequent punishments are a sign of weakness or slackness in the government. There is no man so bad that he cannot be made good for something. No man should be put to death, even as an example, if he can be left to live without danger to society."*

- J. J. Rousseau,  
The Social Contract

### The Concept of Human Rights

Human beings are born equal in dignity and rights. These are moral claims which are inalienable and inherent in all individuals by virtue of their humanity alone, irrespective of caste, colour, creed, and place of birth, sex, cultural difference or any other consideration. These claims are articulated and formulated in what is today known as human rights. Human rights are sometimes referred to as fundamental rights, basic rights, inherent rights, natural rights and birth rights. In a way: "human rights are those minimal rights which every individual must have against the state or other public authority by virtue of his being a member of the human family, irrespective of any other consideration [1]." Thus, human rights are not dependent upon grant or permission of the state.

On the other hand each and every state has granted a limited number of rights to its citizens. They are known as fundamental rights. In a way these rights can be equated with the

doctrine of natural rights. Just as a written constitution has evolved from the concept of natural law, so the fundamental rights may be said to have sprung from the doctrine of natural rights. As the Supreme Court of India has put it: "Fundamental rights are the modern name for what have been traditionally known as natural rights [2]." These rights would differ from country to country, but human rights are the rights that are common to the humankind in general. In short, whatever the rights add to the dignified and free existence of a human being should be regarded as human rights. These are the rights which serve as a necessary prelude for the well-being of human beings for they are universally applicable to all human beings irrespective of colour, race, religion, region, and so on. For example, right to fair trial is a human right, and is equally applicable to the people of east or west.

Another notable distinction between a human right and a fundamental right or freedom is that while a "human right" as it is understood in the preamble of the Universal Declaration, 1948, is confined to natural persons as "members of the human family", but a constitution may guarantee fundamental rights, of which may be available not

only to natural but also to the artificial persons.<sup>3</sup> Again, some constitutions do not extend certain fundamental rights to all human beings but confined them to citizens, e.g. Articles 15, 16(2), 18(2), 19, 29, and 30 of the Constitution of India. As we said earlier that human rights are available to every human being, which means it also available to death convicts. But the question is what would be the consequences if there is delay in execution of death convicts?

*Delay in Execution of Death Sentence: A Gross Violation of Human Rights of Death Convicts*

This above heading looks at how the Supreme Court of India has dealt with the issue of delay in judicial and executive proceedings as a factor to be taken into account while deciding on sentence. As the following narrative shows, in this as with so many other factors, the court has been, and continues to be, inconsistent. While jurisprudence has developed, as is to be expected in a common law context, glaring anomalies exist which highlight death row and the death penalty itself as cruel, inhuman and degrading punishment. Perhaps not surprisingly, the Supreme Court – which sits at the apex of a criminal justice system that allows individuals to languish in jails awaiting trial for many years (in many cases longer than their sentences would be) because of the huge backlog of cases – has gradually moved to a position in which it currently refuses to consider judicial delay as a ground for commutation. However in doing so, it ignores a crucial fair trial standard that individuals should be tried without undue delay set out in Article 14(3)(c) of the ICCPR [4] to which India is a party.

In *Mohinder Singh v. The State* [5], finding that the accused had not received a fair trial, the Supreme Court acquitted him, holding that though it would ordinarily order a retrial, this would “be unfair to ordinary and settled practice seeing that the appellant has been in a state of suspense over his sentence of death for more than a year.” This judgment shows not only that executions were being carried out soon after court verdicts but also that a period of one year spent on death row was considered a ground for commutation.

In *Habeeb Mohammad v. State of Hyderabad* [6] too, an acquittal was directed in place of a retrial as six years had passed since the offence with the accused imprisoned throughout, part of the time on death row, as also in *Abdul Khader and ors. v. State of Mysore* [7] where the sentence was commuted on the grounds that three years had elapsed since conviction. In contrast to these early cases, the last person to be executed in India - Dhananjay Chatterjee - had

completed over 14 years in prison, most of them under the sentence of death and in solitary confinement, before he was eventually executed in August 2004. Yet this was not considered a ground for commutation by the Supreme Court, which refused to be drawn into on the issue of delay.

Interestingly, in *Nawab Singh v. State of Uttar Pradesh* [8], a Supreme Court Bench clarified that while delay may be a factor, it was no rule of law and was a factor primarily to be considered by the executive in its decision on clemency. Subsequently, a Constitutional Bench in *Babu and 3 others v. State of Uttar Pradesh* [9] rejected the ground of delay for commutation without giving any reasons why it was doing so. A change was visible however in *Vivian Rodrick v. The State of West Bengal* [10] where a five judge Bench of the Supreme Court commuted the sentence as the accused had been “under the fear of sentence of death” for over six years. The bench ruled that, “extremely excessive delay in the disposal of the case of the appellant would by itself be sufficient for imposing a lesser sentence.” In this case the High Court had noted the delay even when it confirmed the death sentence in 1967 but stated that since the law was clear that delay alone could not be a ground for commutation, it had to reject this plea. With the case again before it after being remanded by the Supreme Court on another ground (*Vivian Rodrick v. The State of West Bengal*) [11], the High Court repeated its previous position but also suggested that the state government could examine the delay.

In *T.V. Vatheeswaran v. The State of Tamil Nadu* [12] that finally laid down a clear guideline that where there was a delay of two years between the initial sentence of death and the hearing of the case by the Supreme Court, such sentence would be quashed. In the particular case before it, the accused had been under sentence of death – including solitary confinement – for eight years. In fact two other accused sentenced to death along with Vatheeswaran had previously received commutation in *Kannan and anr. v. State of Tamil Nadu* [13] due to their ‘junior’ roles in the killings and a delay of seven years. Only a few weeks after the *T.V. Vatheeswaran* judgment however, another Bench of Chief Justice Chandrachud and Justice A.N Sen. while commuting the sentence of an accused in *K.P. Mohammed v. State of Kerala* [14], made an indirect though obvious reference to *T.V. Vatheeswaran v. The State of Tamil Nadu* [15], stating, “It is however necessary to add that we are not setting aside the death sentence merely for the reason that a certain number of years have passed after the imposition of the death sentence. We do not hold or share the view that a sentence of death becomes in executable after the

lapse of any particular number of years.”

Another two weeks later the judgment in *T.V. Vatheeswaran v. The State of Tamil Nadu* was over-ruled by a Bench of Chief Justice Chandrachud and Justices Tulzapulkar and Varadarajan in *Sher Singh and Ors. v. State of Punjab* [16]. In this case the accused had been sentenced to death in November 1977 and the sentence was confirmed by the High Court in July 1978. The appeal before the Supreme Court was dismissed in March 1979, a writ petition challenging constitutionality of the death sentence was dismissed in January 1981, a review petition was dismissed in March 1981 and another writ petition dismissed in April 1981. The Bench in its 1983 judgment noted that the *Vatheeswaran* rule of two years was unrealistic and no hard and fast rule could be laid down given the present statistics on disposal of cases as also that no priority was given to mercy petitions by the President. The Court also argued that the cause of the delay too was relevant and the object would be defeated if the accused benefited from such a rule after resorting to frivolous litigation. This judgment was followed by *Munawar Harun Shah v. State of Maharashtra*<sup>17</sup> where a delay of five years was rejected as a ground for commutation.

#### *Present Scenario*

With the position on delay still largely unclear, a five-judge Constitutional Bench gave a judgment in *Smt. Triveniben v. State of Gujarat* [18], which effectively overruled the two-year rule set by *T.V. Vatheeswaran v. The State of Tamil Nadu*. The Constitution Bench ruled that an unduly long delay in execution of the sentence of death would entitle an approach to the court but only delay after the conclusion of the judicial process would be relevant and the period could not be fixed. The Bench specified that a Bench hearing a delay matter would have no jurisdiction to re-open the conclusions reached while sentencing the person to death but could take into account all the circumstances of the case to decide on whether sentence should be commuted or not. The judgment in *Smt. Triveniben v. State of Gujarat* effectively moved the entire focus of the question of delay away from the judicial process to that of the executive process of clemency.

In *Daya Singh v. Union of India and ors* [19], a Bench of Justices Sharma and Varma of the Supreme Court directed the commutation of a sentence of death awarded on conviction in 1978 for the murder of the former Chief Minister of Punjab in 1965. The death sentence was confirmed by the High Court in 1980 and upheld by the Supreme Court in August 1980 (a

review petition was rejected by the Supreme Court in September 1981). Mercy petitions had been rejected by the Governor and the President and another writ petition filed by the brother of the accused was heard by the Supreme Court along with *Smt. Triveniben v. State of Gujarat* [20] in 1988 and rejected. Another mercy petition had been filed before the President in 1988 and was still pending. The Supreme Court noted in its 1991 judgment that the prisoner had been in prison since 1972 and therefore commuted the sentence, noting that no rule was being laid down and the sentence was being commuted on ‘cumulative grounds.’ A similar period of 17 years was also taken note of as a mitigating factor by Justices Hegde and B.P. Singh in commuting a death sentence in *Ram Pal v. State of Uttar Pradesh* [21].

Despite the judgment in *Daya Singh v. Union of India and ors* [22], the law on delay since *Smt. Triveniben v. State of Gujarat* [23] is relatively clear that only delay after completion of the judicial process can be considered as a ground for commutation. Importantly, a reading of the judgment of the Constitutional Bench in *Smt. Triveniben v. State of Gujarat* reveals that the rationale for the Court’s position was to avoid a rush through the judicial process, which might jeopardize procedural safeguards and lead to challenges based on the fairness of the trial. The intention of the Bench in *Smt. Triveniben v. State of Gujarat* then was clearly not to exclude cases like Dhananjoy Chatterjee where the judicial process was stalled for years on end as a result of the negligence of officials of the state.

Dhananjoy Chatterjee’s is not the only case where negligence of judicial or executive officials has led to significant delays in the judicial process, and there are no doubt many others. What is of concern of course is that as a result of the *Smt. Triveniben* judgment, the Supreme Court has failed to consider appeals for commutation in such cases because strictly speaking the delay was in the judicial process. Even if delay as a ground for commutation is restricted to the period when ‘mercy petitions’ are under consideration by the executive, a number of questions arise. On 29th November 2006, in a response to a question in the Rajya Sabha (Upper House) of the Parliament, the Minister of Home Affairs reported that at present mercy petitions of 44 persons were pending before the President of India, a number of which had been pending since 1998 and 1999. On 13th December 2006, responding to the clamor by members of the Opposition for rejection of the mercy petition in the case of Mohd. Afzal Guru, who had been found guilty of involvement in the conspiracy to attack the Indian Parliament and

sentenced to death in December 2002, the Minister of Home Affairs announced that the government would rush through the process in this particular case and added that, "no mercy petition has been decided before six or seven years." In July 2007 the Supreme Court dismissed a petition filed 'in the public interest' which challenged the delayed decisions on mercy petitions and sought the fixing of a time-period for such decisions. The Court however dismissed the petition on the grounds that it was not a matter fit for public interest litigation, leaving the possibility open for a future Bench to entertain a petition on this question.

Recently in *Shatrughan Chauhan v. Union of India* [24] the Supreme Court of India expanded the scope and ambit of Art. 21 of the Constitution by commuting the death sentence of 15 individuals to life time imprisonment on the ground of existence supervening circumstances and held that inordinate unexplained delay in execution of death sentence would be violative of Art. 21 of the Constitution. The Court held that Art. 21 is available to every prisoner until his/her last breath and the court will protect the right even if the noose being tied on the condemned prisoner's neck.

### Conclusion

Our Constitution is highly valued for its articulation. One such astute drafting is Article 21 of the Constitution which postulates that every human being has inherent right to life and mandates that no person shall be deprived of his life or personal liberty except according to the procedure established by law. Over the span of years, the Supreme Court has expanded the horizon of "right to life" guaranteed under the Constitution to balance with the progress of human life. This right to life is available not only to citizens but to all human beings irrespective of

caste class creed sex etc. this right is also available to that prisoner who is waiting for death which is evident from the above discussion. But as we noticed there is a big uncertainty relating to the law on delay of execution of death sentence which directly affect the basic human rights of the prisoner.

### References

1. Durga Das Basu, *Human Rights in Constitutional Law* (LexisNexis Butterworths, New Delhi, 2008) at p. 8.
2. *Golak Nath v. State of Punjab*, AIR 1967 SC 1643.
3. They are natural in so far as they are member of the human family, and artificial in so far as they belong to a particular state or nations.
4. International Covenants on Civil and Political Rights, 1966.
5. AIR 1953 SC 415.
6. AIR 1954 SC 51.
7. AIR 1953 SC 355.
8. AIR 1954 SC 278.
9. AIR 1965 SC 1467.
10. (1971) 1 SCC 468.
11. Ibid.
12. AIR 1983 SC 361.
13. (1982) 2 SCC 350.
14. 1984 Supp SCC 648.
15. AIR 1983 SC 361.
16. AIR 1983 SC 465.
17. AIR 1983 SC 585
18. (1988) 4 SCC 574
19. AIR 1991 SC 1548
20. (1988) 4 SCC 574.
21. (2003) 7 SCC 141.
22. AIR 1991 SC 1548.
23. (1988) 4 SCC 574.
24. (2014) 3 SCC 1.