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JUSTICE FOR BILKIS BANO, QUESTIONS ON REMISSION

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‘This case raises important issues on remission and its relationship with punishment that remain unsettled’ | Photo Credit: AP

In an article in The Hindu (August 20, 2022), I had characterised the grant of remission to the 11 gang-rape and murder convicts in the Bilkis Bano case as an ‘injustice of exceptionalism’. The exceptional nature of this injustice is only exemplified by the Supreme Court of India’s judgment in the case delivered by Justices B.V. Nagarathna and Ujjal Bhuyan. As the decision notes, not only did one of the petitioners commit “fraud” by misleading an earlier Bench of the Court in getting a favourable order, leading ultimately to the release orders, but the Government of Gujarat was equally complicit.

Despite the law being amply clear in a Constitution Bench decision in Union of India vs V. Sriharan (2015) that the appropriate government to decide a remission application is the State where the convicts are sentenced, the Court notes that the Gujarat government “usurped” power from the Government of Maharashtra.

Consequently, the Court declared the earlier two judge Bench decision of the Supreme Court holding the Gujarat government as the appropriate government to grant remission in this case as illegal (per incuriam). In effect, the remission orders for the 11 convicts stand cancelled and the men have been directed to go back to the prison within two weeks’ time.

Given the exceptional nature of injustice that pervades Bilkis Bano’s struggle, the Supreme Court is rightfully being lauded for upholding the rule of law. As the decision reads, “rule of law and equality before the law would be empty words if their violation is not a matter of judicial scrutiny.”

Significantly, the firm tone of the decision in calling out the illegalities and the collusion of the Gujarat government with the petitioners is likely to be a soothing balm in Bilkis Bano’s fight for justice. Justice Nagarathna’s words come as solace in light of the disturbing memory of the celebrations that followed the release of the 11 convicts in August 2022.

As a woman and a lawyer, I celebrate this decision. I celebrate Bilkis Bano’s resilience. I celebrate the force and commitment of India’s leading women’s rights lawyers in this case. It is

inspiring.

However, at the same time, this case raises important issues on remission and its relationship with punishment that remain unsettled. But before we get into that, let us briefly examine the concept of remission. Prison is a State subject. As a result, prison rules of each State identify certain reformative and rehabilitative activities that the prisoners can undertake in order to earn remission in the form of days. The total number of days earned in remission is deducted from the actual sentence imposed by the court. Remission is rooted in the logic that, ultimately, prisons are meant to be rehabilitative spaces rather than simply being an instrument to carry out retributive punishment.

In the context of life convicts, they necessarily have to serve a minimum of 14 years in prison before they can become eligible to apply for remission. An application does not guarantee remission and the setting off the earned remission against the punishment imposed by the courts.

Each application has to be individually considered by a committee based on factors laid down by the Supreme Court in Laxman Naskar vs State of West Bengal (2000). These include examining whether the offence is an individual act of crime without affecting the society at large; chance of recurrence of crime; whether the convict has lost their potentiality in committing crime; whether there is any fruitful purpose of confining the convict any more; and socio-economic condition of the convict's family. Naturally, given the individualised nature of the inquiry, these factors are subjective. This makes the reasons guiding these decisions extremely crucial.

However, the reality is that there is both a lack of transparency on how these committees are formed to decide individual applications and reasons guiding the decisions. Such a state of affairs makes remission a potent site for exercise of arbitrary power.

The current case is one such example of unchecked discretion. Besides, the Supreme Court in Epuru Sudhakar vs State of Andhra Pradesh (2006) has held that judicial review of an order of remission is only available when there is a non-application of mind; relevant materials have not been considered, the order is mala fide, or based on irrelevant considerations or suffers from arbitrariness. In the absence of reasons guiding the decisions, there is little scope to challenge them on these grounds. This concern of non-application of mind is writ large in the case of the 11 convicts in Bilkis Bano's case because the orders of the Gujarat government for each of them are exact copies.

In the Bilkis Bano case on remission, the Supreme Court found illegalities and injustices that spoke to 'fraud' and 'usurpation of power' by the government, and, therefore, did not need to go into difficult normative questions. Certain remission policies of States present the question more starkly. States in India today have remission policies that completely deny remission opportunities to certain categories of offenders or have significantly longer periods of incarceration for certain offences before consideration of remission.

We will need to confront the issue of whether certain offenders defined by crime categories must be ineligible for remission. Or, are we better off focusing on developing appropriate conditions for remission and ensuring that there is meaningful and fair compliance with those conditions? A blanket denial of remission for crime categories, rather than ensuring effective compliance with remission conditions, takes us towards a punishment framework that is retributive. These are issues that the Court will inevitably be forced to grapple with sooner than later.

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