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REMISSION, REHABILITATION AND RECIDIVISM: A CRITICAL ANALYSIS OF BILKIS BANO CASE!

ABSTRACT

It is rightly said that *"every saint has a past, and every sinner has a future."*[1] The latter part of the quote accurately summarizes our current criminal justice system, as our primary ideology behind punishment has shifted from deterrence to a reformative theory of punishment over the last few decades. The reformative justice system seeks to reintegrate the offender into mainstream society. Remission originated in reformative justice theory.

This research paper examines the controversy surrounding the convicts' early release in the Bilkis Bano case, a heinous gang rape and murder that took place in Gujarat, India in 2002. This paper then interprets the central tension that exists between the various legal facets and nuances of the remission policy aimed at rehabilitation and the concerns of retribution and preventing recidivism, while also raising several legal and moral questions.

The aim is not solely to ensure dispersal of justice but also ensure equality in the justice dispersed.

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

I. INTRODUCTION

"Injustice anywhere is a threat to justice everywhere." - Martin Luther King Jr

Law has been defined as a set of rules developed and enforced by social or governmental institutions to regulate behavior. In archaic times, the Old English term *'lagu'* was frequently used to refer to authority-prescribed ordinances/rules.

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

Throughout history, all legal systems dealt with the same fundamental issues, whether it was enforcing the rule of law or punishing those who disobeyed it. Persons who fail to follow such laws are commonly referred to as lawbreakers or offenders.

However, the law includes provisions that allow such prisoners to serve only a fraction of their actual punishment and to request early release from the appropriate government.

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. 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.[2]

India celebrated its 75 Independence years on August 15, 2022. Prisoners were granted special remission as part of 'Azadi Ka Mahotsav' celebrations, and Prisons have added a new module called 'Special Remission'. On a much-sweetened day, the 11 condemned men in the Bilkis Bano's gang rape and murder case were released on remission enlightened with the 1992 remission policy instead of the 2014 new policy by the Gujarat government on its remission power under Article 161, on the Supreme Court direction.

This sparked intense debate and controversy. Although, various constitutional, administrative, judicial, and moral questions need to be answered before one could cent percent justify the remission of those convicts.

II. THE BILKIS BANO CASE

The Bilkis Bano case is a horrific story of communal violence, gangrape, and the ongoing struggle for justice in India.

Gujarat had turned violent following the burning of the Sabarmati railway in Godhra on February 27, 2002, which killed 59 karsevaks. During the Gujarat riots in March 2002, Bilkis Bano, a 21-year-old woman who was five months pregnant, fled her village with her family in search of safety. They were attacked by a group of men motivated by religious hatred. She was gang-raped, and

[2] Oksidelfa Yanto, Rachmayanthy, Djoni Satriana, *'Implementation of remission for female prisoner as one of the rights in the correction system'* (2019) 7 (1) IUS accessed 09 March 2024

seven other members of her family, including her 3-year-old daughter Saleha, were killed as unprecedented violence swept the state following the Sabarmati Express massacre. Miraculously, she survived and gave birth prematurely.

The Aftermath of Tragedy!

Bilkis pursued justice with incredible courage. When she attempted to file a complaint, state police refused to add relevant information to the FIR. Bilkis then approached the National Human Rights Commission [NHRC] and proceeded to the Supreme Court. The court ordered that the CBI conduct an inquiry. The accused were arrested within one month, and the trial began in 2004. The trial was originally held in Gujarat, but due to safety concerns, it was relocated to Maharashtra. After years of legal wrangling, the Bombay High Court convicted 11 men of gangrape, murder, and criminal conspiracy.

The Supreme Court ordered the Gujarat government in 2019 to compensate Bilkis Bano, who was gang raped during the state's 2002 riots, with Rs. 50 lakhs in restitution, a job, and housing. The Gujarat government informed a bench headed by Chief Justice of India Rajan Gogoi that action had been taken against the responsible police officers in the case.

Premature Release and its Validity!

The case, however, sparked further controversy. In 2022, after serving 14 years in prison, one of the convict, Radheshyam Shah, approached the Gujarat High Court to file a remission petition under Sections 432 and 433 Cr PC. The court rejected the plea on the grounds that the Maharashtra government lacked jurisdiction and authority over remission.

However, in contrast to the high court's view, the Supreme Court directed the Gujarat government to consider remission because Gujarat was the state where the offense occurred, and the trial was held in Maharashtra under exceptional circumstances and for a limited purpose.

Subsequently, on August 15, 2022, all 11 convicts were released under India's remission policy, which allows for early release based on good behavior and time served. This decision sparked

nationwide outrage. The release called into question the effectiveness of India's remission policy. While the policy aims to promote rehabilitation, concerns were raised about the message it conveyed regarding the gravity of sexual violence and the risk of recidivism.

The public outcry prompted the Supreme Court to take note. The court directed a review of the remission process for such heinous crimes.

III. BILKIS YAKUB RASOOL V UNION OF INDIA[3]

The Supreme Court judgment on January 8, 2024, overturned the premature release of 11 convicts, sentenced to life in 2008 for the gang rape of Bilkis Bano and murder of seven of her family members during the 2002 Gujarat communal riots, striking a delicate balance between the legal principles and the curious facts of the case.

In its 251-page judgment, the bench dwelled upon the concept of remission and the principles governing the statutory provision under the Code of Criminal Procedure (CrPC) that empowers a state government to release life term convicts after they complete at least 14 years in jail.

The division bench of BV Nagarathna and Ujjal Bhuyan, JJ. while setting aside the impugned orders of remission, held the following:

a) Whether the writ petition filed by Bilkis Bano under Article 32 of the Constitution is maintainable?

The Court said that Bilkis Bano has filed her writ petition under Article 32 of the Constitution to enforce her Fundamental Rights under *Article 21* of the Constitution which speaks of right to life and liberty and *Article 14* which deals with right to equality and equal protection of the laws.

The object and purpose of Article 32 of the Constitution, also known as the *"soul of the Constitution"* and a Fundamental Right in and of itself, is to enforce other Fundamental Rights enshrined in Part-III of the Constitution.

[3] Bilkis Yakub Rasool v Union of India, (2024) SCC OnLine SC 25.

Furthermore, the convict filed a writ petition before this Court, invoking Article 32 of the Constitution, requesting that the State of Gujarat consider his case for remission under the 1992 Policy. This Court issued a categorical directive to that effect.

Thus, the Court ruled that the Bilkis Bano's writ petition could not be dismissed on the basis of the availability of an alternative remedy under Article 226 of the Constitution or its maintainability under Article 32 of the Constitution before this Court.

b) **Whether the Gujarat Government was competent to pass the impugned orders of remission?**

The judgement held that the "appropriate government" under Section 432(7) of the Code of Criminal Procedure would be the place of trial and sentence of the offender. The court declared that even in a case where the trial has been transferred by this Supreme Court from a court of competent jurisdiction of a state to a court in another state, it is still the government of the state within which the offender was sentenced which is the "appropriate government", having the jurisdiction as well as competency to pass an order of remission under Section 432 of the CrPC.

Therefore, it is not the government of the state within whose territory the offence occurred, or the convict is imprisoned which can assume the power of remission. It is the State of Maharashtra, which had the jurisdiction to consider the application for remission vis-à-vis the convicts as they were sentenced by the special court in Mumbai, said the bench.

Reliance was placed on *State of Madhya Pradesh v Ratan Singh*[4] (1976) where the Supreme Court held that the convicting state of Madhya Pradesh would be the "appropriate government" even if the convict was discharging his sentence in Punjab. It also relied on *Union of India v V. Sriharan*[5] (2016) where a Constitution Bench reinforced the above definition of "appropriate government."

Justice Nagarathna wrote that the "appropriate government" should exercise the power to grant remission "*in accordance with the law"* and not in an *"arbitrary or perverse manner without*

[4] State of Madhya Pradesh v Ratan Singh, 1976 AIR 1552
[5] Union of India v V. Sriharan, (2014) 4 SCC 242

regard to the actual facts." As a result, the Gujarat government should have dismissed the remission application on these grounds alone.

c) Whether the impugned orders of remission passed by the State of Gujarat in favour of convicts are in accordance with law?

The 1992 Gujarat remission policy allowed prisoners who had served at least 14 years to apply for early release. The policy empowered the state to consider the remaining sentence based on conduct, subject to verification.

The SC however invalidated the 1992 policy in 2012. The court ruled that remission under Section 432 of the CrPC requires obtaining the judge's opinion and reasons from the convicting court, allowing only case-specific decisions.

In response, Gujarat crafted a new policy in 2014, introducing exclusions for some crimes. Thus, the Gujarat Government argued saying that the 1992 policy was applicable in the present case as the conviction of the 11 offenders occurred in 2008 before the 2014 policy was drafted thereby invalidating the application of 2014 guidelines.

The Court ruled that the Gujarat government had usurped the powers of the State of Maharashtra, which could only consider remission applications. Thus, the doctrine of usurpation of powers applies in this case. As a result, the State of Gujarat's Policy dated 09-07-1992 did not apply to the convicts' cases.

Further, the opinion of the Presiding Judge of the Court before which the conviction of was made in the instant case i.e. Special Court, Mumbai (Maharashtra) was rendered ineffective by the Gujarat Government, which had no jurisdiction to entertain the plea for remission The Sessions Judge's opinion lacked jurisdiction because it violated subsection (2) of Section 432 of the CrPC.

While it is usually a larger bench that can declare an order or a judgment of a smaller bench as "per incuriam", the two-judge bench on Monday dubbed the May 2022 order of another two-judge bench "per incuriam", holding that the 2022 order directing the Gujarat government to consider the remission pleas was passed contrary to the relevant CrPC provisions and the judgements of the Constitution bench and other benches of the Supreme Court.

It also declared the May 2022 order of a coordinate bench to be a *"nullity and non est in law"* because it was obtained by concealment of relevant facts by one of the convicts in the case. *Thus, by emphasizing the rule of law, the Court directed the convicts to report to the jail authorities within two weeks.*

IV. WHAT IS REMISSION?

The various theories associated with punishment for crime direct attention toward the main purposes for which a punishment is awarded: deterrence, retribution, reformation, reparation, and prevention, among others.[6] As a part of the reformation process, prisoners are at times released prematurely, i.e., before their sentence is over, with no alteration in the form of punishment. This is referred to as remission.

The term "*remission system"* was first mentioned in the Prisons Act, 1894 in reference to the rules governing the reduction of prisoners' sentences.[7] Section 3(5) of the Prison Act of 1894 defines the remission system. Remission is defined as shortening the jail sentence of prisoners. As the name implies, remission of a sentence implies that its duration has been reduced without affecting the nature of the sentence.

Background of remission history

In the *Kehar Singh v. Union of India case (1989)*,[8] it was noted that courts could not refuse a prisoner the opportunity to be taken into consideration for sentence reduction. If the prisoner refused, there would be no chance for release and they would have to stay there until they died.

In the *State of Haryana v. Mahender Singh case (2007),*[9] the Supreme Court made a similar observation, stating that *"although no prisoner has a basic right to remission, the State must nonetheless assess each case on an individual basis while using its executive power of remission. The Court also concluded that a right to be taken into consideration for remission ought to be*

[6] University of Minnesota, available at: https://open.lib.umn.edu/criminallaw/chapter/1-5-the-purposes-of-punishment/
[7] The Prisons Act, 1894 (Act 9 of 1894), s.3(5)
[8] Kehar Singh and Anr. Vs. Union of India and Anr, AIR 1989 SC 653
[9] Mahender Singh vs. State Of Haryana & Ors, 2022, 4282 P&H

deemed to be a legitimate one. This is done by bearing in mind the constitutional protections provided to convicted criminals under Articles 20 and 21 of the Constitution".

Provisions relating to remission:

Provisions relating to remission are divided into Constitutional and Statutory provisions.

Constitutional provisions

The Constitution of India, which acts as the ***parens patriaeis*** for its citizens, confers myriad powers and duties of government institutions and its agnate organs. Powers of president as well as the State Governor is also one of them.

The Constitution accords the power of remission to the President at the Union level and the Governor at the State level, under what is commonly referred to as the *"pardoning power" or "clemency power".*

Art 72[10]: Under sub-clause (1) of this Article, the President has been vested with the power to absolutely absolve the offender of his crimes (grant pardon), defer or commute the sentence, reprieve, respite, or shorten the imprisonment term without altering its nature (remission) for the violation of a Central law. The President can grant pardons for death sentences and in case of punishments/terms laid down by the Court Martial.

Art 161[11]: The scope of the governor's powers with respect to pardoning is limited as compared to that of the president since a governor cannot pardon a death sentence or interfere in matters of Court Martial. However, in consonance with Art.72(3), the governor does possess the authority to suspend, remit or commute a death sentence. As far as violations of state laws are concerned, the governor does have the authority to pardon, remit, respite, reprieve a punishment, or commute the sentence of the offender.

[10] INDIAN CONST, art. 72
[11] INDIAN CONST, art. 161

Recently, the Apex Court explicated that the authority to commute the sentence for an offence committed under S.302 (punishment for murder) of the IPC (Indian Penal Code, 1860) vests with the State Govt (Governor).[12]

Statutory provisions

The Code of Criminal Procedure provides for the grant of remissions under Sections 432-435[13]. State governments, too, can remit sentences under Section 432 of CrPC because prison is a State Subject.

As per *S.432,* the appropriate government can suspend or remit sentences, provided that the opinion of the presiding judge should be obtained as per sub-clause (2). Furthermore, if the remission or suspension of the sentence is conditional but the appropriate government finds a non-fulfillment of the said donation, then it is empowered to cancel such remission or suspension.

S. 432(7) of the CrPC says the appropriate government will be *"the State within which the offender is sentenced or the said order is passed".*

S.433A imposes a restriction on S.432 wherein the offender must serve a minimum imprisonment of 14 years in the following two conditions:

- for crimes that prescribe the death penalty as the punishment, or
- for those offenders whose sentences have been commuted from the death sentence to life imprisonment.

S. 435 lays down the circumstances under which the State govt is required to compulsorily consult with the Central govt in respect of matters such as:

- where the investigation is carried out by the Delhi Special Police Establishment or by any other central authority,
- where a central government property was destroyed, disfigured, or misappropriated, or

[12] A.G. Perarivalan v. State, 2022 Live Law (SC) 494
[13] Code of criminal procedure code 1973, s432-435

- If the offense was committed by an individual carrying out his duties under the service of the central govt.

The Supreme Court has firmly established that the powers under Arts.72 and 161 cannot be confined by the provisions under the CrPC. However, these provisions are to be met by the authority while exercising the clemency or pardoning powers.[14] The clemency power as provided for under the Constitution, thus, remains unbridled by the statutory provisions.

V. JUDICIAL OVERSIGHT OF REMISSION

In addition to the constitutional and statutory provisions, several judgments have further elucidated upon the premature release of prisoners and the extent and nature of the remission. The Supreme Court has opined in numerous decisions that the powers under Articles 72 and 161 very well fall within the purview of limited judicial review.[15]

The SC has enunciated the considerations governing the grant of remissions[16]:

- Whether the crime committed is an individual act and does not affect society at large
- Possibility of recidivism
- Whether the offender still holds the ability to commit a crime
- Whether any benefits are associated with the confinement of the convict
- The socio-economic background of the offender's family

Furthermore, in *Epuru Sudhakar v Govt of A.P.,*[17] the SC laid down the grounds under which orders under the aforementioned Articles could be challenged. The basis for assailing said orders include orders which are passed as under:

- With no application of mind
- The order itself is mala-fide
- Grounded on extrinsic or immaterial factors
- With no regard for pertinent particulars

[14] State of Haryana v Jagdish, SCC 2010 SC 216
[15] Satpal. v. State of Haryana. AIR 2000 SC 1702
[16] Laxman Naskar v State of West Bengal, SCC 2007 SC 626
[17] Epuru Sudhakar v Govt of A.P, AIR 2006 SC 3385

- Arbitrarily

Recently, the Supreme Court has maintained that the discharge of the remission policy must be done by an objective and transparent method, the non-observance of which would constitute a clear transgression of the rights guaranteed under Articles 14 and 21.[18] Earlier, the Court had stated that there can be no arbitrariness in the implementation of remission and the same has to be carried out reasonably, fairly, and as an informed decision.[19] A similar stance was taken in the case of *Sangeet v State of Haryana*.[20]

VI. SPECIAL REMISSION GUIDELINES

The Centre rolled out a special remission scheme as a part of 'Azadi ka Amrit Mahotsav', under which remission for inmates will be carried out in three phases: August 15, 2022, January 26, 2023, and August 15, 2023, in order to celebrate the 75th year of independence. Specific categories of prisoners have been explicitly debarred from being considered under this policy such as those convicted under the Unlawful Activities (Prevention) Act, 1967, those convicted for rape, dowry death, etc.

In a rather shocking and highly upsetting move, the Gujarat Government endorsed the release of 11 Bilkis Bano Case convicts. This development stemmed in the aftermath of the SC order wherein it was maintained that the appropriate government for the remission of the convicts' sentences was the Gujarat Govt.[21] The Gujarat Govt under its remission policy permitted the release of the convicts on account of "good behavior".[22]

Prisoners Eligible for Special Remission:

1. *Women and transgender criminals* who are at least 50 years old as well as *male offenders* who are at least 60 years old are eligible for special remission. Without taking into account the time served under achieved general remission, these prisoners must have served half of their overall sentence.

[18] Rahidul Jafar @ Chota v State of U.P., 2022 LiveLaw SC 754
[19] State of Haryana v Mohinder Singh, SCC 2000 SC 394
[20] Sangeet v State of Haryana, (2013) 2 SCC 452
[21] Radheshyam Bhagwandas Shah @ Lala Vakil v State of Gujarat, 2022 LiveLaw (SC) 484
[22] The Times of India, *available at: https://timesofindia.indiatimes.com/india/bilkis-bano-case-convicts-granted-remissions-due-to-good-behaviour-gujarat-govt-tells-sc/articleshow/94923481.cms* (last visited on March 08, 2024)

2. *Physically disabled convicts* who have served at least half (50%) or more of their total sentence.
3. *Terminally ill inmates* who have served two-thirds (66%) or more of their total sentence.
4. *Poor or indigent inmates* who have served their full sentence but were detained due to non-payment of fine.
5. *Young offenders* who have served half of their sentence and committed the crime while they were young (18 to 21) and who have no prior criminal history or cases pending against them are also eligible.[23]

Who are excluded from remission law?

1. Convicts, with a death sentence, or life imprisonment
2. The convicts involved in the Terrorist and Disruptive (Prevention) Act of 1985 (TADA), the Prevention of Terrorism Act of 2002 (POTA), the Unlawful Activities (Prevention) Act of 1967 (UAPA), the Explosives Act of 1908, the National Security Act of 1982, the Official Secrets Act of 1923, or the Anti-Hijacking Act of 2016.
3. People who have been found guilty of crimes under the Prevention of Money Laundering Act, 2002, the Immoral Trafficking Act 1956, the Protection of Children from Sexual Offenses Act 2012, the Dowry Death and Counterfeit Currency Notes, as well as any other laws that the State governments or the Union Territory administrations deem appropriate to exclude, will not be eligible for the special remission.[24]

VII. 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 v. State of Maharashtra*,[25] the apex court of our nation mentioned that appeal is the righteous remedy which lies if the enabling

[23]Drishtiias, 15th June 2022< https://www.drishtiias.com/daily-updates/daily-news-analysis/new-norms-for-sentence-remission > accessed on 08 March 2024
[24] Drishtiias, 15th June 2022<https://www.drishtiias.com/daily-updates/daily-news-analysis/new-norms-for-sentence-remission> accessed on 08 March 2024
[25] Naresh Shridhar Mirajkar v. State of Maharashtra, (1966) 3 SCR 744

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.

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 Cr PC. After this, Radheshyam approached the apex court under Article 32 as a method to challenge the Gujarat high court decision.[26]

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. It is always expected for the apex court to follow its own judgments. This is against constitutional morality.[27]

VIII. CONCLUSION

As part of the offenders' reformation process, the emphasis is on reforming the prisoner rather than his confinement. The legislation, viewed as an act of grace and humanity, as well as in the name and spirit of public welfare, allows for sentence reduction and pardon. Such remissions must be implemented in a reasonable and non-arbitrary manner, with due regard for legal provisions and judicial decisions.

Subjected to limited judicial review, the power to suspend, remit, or commute sentences does not exceed judicial scrutiny. Any abuse of the executive's prerogative power will undoubtedly impede the operation of the criminal justice system rather than assisting in the reformation of an offender.

[26] INDIAN CONST, art. 32
[27] Tanish Amin, *"Constitutional Morality of the Bilkis Bano Case : Analyzing the Legality of Remission Granted",* 3.1 JCLJ (2022) 1060