CLEMENCY, ERUDITION AND DEATH : THE JUDICIAL DISCOURSE IN KEHAR SINGH

THE ELEGANCE and erudition of Chief Justice Pathak's opinion (for himself, and Justices E. S. Venkataramiah, Ranganath Misra, M. N. Venkatachaliah and N. D. Ojha) in *Kehar Singh* v. *Union of India*[1] must not hide the fact that the decision was a functional equivalent of death warrant for the accused. Kehar Singh is now dead. But the discourse on clemency power under the Constitution shall live on. We do not wish to revisit the original decision affirming conviction and sentence. But we do wish, to assess the deadly elegance and erudition in *Kehar Singh* in the light of the rather rustic prose of article 21 of the Constitution and its moral majesty.

The significance of article 21 must have been inscribed fully in the minds of the justices in *Kehar Singh.* Barring Justice N. D. Ojha, all the justices in *Kehar Singh* were major participants in the *Antulay*[2] decision. Justice E. S. Venkataramiah led the two-judge bench to impugn the constitutional validity at the bar of article 21, of a five-judge bench decision in *Antulay* (to which Chief Justice R. S. Pathak was a party) directing that the case may be tried by a judge nominated by the Bombay High Court and not by a special judge under the Prevention of Corruption Act 1947. Chief Justice Pathak constituted a seven-judge bench (Justices Ranganath Misra and Venkatachaliah adorned this bench), who annulled (by a majority) the 1984 decision of the court for violation by the judicial order of article 21 right to life and liberty of the accused. The dismissals of both the review and special leave petition against the 1984 decision was not held to be significant. Finality cannot, said these justices, triumph over justice.[3]

Kehar Singh was decided on 16 December 1988, *Antulay* on 29 April 1988. In this period of eight months, no decision had dimmed the lustre of the rediscovery of article 21. Article 21 due process rights provided a sovereign standard for judging state power including the very orders, in the self-same proceedings, passed by the Supreme Court. Any action involving a manifest violation of article 21 rights had to be rectified, no matter how high an authority was affected in the process. If even the Supreme Court is bound so thoroughly by such rights and standards as to annul its own earlier reasoned judicial order, no other authority in the land can claim immunity from subjection to article 21. Referring to justices as fallible, Chief Justice Pathak also, elegantly, describes the judicial mind as "resourced by

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1. J.T. 1988(4) S.C. 693
2. *A.R. Antulay* v. *R.S. Nayak,* (1988) 2 S.C.C. 602
3. See, (1984) 2 S.C.C. 183; (1986) Supp. S.C.C. 510; and *ibid.* For a critique of the *Antulay* decision, see, Upendra Baxi, *Liberty and Corruption · The Antulay Case and Beyond* (forthcoming, 1989).

a harvest of experience".[4] Clearly, that "harvest" was fertilised by the expansive interpretation (the green revolution of article 21) in *Antulay*.

The decision in *Kehar Singh* therefore, comes as a cruel surprise. Despite its elegance and erudition, its discourse is shot through with monumental puzzles. And this is so for the following quite self-evident reasons.

First, the Supreme Court not merely dismissed a review but also a writ petition against the *conviction* and *sentence* of *Kehar Singh*. If a well considered order of a five-judge bench in *Antulay* could be later annulled by the court on the ground of violation of article 21 for alleged corruption offences (which do not carry a death sentence) even after a review and special leave petition were dismissed through a later special leave petition,[5] what grounds exist, in law, logic and justice to deny in *Kehar Singh* a full hearing on writ petition? What is so radically different concerning violation of article 21 rights and standards in *Kehar Singh* which denies the accused in that case the privilege of extended article 21 solicitude so writ large in *Antulay* ? If the petition in *Antulay* had not been admitted, the Supreme Court would not have discovered the "enormity" of its error[6] so hugely violative of article 21 rights in April 1988. Why was the Supreme Court, only eight months after its self-education through *Antulay*, unwilling and unable, to allow even forensic *articulation* of a plausible case for a possible miscarriage of justice (to say the very least) in *Kehar Singh* ? Surely, the seven-judge bench decision in *Antulay* constituted a precedent for the bench that rejected the writ petition; it also bound the Constitution Bench which decided *Kehar Singh*. And by the standards of *per incuriam*, so richly developed in *Antulay*,[7] one would have to say that both these decisions are *per incuriam*. Surely, article 21 prohibits, if it prohibits *anything*, capital punishment *per incuriam*.

Second, if, as the Supreme Court maintains, clemency power is a part of the "constitutional scheme", then article 21 rights and standards assuredly extend to its exercise. Regardless of the issue whether it is discretionary power of the President or one on which he must act on the aid and advice of the Council of Ministers, clemency power being a creature of the Constitution, must remain subject to article 21 discipline. Even the "history" of this power, so elegantly traced by Chief Justice Pathak, has to be construed in India in the light of the sovereignty of article 21 so well asserted in *Antulay*. None of the valued overseas precedents cited so assiduously by the learned Chief Justice can remain wholly relevant after 21 April 1988 in India, even at a persuasive level, because no summit court in the contemporary world has so extended due process rights as to review judicial orders

4. *Supra* note 1 at 698.

5. See, *supra* note 3, esp. ch. 12, 13.

6. See, the opinions of Justices Ranganath Misra and Sabayasachi Mukharji in *supra* note 2 and *ibid*.

7. See, *supra* note 5.

8. *Supra* note 1 at 698.

in the self-same proceedings, and annul these, by the standards furnished by these rights. And if the standards apply to such judicial orders, *ipso facto* they must apply to an executive act.

Third, if article 72 clemency power as a part of the "constitutional scheme" is thus subject to the discipline of article 21, then the accused convicted to die must have a minimal right to personal hearing; to say, as the court does, that such an accused has "no right to insist on presenting an oral argument"[9] is to say that article 72 is not simply a part of the constitutional scheme. For, the court has insisted on such a right in all kinds of contexts where a decision (regardless of how it is named, whether "executive", "ministerial", or "quasi-judicial") affects the constitutional rights of the accused. It has even recognised the right to a post-decisional hearing. In capital punishment situations, such hearing ought to be, under article 21 a constitutional imperative, if clemency power is a part of the constitutional scheme.

Fourth, Chief Justice Pathak describes the power of pardon as being "capable of exercise on a variety of grounds, *for reasons of state*" as well as desire to "safeguard against judicial error."[10] After the *Antulay* decision, "safeguard against judicial error" violative of article 21 rights, has *assumed the proportions of a constitutional right of all citizens and persons enforceable under the Constitution of India.* It is in exercise of that right that in *Kehar Singh* a writ petition was moved against the initial judgment confirming death sentence. The President of India, exercising his powers under article 72 as a part of the constitutional scheme, must be said to have been *technically* wholly justified, post-*Antulay*, in saying that he cannot any longer exercise his clemency power on the ground of rectification of judicial error. The constitutional scheme after *Antulay* permits challenge to the constitutional validity of the Supreme Court's own judicial orders in the very same proceedings before a larger bench, through a petition, *even after* review has been denied and special leave petitions dismissed. And as *Antulay* so vividly illustrates the court is willing publicly to annul its erroneous judgment.[11]

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9. *Id.* at 702. This is a most astonishing holding especially in view of the fact that the court specifically recognises that it is the executive (Home Ministry) whose advice the President has to follow. A section officer in the ministry usually prepares the initial note which moves up the hierarchy, with varying degrees of indifference or interest. And various interests may activate or dominate the structure of that note. If clemency is to be denied, the note must criticise as erroneous and perverse the sessions and High Courts' decisions, both on facts and law. A right to personal hearing would certainly set right or at least make visible the various factors (including the play of power, pull of prejudice and push of influence) and provide the matrix for the ultimate decision. The clemency power, in its final operation shows wide variations statistically. See, Upendra Baxi, "Capital Punishment" in Government of India, *Encyclopaedia of Social Work in India*, vol. I, p. 51 at 54-55 (1986).

10. *Id.* at 698. As to the ground "reasons of the state" it is part read as signifying doctrine of the reasons of the state, a familiar aspect of political theory discourse. The "reasons" of the state (as the court would describe it) must be reasons and of the *state*, not of the regime, government or of a section of privileged bureaucracy.

11. See, *e.g.*, the observations of Justice Ranganath Misra in *Antulay* "To own up

Fifth, if this be so, the only surviving ground of clemency power is "reasons of the state". The democratic republican Constitution of India, as a part of its constitutional scheme, does recognise the doctrine of the reasons of the state in a few limited domains, *viz.*, the power, (*i*) to declare martial law;[12] (*ii*) to declare emergencies;[13] (*iii*) to impose Presidential rule;[14] and (*iv*) to enter into treaties and international agreements as well as of resorting to use of armed force within the permissible limits of the United Nations Charter and related law creating instruments at the level of international law.[15] The reasons of the state, once properly invoked, enables the executive to suspend the exercise of fundamental rights. But, even so, under the present constitutional scheme article 21 rights may not be suspended, even during an emergency.

To extend to clemency power the logic of the doctrine of the reasons of state is constitutionally perverse in the face of the fundamental right to life and liberty in article 21. The Constitution does not authorise a policy of death to "traitors," "insurgents," "naxalites," "dacoits," "terrorists," "anti-national elements," "anti-social elements" in exercise of the discretion inherently entailed in the clemency power. Nor can the court authorise such a pattern of exercise of that power. It has to be exercised case by case, and under the discipline of article 21. *Kehar Singh* in even whispering that clemency power may be exercised on reasons of the state doctrine commits an affront against the constitutional scheme and creates a potential for massive and flagrant violation of human rights for the Indian future.

Sixth, the *Kehar Singh* opinion suffers from a serious logical infirmity. Chief Justice Pathak maintains, on the one hand, that, "Indeed, we think that the order of the President cannot be subjected to judicial review on its merits except within the strict limitations defined in *Maru Ram*."[16] And yet he proceeds to review the ground the President had given namely, that "he cannot go into the merits of the case finally decided by the Highest Court of the Land".[17] The "strict limitations" in *Maru Ram*[18] did not contemplate the judicial review of *this* ground. Not merely does the court review it but

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mistake when Judicial satisfaction is reached does not militate against its status or... authority. Perhaps, it enhances both." *Supra* note 2 at 688.

12. Art. 34.

13. Art. 356.

14. Art. 352.

15. The last two categories are not neatly condensed into specific constitutional provisions as the earlier ones.

16. *Supra* note 1 at 700.

17. *Id.* at 697.

18. *Maru Ram* v. *Union of India*, (1981) 1 S.C.C. 107 concerned suspension and remissions power and the valid grounds of exercise of power plus the need for expenditious decisions under articles 72 and 161 of the Constitution. Not a single aspect of *Maru Ram* entailed the practice ground for exercise of clemency power in issue at *Kehar Singh*, *id.* at 701-702. See also, *id.* at 698-99.

orders that the petition disposed of by the President "shall be deemed to be pending before him" and shall be disposed of "afresh."[19]

Over and over again, the court affirms that the "question as to the area of the President's power under Article 72 falls squarely within the judicial domain and can be examined by the court by way of judicial review."[20] If we then ask, "what can be so examined?" *Kehar Singh*, over and over again, says, *nothing*. No right to oral hearing can be required,[21] no judicial guidelines for the exercise of clemency power can be prescribed, no rejection of clemency can be adjudicated. The clemency power is "sovereign" *except* that the President may not say that he is bound by the "Highest Court in the Land".

Assume a counterfactual situation for a moment in which in disposing of the "deemed" to be pending petition, the President had reiterated his earlier ground, even after the decision in *Kehar Singh*, and the matter again taken to the Supreme Court. Would the court have again deemed the petition to be pending before him?

Let us even assume this. And let us assume that the third time round the President added a further reason as follows :

> The Highest Court in the Land now possesses the power after the *Antulay* decision to correct its own judicial errors in the self-same proceedings. In the case before me, it has declined a review and a writ petition. Since my powers under Article 72 are a part of the constitutional scheme, I am now bound by the imperatives of Article 21. Even the Supreme Court had difficulties in *Antulay* case to ascertain whether it had by its order violated Article 21 standards. This is a question best decided by the Hon'ble Justices of the Supreme Court. Since they have decided that no violation of Article 21 exists in their judgment, exercising my clemency power as a part of the constitutional scheme, I decide not to grant clemency in this case.
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> Sd/ President of India

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19. See, *supra* note 9.

20. *Id.* at 702. Statistical analysis of clemency power suggests need for guidance. See, Upendra Baxi, *ibid.*

21. See, for a detailed historical analysis of the 1728 trial, M.P. Jain, *Outlines of Indian Legal History* 122-26 (2nd ed. 1966) and esp. note 2 at 123 describing the view of James FitzJames Stephen that the Calcutta Supreme Court's trial was unfair espeally in its reliance on circumstantial evidence and grave mistakes of law. Keith described the death sentence and execution of Raja Nandkumar as an "odious crime" committed by the Supreme Court (*id.* at 124). The Supreme Court decision was also described as "judicial murder". Jain does not go so far but he does agree with the overall view that the Nandkumar trial was vitiated.

> *P. S.* No reason of state applies here; anyway I am sure that Article 72 does *not* contemplate this ground. Since the matter is so clear to me, I am not persuaded to seek the advisory opinion of the Court on this issue.

What, pray, would the Supreme Court of India have held on such an order as to its power of judicial review? It is no answer to say that such a question had not arisen. The purpose of constructing a counterfactual, among other things, is to probe the logical coherence and consequence of an approach. And, in the author's view, it suggests that the court will have to rule, if its initial position is cogent and correct, that judicial review power extends to declaring such orders constitutionally invalid.

Quite clearly, *Kehar Singh* fails to persuade as an act of reasoned discourse. This then raises deeper questions concerning judicial behaviour: Why did the court admit a writ petition against the President's order? Why then did it decide as it did? An answer suggests itself if we bear in full review the intensity of outraged public opinion at the Supreme Court's decision awarding capital punishment to Kehar Singh of which even the author had some access, through international media coverage, as far as Australia during his academic sojourn there.

Unwilling, for reasons best known to itself, the Supreme Court is wholly reticent to apply the *Antulay* standards of article 21 solicitude in *Kehar Singh.* The court here responds to intense public opinion by transferring the whole matter to the executive. The executive, too, seeks at first to rest the moral and constitutional burden back on the court. To permit this to happen would be to permit the interrogation of the justice of the original decision. Deftly, the court returns the final burden to the executive. And it hopes that its elegant and erudite discourse will provide a functional substitute for not allowing a writ petition challenging the constitutional validity of the conviction and sentence of Kehar Singh.

Just as we today, nearly two hundred and fifty years later discuss the judicial behaviour in *Raja Nandkumar* case,[22] Indian posterity will now be burdened with a searching moral examination of *Kehar Singh.* But for the present, *Kehar Singh* means just this: Article 21 will remain the custodian of the due process rights of people in high places charged with corruption; it would not exist, even in its most attenuated forms, for the accused in cases of high political assassination. Convicted wholly on circumstantial evidence, even of most doubtful veracity, *Kehar Singh* emerges as a monument dedicated to the reason of state in India. The prospects for just governance in India depend on its swift and thorough-going demolition.

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22. *Ibid.*

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