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Constitutional Morality of the Bilkis Bano Case: Analyzing the Legality of Remission Granted

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It is rightly said that "every saint has a past and every sinner has a future."[1] The latter part of the quote very well summarizes our criminal justice system as of today as our main ideology behind punishment has drastically shifted from deterrence to a reformative theory of punishment in the past couple of decades. The Reformative justice system seeks to reintroduce the offender back into mainstream society. Remission as a concept has evolved from the theory of reformative justice. Although arbitrary remission defeats the purpose of fairness under the principles of natural justice. The provisions of the law and the circumstances under which remission was granted to the convicts in the Bilkis Bano case raise several questions of law, conscience, and morality. Although the recent PIL filed against the remission granted to the convicts is pending to be heard before the apex court of our nation, this article discusses the various legal facets and nuances of the remission law and the socio-legal issues revolving around it.

Keywords: *remission, bilkis bano case, constitutional morality, criminal justice system.*

INTRODUCTION

"Justice is a conscience, not a personal conscience but the conscience of the whole of humanity."

[1] Oscar Wilde, 'A woman of no importance' (published 1903, Penguin Random House)

- Aleksandr Solzhenitsyn

The evolution of the theories of punishment in the Indian criminal justice system has been nothing but exemplary. Earlier, the whole idea behind the concept of jail and other prevalent forms of punishment was to deter other people in society from committing the same offense. Although, India has witnessed a gigantic shift from deterrence to a reformative theory/form of punishment. The reformative theory of punishment is aimed at bringing reform/positive changes in the overall personality/behavior of the person with a view to reintroducing such a person back into mainstream society.[2]

The overall perception of jail has changed due to the reformative theory. Constitutional safeguards are also provided under Articles 20 and 21 to accused and convicts. The scope of these articles has been widened to include every other basic human right including the ones recognized by judicial precedents.[3] Provisions to commute, reprieve, and remit sentences have evolved in consonance with the same. Remission forms a part of the reformative theory of punishment in our modern-day criminal justice system which a democratic nation like India has long waited for.[4] Although there remain various socio-legal nuances that need to be catered to before it can be said that India has achieved hassle-free regulations for remission. In the recent remission granted to the convicts in the Bilkis Bano case, various constitutional, administrative, judicial, and moral questions need to be answered before one could cent percent justify the remission of those convicts.

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[2] Goel Udita, 'Criminal justice reforms in India' (*SSRN E-Journal*, 8 July 2021) <http://dx.doi.org/10.2139/ssrn.3872956> accessed 12 September 2022

[3] Priyadarshi Nagda, 'Brief study of constitutional provisions regarding prison system and inmates in India' (2017) 3(4) IJARIIE <http://ijariie.com/AdminUploadPdf/BRIEF_STUDY_OF_CONSTITUTIONAL_PROVISIONS_REGARDING_PRISON_SYSTEM_AND_INMATES_IN_INDIA_ijariie6016.pdf> accessed 10 September 2022

[4] Oksidelfa Yanto, Rachmayanthy, Djoni Satriana, 'Implementation of remission for female prisoner as one of the rights in the correction system' (2019) 7(1) IUS <https://jurnalius.ac.id/ojs/index.php/jurnalIUS/article/view/577> accessed 10 September 2022

A BRIEF TIMELINE OF EVENTS

3rd of March, 2002: During the communal riots a violent mob attacked the family of Bilkis Bano and killed seven of her family members while the remaining six family members managed to save their lives. Bilkis Bano who was five months pregnant at that time was brutally gang raped.

2003: After the local police denied filing an FIR of her case, she was threatened to not take any action against the wrong done to her and her family. Even after an FIR was filed, various crucial details regarding the case were not mentioned/omitted. Bilkis then approached the National Human Rights Commission (NHRC). After receiving aid from the NHRC (i.e. NHRC filed a writ petition in the Supreme Court), the Supreme Court in December 2003 ordered the Central Bureau of Investigation (CBI) to investigate the matter.

August 2004: Bilkis Bano showcased her issues and presented her concerns regarding constant threats being received as well as chances of evidence/witness tempering; the case was then transferred to the Bombay high court from Gujarat high court.

January 2008: The trial court convicted 11 accused of rape, murder, and criminal conspiracy and awarded them life imprisonment. In May 2017 the Bombay High Court confirmed the decision of the trial court.

May 2022: One of the prisoners I.e. Radheshyam Bhagwandas Shah had already spent more than 15 years in prison and approached the apex court for premature release via remission. The apex court then directed the state government of Gujarat to consider his application for remission. Eventually, in August 2022 the 11 convicts were released from the Godhra sub-jail.

WHETHER THE COMMUNAL VIOLENCE WAS SPONTANEOUS

It is quite important to understand whether the communal violence was a result of the hatred being spread about the marginal communities for a very long time or was it spontaneous. In the landmark and much debated Zakia Jafri case which is related to the 2002 communal riots, the apex court denied a probe into a larger conspiracy behind the riots as claimed by Zakia and termed the incident as 'spontaneous'.[5] Although the interesting fact is, that no conclusive proof

[5] Pooja Bakshi, 'Communal Riots in Gujarat: Examining State Power and Production of Marginality in the Attempt to Constitute the Past' [2015] E&PL 63, 65

was presented before the apex court through which it can be stated that the Gujarat communal riots were spontaneous. [6]

After it came to light that re-investigation was required in nine different cases from nine districts in Gujarat, a special investigation team was set up, and Adv. Harish Salve was appointed as an *amicus curiae.* He was also the *amicus curiae* in the Bilkis Bano case.[7] It was not clear as to whether the whole act was an act committed under a conspiracy, but it also does not clarify the reasoning of the apex court behind terming it as spontaneous. These acts of atrocities have begun to become clearer. Rape, by the nature of the act and as an offence cannot be termed spontaneous.[8]

WHAT IS REMISSION

Remission is the act of releasing a previously convicted offender prematurely, i.e., before the term of punishment comes to an end. It can also be described as an act of pardon or forgiveness. The power to grant remission is vested with the State Government under section 432 of the Code of Criminal Procedure[9]. The seventh schedule of the Indian Constitution mentions 'prison management' under the state list.[10] The Prisons Act, of 1894 and the state government's prison manuals aid in the overall management and administration of the prisons.

Rules regarding the premature release of convicted prisoners via remission can only be formulated by the state government as mentioned under the Prisons Act. Every prisoner cannot be denied the opportunity to be considered for remission as this provides a ray of hope even to the life convicts that may see the light of day.[11] This is stated by the apex court in the landmark case of ***Kehar Singh v Union of India***[12]. In another landmark case of the ***State of Haryana v***

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[6] Jaffrelot, Christophe, 'Communal Riots in Gujarat: The State at Risk' (2003) 17, HP SA & CP, 3-7

[7] J Venkatesan, 'Court seeks amicus curiae’s response to plea to recast SIT' *The Hindu* (India, 7 December 2009)

[8] Indira Jaising, 'Bilkis Bano case: Will Supreme Court restore constitutional morality?' *Indian Express* (India, 30 August 2022)

[9] Arindam Bharadwaj, 'A Prisoner's Right to Remission in India: An unending conundrum' (*Outlook India*, 3 September 2022) <https://www.outlookindia.com/website/story/india-news-a-prisoners-right-to-remission-in-india-an-unending-conundrum/359776> accessed 15 September 2022

[10] The Constitution of India 1950

[11] Banamali Barik, 'The prison system and human rights in an era of liberalization and privatization' (*The Law Brigade*, 12 July 2019) <https://thelawbrigade.com/wp-content/uploads/2019/05/Banamali.pdf> accessed 07 September 2022

[12] *Kehar Singh v Union of India* [1989] AIR 653

Mahender Singh and Ors, the apex court mentioned that convicts do not have a fundamental right to remission; although the state under its executive powers should on a case-to-case basis take into account all relevant factors.[13]

GROUNDS AND LEGALITY WHILE GRANTING REMISSION

A very important principle of legal jurisprudence is that the judgment delivered by the court cannot be overturned by the executive. Although, the executive I.e. the State government can grant remission to convicts under section 432 of the CrPC[14]. Such a provision is permitted in law because remission of a convict only seeks to change the execution of the sentence granted by the court. It does not overturn the court's decision of conviction per se. However, it is essential to know that remission falls under the purview of judicial review. This means that the legality of remission granted by the state government can be challenged in a court of law.[15]

In the current scenario, the remission granted to the convicts can be challenged on the following grounds:

***Consultation with the central government*:**

A. The Gujarat state government did not consult with the Central government. It is compulsory for the state governments to do so in cases that were probed by the Central Bureau of Investigation (CBI). This is provided under section 435 of the Code of Criminal Procedure.[16] This is applicable where the case is tried by any central agency. The reasoning for the same is that when a case is tried by any central agency, it falls within the scope of the executive powers of the state. Due to this, the state cannot by itself, grant remission to the convicted person.

***Arbitrariness in the formation of the remission panel*:**

[13] *State of Haryana v Mahender Singh & Ors* [2007] 13 SCC 606
[14] Code of Criminal Procedure, 1973, s 432
[15] Krishnadas Rajagopal, 'Reasons for remission not beyond judicial review: experts' (*The Hindu*, 20 November 2018) <https://www.thehindu.com/news/national/tamil-nadu/reasons-for-remission-not-beyond-judicial-review experts/article25542354.ece> accessed 05 September 2022
[16] Code of Criminal Procedure 1973, s 435 (1)

B. The remission panel which is formed by the government includes senior government officials who are usually in charge of law or home ministry or work in close consonance with the same. Along with them, the investigating officer, prison superintendent, a district and sessions court judge are the ideal members of the panel. The 10-member remission panel formed in this case comprised of 2 BJP MLAs (Member of Legislative Assembly), Shri C K Raulji and Shrimati Suman Chauhan. The fact that there were political leaders present raises several red flags about the outcome of the panel.[17]

***What is 'appropriate government'*?**

C. Section 432 (7)(b) of the CrPC defines 'appropriate government' as the government where the order is passed or the state in which the offender is sentenced.[18] Accordingly, the state of Maharashtra should be the appropriate government. Although in the landmark case of ***Radheshyam Bhagwandas Shah, Lala Vakil v State of Gujarat***[19] (a convict in the Bilkis Bano case), the apex court observed that the crime was committed in the state of Gujarat and the case was transferred to the Bombay High Court under special circumstances, just for the disposal of the case and hence, the appropriate government under section 432 CrPC shall be the Gujarat state government.

***Opinion of the presiding judge*:**

D. The opinion of the presiding judge in case of remission or suspension of the sentence was not taken into account; in fact, the presiding judge had a dissenting opinion in the matter. Section 432 (2) of the Code of Criminal Procedure[20] mentions that the opinion of the presiding judge may be taken by the appropriate government before the person who is convicted is released via remission. Justice UD Salvi mentioned that he was not aware that a remission proposal was under consideration. Justice Salvi of the Bombay high court was the presiding judge in the matter.

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[17] Rohini Roy, 'Bilkis Bano Case: 5 From BJP in 10-Member Panel That Backed Convicts' Release' (*The Quint*, 19 August 2022) <https://www.thequint.com/news/politics/bilkis-bano-case-5-from-bjp-in-panel-that-backed-convicts-release> accessed 09 September 2022

[18] The Code of Criminal Procedure, 1973, s. 432 (7) (b)

[19] *Radheshyam Bhagwandas Shah v State of Gujarat* [2022] SC 421

[20] The Code of Criminal Procedure, 1973 s. 432 (2)

The constitution bench in the landmark case of ***Union of India v Sriharan***[21] clearly mentioned that the procedure provided under section 432 (2) of CrPC[22] is mandatory. The reasoning behind the same was that the opinion of the presiding judge would aid the state government in taking an appropriate decision. A similar view was held in the case of ***Sangeet v State of Haryana***[23], the court stated that the decision of remission should be fair and well-reasoned. This also seeks to avoid the misuse of powers by the appropriate government. In ***Laxman Naskar v Union of India***[24], the presiding judge considered five factors while granting remission. They are as follows:

1. Impact on society due to the offence committed,
2. On the off chance that such an act could be repeated,
3. Social and economic conditions of the convict and his/her family,
4. Whether any purpose is achieved by keeping the convict in prison.
5. Potential of the convict to indulge in any criminal activities.

These factors were also reiterated in the case of ***Ram Chander v State of Chattisgarh & Anr.***[25]

Although in the case of ***Ravi Pratap Mishra v State of Bihar***[26], the Patna high court stated that section 432 (2) can only be viewed as a guiding factor and is not mandatory for the state government to do so. The opinion of the various high courts seems to be divided on this matter. Although the opinion of the presiding judge needs to be taken as it acts as a check on the executive which aids in avoiding granting of arbitrary remissions.

***Article 14 of the Indian Constitution*:** In the landmark case of the State of Haryana v Mohinder Singh,[27] the apex court stated that the arbitrary usage of the power of remission is prohibited as remission granted should be reasonable and fair as well as informed. The power as to whether

[21] *Union of India v Sriharan* [2014] 4 SCC 242
[22] *Supra*
[23] *Sangeet v State of Haryana* [2013] 2 SCC 452
[24] *Laxman Naskar v Union of India* [2000] 2 SCC 595
[25] *Ram Chander v The State of Chhattisgarh & Anr* [2022] WP Crl 49
[26] *Ravi Pratap Mishra v State of Bihar* [2017] Crl. 272
[27] *State of Haryana v Mohinder Singh* [2000] 3 SCC 394

a specific prisoner be granted remission or not lies wholly with the state but it still does not mean that the power can be exercised in an arbitrary manner. Rule of law has to be followed as inculcated under Article 14 of the Indian Constitution[28]. The power given to the executive to grant remission is subject to the Rule of Law as well as fairness.

RETROSPECTIVE EFFECT OF REMISSION POLICY?

The apex court directed the Gujarat state government to look after the release of 11 convicts under the 1992 remission policy of the Gujarat state government instead of the 2014 remission policy. Under the 2014 remission policy which is in force as of today, they wouldn't have been released. [29]This is due to the provision under the 2014 policy which mentions that murder and rape convicts cannot be released by the state government. The Supreme Court did not give a retrospective effect to the 2014 policy and advised the state government to consider the application of remission as per the 1992 policy as that policy was in effect when the accused were convicted.[30]

THE MORALITY OF THE REMISSION GRANTED

From a human and moral point of view, it becomes necessary to look at the gravity of the offence committed. Whether people who commit such heinous crimes be remitted or not; as mass killing and gang rape are crimes against humanity and the whole society for that matter. Also, these atrocious acts were done as a part of communal riots against a minority community in our society.[31] Since the news of remission broke out, people and NGOs have depicted an outburst and now claim for quashing the remission granted.

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[28] The Constitution of India 1950, art. 14

[29] 'Government of Gujarat, Home Department, Resolution on State Remission of prisoners' (*Write Read Data*, 2014) <https://bprd.nic.in/WriteReadData/userfiles/file/201708091210442982387Gujaratason04.02.17.pdf> accessed 10 September 2022

[30] Jhuma Sen, 'Understanding the Remission Policy That Led to the Release of Bilkis Bano's Rapists' (*The Wire*, 1 September 2022) <https://thewire.in/law/understanding-the-remission-policy-that-led-to-the-release-of-bilkis-banos-rapists> accessed 10 September 2022

[31] Dr. Munir Ahmad Mughal, 'Law of Suspensions, Remissions and Commutations of Sentences' (SSRN E-Journal, 30 October 2012) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2168954> accessed 02 September 2022

CONSTITUTIONAL MORALITY

It can be rightly said that the Indian judiciary is faced with a constitutional and moral issues. Although immoral decisions cannot attain the legal accountability of the Supreme Court or any court for that matter. The morality of our constitution and democracy seems to have been damaged beyond repair. In the landmark case of ***Naresh Shridhar Mirajkar and Ors. v State of Maharashtra and Anr.***[32], the apex court of our nation mentioned that appeal is the righteous remedy which lies if the enabling statute so provides, otherwise revision remains as the remedy. The judgment of any court shall not be challenged under Article 32 of the Indian Constitution.[33]

Although when the high court of Gujarat denied looking into the remission of the convict Radheshyam and advised him to approach the Bombay high court as the high court of Gujarat deemed fit for the state of Maharashtra to be the 'appropriate government'. This was in tandem with the interpretation of the CrPC. After this, Radheshyam approached the apex court under Article 32 as a method to challenge the Gujarat high court decision.[34] The apex court then ordered the Gujarat high court to look after the remission application of the convict after declaring the Gujarat state government as the 'appropriate government'. This seems to be against the stance which was taken in the Mirajkar case.[35] It is always expected for the apex court to follow its own judgments. This is against constitutional morality.

PIL FILED IN SUPREME COURT AGAINST THE REMISSION GRANTED

A former Indian Police Service (IPS) officer Dr. Meeran Chadha Borwankar, Madhu Badhuri who is a former IFS officer, and activist Jagdeep Chokkar have filed a Public Interest Litigation (PIL) in the Supreme Court of India[36]. They believe that the remission granted should be quashed. This petition also seeks to throw light on the transparency issue of the whole procedure of granting remission, especially in this case as the convicts were granted remission within 4 months from the date of application when there have been several hundreds of remission

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[32] *Naresh Shridhar Mirajkar and Ors v State of Maharashtra and Anr* [1966] 3 SCR 744
[33] Constitution of India 1950, art. 32
[34] *Ibid*
[35] Constitution of India 1950, art. 32
[36] Dhananjay Mahapatra, 'SC agrees to hear PIL challenging release of Bilkis case convicts' (*Times of India*, 24 August 2022) <https://timesofindia.indiatimes.com/india/sc-agrees-to-hear-pil-challenging-release-of-bilkis-case-convicts/articleshow/93740536.cms> accessed 08 September 2022

applications throughout India which are delayed by several years. Not only the convicts have left a lifelong wound on the victim but also disrupted the social harmony of the society. The acts of the convicts also included the barbaric killing of an infant and a 3-year-old girl who were family members of Bilkis Bano. Considering the gruesomeness of the offenses committed it cannot be said that it would be reasonable to grant remission to such convicts. All the reasons stated above in this article also highlight that this step of granting remission is arbitrary, done with malafide intentions, and has been taken without considering the authority of law.[37]

CONCLUSION

These acts by the executive do not instill hope and confidence in the people at large in the criminal justice system of our nation. On the other hand, it embodies anticipation of the easy release. In the minds of such convicts after 14 years of imprisonment in cases where life imprisonment is awarded. Such acts do not send the right message to the general masses and society turns more unsafe for women. The outcome of the PIL still needs to be seen. Nevertheless, the apex court should take stringent steps in making the process of remission more transparent. If not the whole process of remission, at least the executive should state appropriate reasons as to why the convicts are deemed fit for remission.

[37] Paras Nath Singh, 'Gujarat government's decision to remit sentences of convicts in Bilkis Bano case flies in the face of legal precedents' (*The Leaflet*, 19 August 2022) <https://theleaflet.in/gujarat-governments-decision-to-remit-sentences-of-convicts-in-bilkis-bano-case-flies-in-the-face-of-legal-precedents/> accessed 07 September 2022