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The Bhullar Judgement Needs Reconsideration

KALEESWARAM RAJ

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Kaleeswaram Raj (kaleeswaramraj@gmail.com) is a lawyer at the Kerala High Court.
kaleeswaramraj@gmail.com

The proactive role of the executive and major political parties in subverting the principles of clemency and in hastening the execution of capital punishment for a couple of convicts recently will only enhance following the Devinder Singh Bhullar judgment which has a populist, majoritarian tone.

> "To assert in any case thata man must be absolutely cut off from society because he is absolutely evil amounts to saying that society is absolutely good…." -Albert Camus

The Supreme Court decision in Devinder Pal Singh Bhullar's case (Complete Digital Judgments SC 306, 2013) to dismiss his appeal against capital punishment is a severe setback to the human rights movement and the criminal jurisprudence in the country. Though it would appear as a critique of the presidential delay in the context of mercy petitions, in essence, it exhibits a shocking rapport with the enthusiasm shown by the political executive for activating the gallows in this case. The judgment calls for a review and reconsideration, especially in view of subsequent pronouncement on 1.5.2013 by which the same bench consisting of justice Singhvi and justice Mukhopadhaya commuted the death penalty imposed on Mahindra Nath Das to life imprisonment, on the ground of delays in its execution.

It was only recently that K.T.Thomas, a former judge of the Supreme Court who was party to the Bench that confirmed the death penalty to the accused in Rajiv Gandhi assassination case made a public statement that the execution should not be carried out after such a long lapse of time. It was not a mere gesture of introspection. The former judge relied on the reformative rationale in Santhosh Kumar Satish Bariyar's case (6 Supreme Court Cases [SCC] 498, 2009). In Bariyar's case, the Supreme Court expanded the scope of the judgment in Bachan Singh's case (2 SCC 684, 1980) by underlining the need to develop a "principled approach in sentencing" motivated by "the spirit of Article 14 and Article 21". The Bench noted that the "constitution prohibits excessive punishment borne out of undue process".

Henrik Ibsen, in a play, boldly proclaimed that the majority is always wrong. The popular perception of crime and punishment need not necessarily reflect a constitutional or even a

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humane approach and the Bench in Bariyar's case rightly said that in such situations, to a good extent, the constitutional role of judiciary would be even "counter majoritarian".

In my view, the judgment on Bhullarsuffers from ten major deficits:-

1. The judgment has ignored the "error factor" in the process of conviction. The conviction and sentence on Bhullar was confirmed by the Supreme Court on 22.3.2002. The senior most judge in the three judge bench, justice M.B Shah had even found Bhullar innocent and acquitted him of blame. Though the majority confirmed the conviction and sentence, the minority judgment is a vital and fundamental factor in deciding the question of clemency. There are indications to this effect even in the original verdict on Bhullar (2002). This is probably the soul of the judgment. Not technically, but substantially, a minority view is always an indication of possibility for error in the majority judgment. The minority judgment is relevant in the context of remission under S.432 of the Criminal Procedure Code (Cr.P.C.) as well. The present judgment does violence to the legal principles including the principle laid down in Bhullar's own case in 2002. Even the majority of judges had held that the dissent by justice Shah is a relevant material which could be considered by the government while deciding the question of commutation under Section 432 of Cr.P.C. This aspect is totally and shockingly overlooked in the present judgment.
2. The legality of death penalty or identification of "the rarest of rare" case was not a matter in issue in Bhullar's case. But paragraphs 1 to 8 of the judgment, i.e. 18 out of the 53 pages in the print copy of the judgment contain unwarranted reiterations of the pro-retention precedents. This is unconnected with the basic issue involved in Bhullar- Whether long delay in execution is reason enough for commuting death penalty into life imprisonment?
3. On the basic issue, the respective counsels have placed Indian precedents of binding nature and foreign decisions of persuasive value. (Please see paragraphs 10 to 14 of the judgment). In the light of T.V.Vatheeswaran v. State of TN (2 SCC 68, 1983) K.P.Mohammed v State of Kerala (Supp.SCC 684, 1984), Javed Ahmed v. State of Maharashtra (1 SCC 275, 1984) and Sher Singh's case (2 SCC 344, 1983) it was argued that even eight years' delay in disposal of mercy petition would constitute a legal ground for commutation of death penalty into life imprisonment. One fails to understand why the Bench did not follow the decisions cited in the instant case where the accused suffered a much longer period of imprisonment, facing humiliating uncertainty which ultimately led to unsoundness of mind. The judgment does not give coherent or valid reasons for taking a different stand or reaching a different conclusion in the instant case, which on facts, would call for a more sympathetic consideration.

4. 1. If at all there is any reason stated for deviating from the rationale of earlier decisions, it must have been based on the "TADA" (Terrorist Activities Disruption Act) factor. In paragraph 40 of the judgment the Bench said –

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> Triveniben's case and some other judgments (sic, holding) that long delay may be one of the grounds for commutation cannot be invoked in cases where a person is convicted for offence under TADA or similar statutes.

I am afraid that this is a proposition with enormous human rights' ramifications. Applying this rationale, any political crime which is labelled as a terrorist activity would fall within a new species of "rarest of rare" cases and therefore would even cease to get the benefit of the law declared by the larger benches of the Supreme Court on earlier occasions on the question of commutation. Conventionally, political crimes were not seen as more brutal than individual crimes. One can have different opinion on this issue. But the fact remains that the Constitution, vide Article 72/161 or Criminal Procedure Code vide Section 432 does not draw such distinction and therefore the rationale of the apex court is unsupported by law. Thus paragraph 40 of the judgment that gives undue weightage to a draconian legislation like TADA is disturbing. Though TADA was upheld in Kartar Sigh v. State of Punjab (3 SCC 569, 1994) it is a statute which the Parliament was constrained to repeal. The justice Ranganath Misra panel that studied the "misuse" of the law even found that between May 1985 and March 1993, there were a total of 52,998 arrests under TADA and only 434 (i.e 0.8%) among the arrestees were found by the competent courts to have some connection whatsoever with terrorist groups. If, as proclaimed by justice Holmes, "life of the law is not logic, but experience", TADA is a case of the country's bitter experience. The Supreme Court ought not to have evolved a fresh category for gallows, ignoring the humiliating delay, on the basis of a misused and repealed enactment. TADA is regarded as the harshest post-independence statute that led to massive infringement of fundamental rights. In the matter before the Supreme Court, it is the repeal of the Act, and not the decision in Kartar Singh vs State of Punjab which validated the Act that warranted cognisance.

5. The judgment has been apparently unkind while considering Bhullar's illness. Even the documents showing his illness were discarded by the Supreme Court without a proper or valid reasoning. In paragraph 46 of the judgment, the court held,

> Though the documents produced by Shri K.T.S. Tulsi do give an indication that on account of prolonged detention in jail after his conviction and sentence to death, the petitioner has suffered physically and mentally, the same cannot be relied upon for recording a finding that the petitioner's mental health has deteriorated to such an extent that the sentence awarded to him cannot be executed.

This seems vulnerable on legal and ethical scrutiny. The long delay in sentencing has been a matter of judicial concern for the Supreme Court in the T.V.Vatheeswaran

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(1983), Sher Singh (1983), Tribeniben (1988) and Jagdish (2009) cases. The European Court of Human Rights takes the view that belated execution is a double punishment and therefore needs to be averted. The Supreme Court directives run counter to the interdictions of Article 5 of the Universal Declaration of Human Rights stating "no one shall be subjected to torture or to cruel inhuman or degrading treatment or punishment". The reasons for departure from the earlier decisions are not convincing, especially in the facts of the case.

6. The judgment is neither introspective nor sensitive to the post Afzal Guru critique of the death penalty. The former Solicitor General of India T.R.Anthyarujina described it as "the most callous death sentence carried out by the Government of India" (The Hindu, 19.2.2013). The state acted in horrendous secrecy.

7. The judgment is an intrusion indirectly to the President's power under Article 72 of the Constitution. The power to decide a mercy petition would include the power not to take a decision as well, for no time limit is constitutionality prescribed. The power under Article 72 is amenable to judicial review (vide Epuru Sudhakar vs Government of Andhra Pradesh, 2006). There is no constitutional impediment in reconsidering a mercy petition after long lapse of time despite its initial rejection. In that case, the question of delay would be a material factor warranting anxious consideration. There are divergent views by the Supreme Court on the cause for delay and its impact on commutability. But the judgment on Bhullar can have a reductionist impact on the exercise ofexecutive/political discretion in future. No president can hereafter afford to take a decision on any mercy petition, untrammelled by the Bhullar judgment. The observation in para 47 of the judgment that the president will dispose of the mercy petitions without unreasonable delay is not supported by the express words in Article 72/161 of the Constitution.

8. The clemency proceedings under Article 72/161 are essentially different from judicial proceedings. The executive could take the moral, social or even political factors into consideration in deciding a mercy plea. The judgment tries to foreclose such accommodative discretion vested with the executive by attaching too much of rigid standards on clemency jurisdiction.

9. 97 countries have abolished death penalty by law and 35 have practically done so by moratorium, either formal or informal. (See the report by the Amnesty International, 2012) Even countries like Nepal and Bhutan have chosen to be abolitionists. This "global move" was rightly and relevantly noticed by justice S.B.Sinha in Santhosh Kumar Bariyar's case (2009). The judgment on Bhullar takes a reverse direction.

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10. Repeated submission of mercy petitions is seen as a reason for delay in execution as per paragraph 45 of the judgment. Even after the judgment, justice Katju has placed a fresh plea for mercy before the President, on behalf of Bhullar. The political content of the matter and its linkage with mercy plea is overlooked by the court. It is true that it need not be the court's concern. But it could be the concern of the executive, which the court ought to have realised and accordingly left open.

What makes Bhullar's case different from the plea put forward by M.N Das? Capital punishment on M N Das was confirmed by the Supreme Court in 1999. Das filed the mercy petition in the same year, which was rejected by the President only in 2011. Das is now rightly given "the benefit of delay." Therefore, the judgment on Bhullar becomes all the more unreasonable and unjustifiable. The "political crime" by Bhullar is stated to be committed on 11.9.1993. He was in prison for about 18 years. Das was in jail for 14 years which the Supreme Court sympathetically considered

Bhullar's antecedents also are relevant. He was deported back from Germany where he sought political asylum after the conviction. According to the reports, he was also a victim of misfortunes. Reports say,

> The German government had informed it would not have deported death row convict Devinder Pal Singh Bhullar from Frankfurt in 1995, had it known that he would be punished with the death penalty….The German president has written that his country together with European Union advocates worldwide abolition of the death penalty. Under German law, no one could be extradited or deported from Germany who might face death penalty in his own country. (NagendarSharma, Hindustan Times, New Delhi, 15.4.2013).

A comparison of the plight of Bhullar with that of Das who committed an individual crime of murder would expose the fragility and irrationality of the verdict on Bhullar. Technical explanations in the judgment on Das cannot cover up the egregious folly committed on Bhullar.

In India, an average of 132 persons, every year, are sentenced to death, according to report of Asian Centre for Human Rights. Though between 2001 and 2011 there was only one instance of execution, the scenario has radically changed following the hanging of Kasab and Afsal Guru. What bothers one is not the delay in deciding the mercy petitions, but rather the haste with which they are rejected by a "political" president who rejected 18 mercy petitions within a short span of time. The proactive role of the executive and major political parties in subverting the principles of clemency will only be enhanced following the Bhullar judgment, which has a populist, majoritarian tone. The Supreme Court has, to a good extent corrected the mistake in the Das case and it is all the more the reason why Bhullar should not be sent to the gallows. After all, unlike religious canons, the Constitution is meant for non-believers as well.